Decisions Demonstrate Prohibition Against Bargaining Health Care Plan Design Not So Easily Understood

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Practice Area: County and Municipal Governance & Government Law

The prohibition against bargaining health care coverage plan design or the impact of the design and selection of health care coverage plans with public safety employees appeared fairly straight forward when first enacted as Wis. Stat. § 111.70(4)(mc)6 by 2011 Wisconsin Act 32 ("Act 32"). However, after several court challenges to the scope of the prohibition in sec. 111.70(4)(mc)6, municipal employers were left with more questions than answers as to what health care plan decisions are prohibited or mandatory subjects of bargaining. Nonetheless, amendments to sec. 111.70(4)(mc)6 by 2013 Wisconsin Act 20 ("Act 20") likely provide the final answer. This article explores court decisions that interpret and apply the language in Act 32 and the impact Act 20 is likely to have on those analyses.

The *City of Milwaukee* Decision

Following the enactment of Wis. Stat. § 111.70(4) (mc)6 by Act 32 in July 2011, many municipal employers unilaterally made changes to health care plans covering public safety employees. Notwithstanding the apparent right to make changes to health care plan design without bargaining the changes, bargaining representatives of public safety employees began challenging a municipal employer's refusal to bargain changes to health plan design.

For example, in *MilwaukeePolice Ass'n, Local 21, IUPA, AFL-CIO v. City of Milwaukee*, 2013 WI App 70, 348 Wis. 2d 168, 833 N.W.2d 179, the union representing City of Milwaukee public safety employees disputed the City's ability to make changes to the specifics of health care coverage plans without bargaining the direct financial impact of the changes on the employees. In essence, the union in *City of Milwaukee*claimed that while a municipal employer may unilaterally make changes to health care plan design, matters surrounding the employer and employee contribution to deductibles or copays were still subject to bargaining. The circuit court agreed with the union and the City appealed.

On appeal, the court of appeals reversed the decision of the circuit court. Relying solely on the plain meaning of section 111.70(4)(mc)6, the court stated:

> It would make no sense for the legislature to have granted to the City and other municipal employers the unilateral right to design and select health-care-coverage plans irrespective of the "impact" the "design and selection" has "on the wages, hours, and conditions of employment of the public safety employee," but require bargaining on what the Association calls the "direct result" on the public-safety employee's finances.

The court concluded that "the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee is no longer a subject that a municipality may bargain with the unions representing public-service (sic) employees."

The *WPPA v. WERC* Decision

In contrast with the court's analysis in *City of Milwaukee* regarding the meaning of sec. 111.70(4) (mc)6, the court of appeals in *Wisconsin Prof'l Police Ass'n v. Wisconsin Employment Relations Comm'n* ("*WPPA*"), 2013 WI App 145, 352 Wis. 2d 218, 841 N.W.2d 839, held that "deductible payment allocation" is not a prohibited subject of bargaining under sec. 111.70(4)(mc)6.

In *WPPA*, a union representing public safety employees in Eau Claire County argued that section 111.70(4)(mc)6 does not prohibit bargaining over who pays the deductible once a plan is selected by a municipal employer. The union contended that, while the design and selection of the health care coverage plan could be unilaterally decided by the County, the allocation of who pays the deductible in the plan was not a prohibited subject of bargaining.

In the declaratory relief proceeding, the Wisconsin Employment Relations Commission ("WERC") interpreted sec. 111.70(4)(mc)6 to prohibit the County and the union from bargaining over deductible payment allocation. WERC concluded that the deductible payment allocation involves the "content" of a plan and has an impact on wages, hours, and conditions of employment, and is therefore a prohibited subject of bargaining.

On judicial review, the circuit court disagreed with WERC based on its interpretation that the deductible payment allocation is "extrinsic" to a plan, and that, as a consequence, such an allocation is neither part of the "design and selection" of a plan nor an impact of plan design and selection on wages, hours, and conditions of employment.

On appeal, the court of appeals agreed with the circuit court that the deductible payment allocation was separate from plan design and therefore not a prohibited subject of bargaining. The court of appeals further concluded that bargaining over who pays the deductible is not considered bargaining over the impact of the plan design which would otherwise be prohibited by section 111.70(4)(mc)6.

The *Manitowoc County* Decision

Based upon the court's decision in *WPPA*, the court of appeals in *Manitowoc County Sheriff Department Employees v. Manitowoc County*, Appeal No. 2013-AP-1 (March 5, 2015), held that the allocation of who pays contributions to a public safety employee's health savings account ("HSA") is not a prohibited subject of bargaining under sec. 111.70(4)(mc)6.

In *Manitowoc County*, the County and union were negotiating a successor to their collective bargaining agreement last effective in 2010 which required the County to contribute towards to the employees' HSA to pay the employee's health plan deductible. After sec. 111.70(4)(mc)6 became effective in July 2011, the County notified employees that it would no longer be contributing to their HSAs. The union then filed a declaratory action in circuit court asking whether HSA contributions are a prohibited subject of bargaining. The circuit court concluded that HSA contributions are a prohibited subject of bargaining.

On appeal, the court of appeals reversed the circuit court. The court found the case was governed by the *WPPA* court's finding that the phrase "health care coverage plan" was only reasonably understood as a plan addressing "the rights and obligations that flow between the insurer and insured." Though a deductible concerns these rights and obligations, a deductible payment allocation between and employer and employee does not, and is "a subject extrinsic to the rights and obligations of an insurer and insured."

Similarly, the *Manitowoc County* court concluded that the allocation between the County and its employees of payments made into an employee's HSA is not an element of the "health care coverage plan" designed and selected by the County and is therefore not a prohibited subject of bargaining. The court explained:

> The funding mechanism for an employee HSA which is used to pay the employee's health care deductibles does not concern "the rights and obligations that flow between the insurer and insured." [Citing *WPPA*, ¶ 26]. The HSA payment allocation is irrelevant to the insurer and is extrinsic to the design and selection of the County's health care plan. Because the HSA funding allocation is not part of the County's health care coverage plan, it is necessarily not an impact of that plan's design and selection.

Impact of Amendment to Section 111.70(4) (mc)6 by 2013 Wisconsin Act 20

In an effort to provide additional clarity to the statute, the legislature amended sec. 111.70(4)(mc)6 as part of the 2013-14 biennial budget bill, 2013 Wisconsin Act 20. Act 20 revised section 111.70(4)(mc)6 to prohibit a municipal employer from bargaining collectively with public safety employees with respect to:

> 6. Except for the employee premium contribution, all costs and payments associated with health care coverage plans and the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of such costs and payments and the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.

Id. (Wis. Rev. Stat. 2013-14). The amendment to sec. 111.70(4)(mc)6 first applies to a public safety employee who is affected by a collective bargaining agreement that contains provisions inconsistent with Act 20 on the day on which the collective bargaining agreement expires or is terminated, extended, modified, or renewed, whichever occurs first. If a collective bargaining agreement covering a public safety employee is not inconsistent with Act 20, the amendment to sec. 111.70(4)(mc)6 takes effect on Act 20's general effective date of July 2, 2013. Collective bargaining agreements entered into after July 2, 2013 are subject to Act 20.

Importantly, the court of appeals decisions in *WPPA* and *Manitowoc County* interpreted the language of sec. 111.70(4)(mc)6 as enacted under Act 32, not Act 20. In fact, the court in *Manitowoc County* acknowledged that given the amendment of sec. 111.70(4)(mc)6 by Act 20, aspects of the union's claim may be moot. Furthermore, the WERC acknowledged in a recent declaratory ruling that "[c]learly the import of [Act 20's] modification was to overrule the decision in *WPPA, supra*, and make it clear that the employee premium contribution was the only health insurance item subject to collective bargaining with public safety employees."

Conclusion

The court of appeals decisions in *WPPA* and *Manitowoc County* hold that the prohibition against bargaining health care coverage plan design and selection under sec. 111.70(4)(mc) as enacted by Act 32 is limited to the rights and obligations that flow between the insurer and insured, such as whether to include a deductible in the plan design and how much. However, the allocation of who pays the deductible, or contributes to an HSA, is "extrinsic" to the plan and therefore not a prohibited subject of bargaining.

Once Act 20 has taken effect with respect to the public safety employees in a county, either because their collective bargaining agreement is not inconsistent with Act 20 if entered into before July 2, 2013 (Act 20's general effective date) or if the agreement was entered into after July 2, 2013, then it finally appears clear from the amended language of the statute that the only aspect of health care coverage plan design and selection which is not a prohibited subject of bargaining is employee premium contributions.

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1 As enacted by Act 32, Wis. Stat. § 111.70(4)(mc)6 stated:

> i. (mc) Prohibited subjects of bargaining; public safety employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a public safety employee with respect to any of the following:
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> ii. …
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> iii. 6. The design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the
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> iv. Id. (Wis. Rev. Stat. 2011-12).

2 Id., 2013 WI App 70, ¶¶ 4, 5.

3 Id., ¶ 9.

4 Id., ¶ 11 (internal quotes omitted).

5 Id., 2013 WI App 145, ¶ 2.

6 Id.

7 Id.

8 Id. at ¶¶ 26, 27.

9 Id., ¶ 45.

10 Id., Appeal No. 2013AP1, p. 3 quoting WPPA, supra, at ¶ 26.

11 Id., p. 4, quoting WPPA at ¶ 26.

12 Id., p 4.

13 Id.

14 2013 Wis. Act 20, § 9329(1e).

15 Manitowoc County, supra, n. 5.

16 See City of Milwaukee (Milwaukee Police Supervisor's Organization), Dec. No. 73166 (WERC 6/19/14), p. 5.

17 The County has petitioned the Wisconsin Supreme Court for certiorari review of the court of appeals decision in Manitowoc County. The Court has not made a decision on whether to accept review of the case as of the date of this article.
