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On Wednesday, September 11, 2013, a Wisconsin Federal District Court Judge dismissed another lawsuit challenging the constitutionality of Act 10 filed by general municipal employee unions. The Federal District Court opinion found Act 10's differential treatment of general municipal employee unions from the treatment of nonrepresented employees did not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. The Seventh Circuit Court of Appeals previously held that Act 10's differential treatment of general municipal employee unions from the treatment of public safety unions did not violate the Fourteenth Amendment.
The Court also rejected the unions' claim that the First Amendment gives general municipal employee unions the unfettered right to collectively bargain on any subjects and that Act 10 violates that First Amendment right. The Court found that no such right exists under the First Amendment and identified 22 states that already prohibit collective bargaining. The Court also found that Act 10 does not violate the First Amendment, because "Act 10 does not silence general employees and their unions from engaging in collective bargaining; rather, it limits municipal *employers*from engaging in collective bargaining." Quoting the U.S. Supreme Court, the District Court found:

> Whatever rights public employees have to associate and petition their public employers on wages and conditions of employment, this right certainly does not compel the employer to listen. As the United States Supreme Court explained . . . , "the First Amendment does not impose an affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it."

Another lawsuit pending in Dane County Circuit Court makes similar arguments raised by the unions in this Federal District Court decision. The Wisconsin Supreme Court also is preparing to receive arguments in the decision decided by Dane County Circuit Judge Juan Colas. The Dane County Circuit Court decision issued in September 2012 found only a few parts of Act 10 were unconstitutional. The primary substantive elements of Act 10 remain intact, most notably the limitations on bargaining over only "wages" with a general municipal employee union. Additionally, an employer is free to implement its last, best offer since no interest arbitration process exists to force settlements with a general municipal employee union. The employer must still bargain with public safety and transit unions regarding the broader issues of wages as well as hours and working conditions. This most-recent Federal District Court decision has no effect on public safety and transit unions.

As many employers are in the process of implementing and updating employee handbooks, modifying health insurance plans, and implementing wage studies, many issues will continue to arise for each community related to this decision and the other pending cases. We anticipate there will still be challenges by unions, but they will choose their local test cases wisely. Employers can still achieve their desired results, but should act cautiously at this time and engage in well-calculated and thoughtful decisions. As this process unfolds and more information becomes available, following are some helpful thoughts and reminders as employers await the end of Act 10 litigation:

- **Develop Your Organization's Strategy.** The complex issues associated with ongoing litigation of Act 10 at the state and federal level, a possible appeal of this District Court decision, and the Wisconsin Supreme Court's pending decision necessitate that each community carefully prepare its strategy for responding to a demand to bargain and possible outcomes of these decisions. After reviewing this decision and the Seventh Circuit Court of Appeals Opinion upholding Act 10 that was issued earlier this year, we believe there is a good chance this District Court decision will be upheld if appealed. When contacted by the union to discuss issues unrelated to total base wages, the smartest approach the employer can take is to listen and then inform the union that the supervisor will confer with management and decide on an appropriate course of action.

- **Once Again, Don't Overreact**. Just like past decisions involving Act 10, there will be uncertainty fueled by misinformation. The Federal District Court opinion used strong language indicating employers may not even "listen" to the general municipal employee union on issues unrelated to total base wages. Because of the information reported about this decision, there may be concern and excitement among represented general municipal employees and their unions that the employer cannot even "listen" to them. We anticipate unions will grasp this comment from the District Court opinion and try to use it as political leverage to attempt to encourage local elected leaders to engage them and influence employer decisions over issues other than "total base wages."

  We believe an employer may receive information from a general municipal employee union, just as it may receive information from any other interested nonrepresented employee, citizen or group. What the employer may not do is engage in collective bargaining or reach an agreement with the general municipal employee union on issues unrelated to total base wages. The employer remains free to make its own decisions and consider or ignore the information provided by these interested parties. As the Seventh Circuit Court of Appeals has said, the First Amendment "provides no guarantee that a speech will persuade or that advocacy will be effective."

- **Don't Be Afraid to "Listen."** Supervisors and elected officials should avoid the potential problems created by the "listening" conundrum. We anticipate a supervisor or elected official who refuses to listen to a represented general municipal employee or union based solely on this court decision may unnecessarily generate litigation or a public relations predicament for the employer. Supervisors and elected officials should also be equally mindful of other stray comments including making agreements with the union or other promises or assurances to modify policies, to bargain over the employee handbook, or to extend or reinstate an expired collective bargaining agreement. Those statements may also result in litigation and public relations debacles, particularly since those decisions continue to rest exclusively with the discretion of the employer.

We are ready to advise our clients pertaining to these issues and the unique situations that each community faces. If you have questions regarding this decision or any aspect of labor and employment law, then please feel free to contact any member of the von Briesen & Roper Labor and Employment team.
