

Seventh Circuit Court of Appeals Finds the 2011 Budget Repair Bill that Dramatically Limited Collective Bargaining Is Constitutional

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Posted By: Kyle J. Gulya

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On Friday, January 18, 2013, a three-member panel of the Seventh Circuit Court of Appeals issued its decision upholding 2011 Act 10 in its entirety and found that Act 10 does not violate the U.S. Constitution. This long-awaited decision reversed an injunction issued in March 2012 by a Wisconsin Federal District Court judge. That injunction prohibited the Wisconsin Employment Relations Commission from conducting the required annual recertification elections of unions composed of general municipal employees who had not yet been decertified or who had existing contracts as of March 30, 2012. That injunction also directed employers to facilitate voluntary union dues deduction and prohibited employers from refusing to deduct union dues from employee pay. The Court of Appeals decision upheld the District Court's decision that Act 10's prohibition of negotiation on all subjects of bargaining except total base wages is not a violation of the U.S. Constitution. A dissatisfied party may request that this three-member panel rehear the appeal or that the Seventh Circuit Court of Appeals rehear this decision "en banc" wherein all judges in the Seventh Circuit Court of Appeals review and issue a decision involving this case. The decision may also be appealed to the United States Supreme Court. A request for rehearing or an appeal does not need to be accepted by the Court of Appeals or the U.S. Supreme Court, because each has discretion as to whether they will review this decision if asked. While there is other pending litigation involving Act 10, only the Federal District Court specifically issued an injunction binding WERC regarding annual recertification elections.

The most notable piece of litigation still pending is the Wisconsin state-level Court of Appeals review of Dane County Circuit Court Judge Juan Colas's September 14, 2012 decision that found several aspects of Act 10 as unconstitutional. Judge Colas's decision addressed several different arguments than those raised in the Seventh Circuit Court of Appeals decision, including provisions in Wisconsin's State Constitution. Here is a link to our September 2012 Legal Update titled, "What Did Judge Colas Really Do?", which outlines the decision in *Madison Teachers Inc., et al v. Scott Walker*, Case No. 11CV3744.

The Wisconsin Court of Appeals is presently deciding whether to issue a stay of Judge Colas's decision and to better define the scope and immediate impact of Judge Colas's decision and which parties it actually affects. On December 28, 2012, the Court of Appeals asked the parties to address several important legal issues before deciding whether to grant or deny a stay of Judge Colas's decision, including:

- whether Judge Colas's decision is binding statewide on municipal employers and unions who are not parties to that case, and whether the decision impacts contract negotiations between those municipal employers and unions who are not parties to that case;
- whether Judge Colas's decision enjoins the WERC from enforcing the specific provisions of Act 10 found to be unconstitutional, and whether the WERC and its commissioners are bound by Judge Colas's decision when dealing with other non-parties;
- if a stay is ordered and Judge Colas's decision is eventually upheld on appeal, then whether there is any legal reason why unions statewide could not bargain to obtain benefits and wages through retroactive application of the law for time periods during which the unconstitutional provisions were in force; and
- if a stay is not ordered, and if municipalities and unions statewide enter into collective bargaining agreements that provide benefits and wages to employees on issues other than total base wages, and Judge Colas's decision is eventually reversed on appeal, then is there any legal reason why municipalities could not hold employees liable for such benefits and wages and recoup them?

The Court of Appeals' careful attention to these details and addressing the potential statewide impact of Judge Colas's decision demonstrates the Court of Appeal's recognition that a lot is at stake for all public-sector employers with regard to their decision to issue a stay and their decision on the merits of this case.

As a result of this Seventh Circuit Court of Appeals decision and the pending Wisconsin Court of Appeals decision regarding whether to stay Judge Colas's decision and the issues addressed above, following are several important steps that employers should consider.

- **Closely monitor developments regarding the Seventh Circuit Court of Appeals Decision and the Wisconsin Court of Appeals.** The next steps taken by these courts will dictate what actions public-sector employers must take. Timely action by employers in response to the courts' directions will allow those employers to best control their local work environments with minimal disruption.
 - **Prepare for the Return of Recertification Elections.** Once the federal court's injunction is lifted and based on further guidance from Wisconsin's Court of Appeals on the issue of the stay of Judge Colas's decision, WERC may then be in a position to reinstitute the annual recertification elections. We anticipate WERC will give direction to employers and unions regarding this process, and employers should carefully monitor the WERC's direction. Employers who have a bargaining unit composed of general municipal employees and who had a collective bargaining agreement that expired after March 30, 2012 should be prepared to notify the WERC of the need for the annual recertification election for that Union once the direction is issued.
 - **The Decertification Process Remains an Option for Employees and Employers in the Interim.** While these cases are ongoing, the decertification process has been successfully used by employees in the interim to decertify their local unions. The decertification process continues to remain available to employers and employees regardless of the pending litigation involving Act 10. Employees interested in the decertification process may contact the Wisconsin Employment Relations Commission or their own legal counsel. Employers interested in the process should contact the employer's labor attorney.
 - **Develop a Plan to Cease Voluntary Union Dues Deduction.** Once the injunction is lifted and guidance is issued by Wisconsin's Court of Appeals, employers will also be prohibited from deducting union dues for general municipal employees operating under a post-Act 10 collective bargaining agreement. Employers should pay close attention to any orders issued by the courts so as to avoid unnecessary dues deductions from employee pay.
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