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Practice Area: Labor and Employment

On Monday afternoon, October 21, 2013, Dane County Circuit Court Judge Juan Colas held Commissioners of the Wisconsin Employment Relations Commission in contempt for enforcing Act 10's annual union certification elections. Judge Colas granted an injunction barring WERC from enforcing provisions of Act 10 he previously found unconstitutional in September 2012. The injunction applies to "anyone, anywhere in the state," and WERC's efforts to implement Act 10's unconstitutional provisions must cease and be reversed. Judge Colas also ordered WERC to recognize the Kenosha Education Association as the certified bargaining representative for teachers in the Kenosha Unified School District. Following this decision, WERC issued notice halting the annual certification elections for school district bargaining units pending an appeal of Judge Colas's decision. WERC also stated these elections may very well begin on November 1 as scheduled.

Employers should remember that Judge Colas's original decision in September 2012—which is presently on appeal before the Wisconsin Supreme Court—did not hold Act 10 unconstitutional in its entirety. Instead, Judge Colas only found the following narrow statutory sections created by Act 10 as unconstitutional:

- Restricting Mandatory Bargaining over Wages to only Total Base Wages. This statutory provision prohibited bargaining with general municipal employee unions except about the issue of wages and only "total base wages" up to a CPI cap and specifically excluded bargaining over any other compensation including overtime, premium pay, merit pay, and other forms of compensation.
- Referendums regarding Bargaining Above the Total Base Wages CPI Cap. These statutory provisions required that a referendum be held before the employer could bargain increases in total base wages above the CPI cap.
- Limiting Fair Share Agreements to only Public Safety and Transit Employee Unions. This statutory definition limited fair share agreements to only transit employee and public safety unions.
- Dues Deduction and Requiring Annual Recertification Elections. These statutory provisions restricted an employer from deducting union dues from employee pay and then remitting payment to the Union, and also required annual recertification elections of unions.
- City Of Milwaukee Pension Plan Employee Contribution. This statutory provision required a pension contribution of the employee share by City of Milwaukee employees to the City's pension system.

The primary substantive elements of Act 10 have remained intact—most notably, the limitations on bargaining over only "wages" with a General Municipal Employee union and the lack of any interest arbitration process to "force" settlements with the union. This means the employer still retains the unilateral ability to manage and control work environments. Additionally, the current practice of negotiating with general municipal employee unions in good faith until an impasse is reached and then implementing the employer's last best final offer, absent a voluntary agreement, is the process that remains. Bargaining with General Municipal Employees is also still limited to "wages," and may still be limited to "Total Base Wages." Moreover, even if Judge Colas's decision is not stayed pending the appeal, fair share and dues check off are now likely only permissive, not mandatory, subjects of bargaining, so agreement on those subjects must still be reached before they become effective.

We expect that several employers will be contacted by local union leadership and bargaining unit representatives demanding to immediately commence bargaining with a general municipal employee union over subjects of bargaining unrelated to total base wages. The complex issues associated with ongoing litigation of Act 10 in the federal courts and before the Wisconsin Supreme Court necessitate that each community carefully prepare its strategy for responding to the union.

When a request to bargain is made, the smartest approach the employer can continue to take is to inform the union that the employer will confer with management and decide on an appropriate course of action for bargaining. The employer should decide the scope of bargaining that best reflects its interests, but the employer should never refuse to bargain. We anticipate many employers will continue to take the position that they will follow Act 10 as it is written until they are embroiled in litigation and a judge tells that employer otherwise.

The law also does not require employers to take knee-jerk reactions in response to a demand to bargain. In 2012, the WERC in Public Utility Commission of the City of Richland Center, Dec. 33281-B, found an employer did not refuse to negotiate with a union when it took a "wait and see" approach to labor negotiations immediately following the announcement and litigation surrounding Act 10 in Spring 2011. WERC's assessment of the litigation climate following the announcement of Act 10 is similar to the current climate as the Wisconsin Supreme Court prepares to address Judge Colas's decision in November 2013 and issue a decision, probably in 2014. In that decision, WERC stated:

With the imminent adoption of Act 10 clearly the strategy and approach to be used by both sides would be dramatically different. Had the injunction not temporarily halted implementation the parties would have been bargaining over increases in base wage rates and nothing else. After the injunction temporarily halted the implementation there was certainly the possibility that either the Court of Appeals or the Supreme Court would lift the injunction, thereby permitting the publication of the law. It was also well within the realm of possibilities that the appellate courts would have applied a decision upholding the law retroactively thereby rendering a collective bargaining agreement reached after March 21, 2011 void as to any subject other than base wages.

. . . . We cannot however criticize a party that made a conscious decision to await the final resolution by the Supreme Court before engaging in continued bargaining. This is particularly true when the employer is a small utility sensitive to the needs of its rate payers. The union did not offer to treat Act 10 as being fully in force and had it done so, this might be a different case. The employer could have gone through the motions of several meetings to drag the process out until the Court resolved the issue but who would have benefited from that approach? Even if we assume that the parties here could have reached an agreement there may have been subsequent legal challenges to the agreement itself. The temporary suspension of bargaining in these small units was a prudent course of action.

. . . . In our judgment this cautionary approach simply cannot be deemed to be a refusal to bargain. Our decision is not intended to authorize protracted delay or other tactics designed to avoid the duty to bargain. It is simply a recognition of the fact that it is poor public policy to require employers and employees to make important decisions without a clear understanding of the law governing this relationship.

Many employers have moved forward from collective bargaining agreements and have implemented employee handbooks, modified health insurance plans, and conducted wage studies. Even if an employer is confronted with a request to bargain, an employer should still be able to achieve their desired results and continue their well-calculated and thoughtful decisions due to the absence of interest arbitration.

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