

WERC's City of Racine Decisions Impact Public-Sector Health Insurance Collective Bargaining: What Do Public-Sector Employers Need to Know?

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Practice Area: Government Law

On July 6, 2022, the Wisconsin Employment Relations Commission (WERC) issued two rulings prohibiting collective bargaining over subjects related to employer-provided health care coverage plans per Wis. Stat. § 111.70(4)(mc)6. The two rulings—*City of Racine*, Dec. No. 39446 (WERC, 7/22) and Dec. No. 39447 (WERC, 7/22)—reaffirm the broad discretion and unilateral control that local government employers, like Racine, have under the statute including deciding whether to provide a health care plan to public safety employees. With regard to the language analyzed in these two decisions, WERC concluded that with the exception of employee premium contribution and Medicare Part B payments, the other language involving an employer-offered health care plan, including health care plan participation for future retirees and family members, constituted prohibited subjects of bargaining.

The impact of these two *City of Racine* decisions may be profound. WERC acknowledged one union's arguments about the possible negative statewide impact on hundreds of collective bargaining agreements. This *Legal Update* summarizes the *City of Racine* decisions by highlighting the prohibited bargaining matters relating to employer-provided health care plans for fire and police unions and providing considerations for public-sector employers for assessing their collective bargaining agreements and negotiations in light of these two rulings.

WERC Rulings on Disputed Bargaining Proposals

The *City of Racine* cases centered around several proposals involving health insurance benefits for existing public safety employees, retirees, and spouses and dependents. These proposals included:

Medical Coverage and Health Insurance Plans

Both fire and police union bargaining proposals included medical coverage provisions, which state that full-time employees shall be eligible for employer-provided health insurance and that Racine shall define a national health insurance premium. WERC concluded these proposals were prohibited subjects of bargaining under Wis. Stat. § 111.70(4)(mc) 6. The proposals required Racine to have a health insurance plan available to public safety employees, and the proposals dictated the terms of the plan design by requiring that full-time employees be eligible for employer health insurance coverage. WERC determined Wis. Stat. § 111.70 (4)(mc)6 only permits collective bargaining over employee premium contribution, which WERC determined occurs after the employer decides to offer a plan and after the plan and its design have been established. WERC stated, “[o]nce [the decision of who will be covered by the plan and what benefits the plan will provide] has been made, then bargaining can occur as to what the employee premium contribution will be.”

The police union also included a proposal that said health insurance plan specification booklets would be provided to eligible employees “upon request from the Human Resources Department,” and “on-line in the Human Resources Department page on CORI.” WERC determined this proposal was prohibited, because it assumed the existence of a health insurance plan, which WERC concluded is a prohibited subject of bargaining under the statute.

Coverage for Retirees under the Existing and Future Agreements

Both fire and police union bargaining proposals included the statement that all employees who retired after January 1, 1996, “shall be subject to placement within the insurance program established for active bargaining unit employees.” WERC concluded this disputed sentence was prohibited under Wis. Stat. § 111.70(4)(mc)6 because it would create an obligation for Racine to have an insurance plan for current employees and employees who retire during the term of the next contract. WERC also indicated that municipal employers “have no duty to bargain over insurance benefits for employees who have already retired” because retired employees are no longer represented by the bargaining unit.

Notably, WERC stated, “[a]s to employees who may retire under the terms of the agreement the City and the Association will bargain, the Commission concludes that the language of Wis. Stat. 111.70(4)(mc) 6., has eliminated the right to bargain insurance coverage as part of deferred compensation.” WERC supported the decision by stating, “[i]f current employees have lost the right to bargain over whether the City will even offer insurance benefits as current compensation while they are employed, it logically follows that the Association is prohibited from bargaining over such benefits as part of deferred compensation if an employee retires during the term of the next contract.” As such, the statutory language prohibits bargaining for insurance coverage benefits both as current compensation during employment and insurance coverage benefits as deferred compensation after retirement.

Medicare Part B Premiums

Both fire and police union bargaining proposals required the City to provide City health insurance and pay Medicare B premiums for retirees who were hired prior to January 1, 2007 (fire union’s proposal), or January 1, 2010 (police union’s proposal). Retirees who were hired on or after January 1, 2007 (fire union’s proposal), or on or after January 1, 2010 (police union’s proposal), would be ineligible for Racine’s Medicare B payments but entitled to receive Racine’s health insurance upon reaching Medicare eligibility age or federal retirement age, whichever occurs later. WERC gave a mixed ruling here. WERC found the language requiring Racine to offer a health insurance plan for retirees is a prohibited subject of bargaining because it designates the design of the plan, such as who would be covered and under what terms. However, WERC found that bargaining over Medicare B payments as deferred compensation for current employees who retire during the term of this agreement was a mandatory subject of bargaining, because Medicare B is not a “health care coverage plan” provided by Racine and consequently falls outside of the statutory prohibition. Notably, WERC did not address whether this payment of Medicare Part B premiums is a prohibited impact bargaining proposal under Wis. Stat. § 111.70(4)(mc)6.

Continued Insurance for Disabled Employees and Spouses and Dependent Survivors

Both the fire and police union proposals require Racine to pay the premiums on surgical, hospital, and major medical insurance for any police officer or firefighter who is "forced to retire by virtue of duty incurred injury or disease" or who retires at age fifty-two with at least twenty years of "continuous service immediately preceding retirement." The proposals also required Racine to allow the retiree's surviving spouses and dependent survivors to remain on the plans and pay the surgical, hospital, and major medical insurance for the surviving spouse and dependent family members until the spouse remarries. WERC concluded these proposals are prohibited because the proposals presume the existence of Racine's insurance plan and coverage eligibility under the plan, which is prohibited under the statute.

Substitution of Insurance Coverage Provided by Another Employer for a Retiree

Both the fire and police union proposals required Racine to allow retirees to hop off the insurance plan if the retiree has alternative employment with insurance benefits, and to allow the retiree to hop back on the plan after they leave that employment. WERC concluded these proposals are prohibited because the proposals presume the existence of Racine's insurance plan and coverage eligibility under the plan, which is prohibited under the statute.

What Should the Public-Sector Employer do Next?

As noted, the WERC decisions find certain provisions to be prohibited. That means the provisions are essentially illegal to be bargained or included in a collective bargaining agreement. Unlike "permissive" subjects which continue during an existing contract until the expiration, it may not be sufficient or legal for the employer and union to simply set the issue aside until the next bargain based on WERC's decision.

In consideration of the *City of Racine* decisions, public-sector employers should do the following immediately:

1. Remember that benefits are important to employees. This issue is important to your organization's employees and your organization's relationship with their union. The union and employer both have a strong desire to offer a competitive benefits package. But as it relates to the design of health insurance and retiree health insurance, employers have significant unilateral authority. Careful and thoughtful approaches to designing employee benefits is essential. Also important is how the employer approaches this issue with the local union and employees to preserve effective relationships and achieving cost-efficient mutual understanding that the language is prohibited and unenforceable and commitment to removing the language from the collective bargaining agreement. While the contract language may no longer be enforceable or appropriate for a collective bargaining agreement, every employer will need to individually determine what is the best approach for addressing their situation.
2. Analyze Your Organization's Existing Collective Bargaining Agreements. All collective bargaining agreement language between different employers is distinct and unique. The *City of Racine* decisions address language in dispute between Racine and its fire and police unions. Every public-sector employer needs to evaluate their own organization's existing collective bargaining agreement language with public safety employees and address possible prohibited language that may require attention under their individual agreements.

For example, WERC has made it clear that they believe the law reserves to the employer complete discretion whether to offer a health insurance plan to public safety employees and any language requiring the employer to offer a health insurance plan may be prohibited. WERC stated:

- As logically flowing from that discretion and consistent with a part of the rationale in the *City of Monona* decision, the Commission is persuaded that the statute gives the City discretion to determine whether it will even have a health insurance plan for public safety employees. Thus, any Association bargaining proposal over the "employee premium contribution" must be framed in the context of that City discretion if it is to be a mandatory subject of bargaining primarily related to wages.

In consideration of this statement, many employers will need to address and revise collective bargaining language to preserve employer discretion to offer a plan in the first place.

3. Promptly Address Problematic Language with the Union. If there is language within the collective bargaining agreement or a proposal that could reasonably be found to be prohibited based on the *City of Racine* decision, then the employer should approach the Union to discuss removing this language from the collective bargaining agreement and the employer may cease bargaining on any proposals containing prohibited language.
4. When no Understanding Exists, Consider Filing for a Declaratory Ruling. If the employer believes that the collective bargaining agreement language or proposal language is prohibited and unenforceable and the union disagrees, then the employer may pursue a declaratory ruling with WERC on those possible prohibited subjects of bargaining. This approach is essential in the event the collective bargaining agreement includes language like plan participation, HSA contributions, or flexible spending plans similar to the prohibited language found in the *City of Racine* decisions. Moreover, if your organization is making plan design changes which will limit the pool of persons who are eligible to participate in the plan, then now is the immediate time to address this issue. While declaratory ruling processes are expensive and time consuming, and frankly should be avoidable in light of the conclusive nature of the *City of Racine* decisions and the guidance that WERC provides, the costs of addressing this issue immediately through declaratory ruling can outweigh the long-term impacts of not addressing this issue.
5. This Will Get Political. WERC noted that a municipal employer may unilaterally continue to provide the same insurance benefits identified in a collective bargaining agreement that WERC found were prohibited subjects of bargaining in its decisions. As a result, employers should prepare for lobbying of local elected officials by local unions and members to "leave the benefits alone" or to unilaterally establish promises of these benefits in handbooks and policies. Careful thought should be given by employers when approaching these requests and when crafting language.
6. Explore Benefit Changes. As workforce demographics have changed, so has the value employers receive from the benefits it offers. For some workplaces, retiree health insurance benefits may be viewed as undesirable and a remnant of a different era. Employees may want new benefits in place. Moreover, certain retiree benefits offered by employers may be tax inefficient or too costly without good return on investment. As such, employers should consult with their benefit providers and consultants to identify different benefit options so as to craft a benefits package that is designed to attract and retain high quality employees.
7. Impact Bargaining. Wis. Stat. § 111.70(4)(mc)6 prohibits a municipal employer from bargaining "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." In the *City of Racine* decisions, WERC largely concluded the proposed language was prohibited based on the first part of this statutory prohibition and did not provide detailed analysis regarding what aspects of impact bargaining are prohibited. In the event a union raises a proposal as an effect of the health care plan design or selection, then the employer needs to be ready to address whether it may lawfully engage in bargaining over that issue.
8. Watch for Appeals. This decision impacts important benefits for employees. It would be prudent to expect appeals of the WERC's *City of Racine* decisions. But appeals do not stop your organization from immediately confronting problematic prohibited language in your collective bargaining agreements. It will take significant time for these cases to be resolved at the appellate level. Your organization may be better protected by pursuing your own declaratory ruling in the interim. Further, your organization can better rely on your own declaratory ruling decision rather than the possibilities associated with relying on the *City of Racine* decisions.
9. Don't assume. This is a complex issue. This issue requires individualized analysis of your organization's collective bargaining agreement. While your organization may think it has a simplistic issue, the problem may be much deeper and complex, including when addressing issues associated with vesting of benefits. In consideration of the multitude of issues that emanate from these decisions, work with your municipal attorney, cooperative counsel, or outside legal counsel.

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