

Wisconsin Supreme Court Finds Act 10 Constitutional in its Entirety Re: Collective Bargaining

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On Thursday, July 31, 2014, the Wisconsin Supreme Court issued its long-awaited decision involving the **constitutionality of Act 10**. The Court reversed Dane County Circuit Court Judge Juan Colas's decision and upheld "Act 10 in its entirety." In *Madison Teachers, Inc. v. Walker*, 2014 WI 99, the plaintiffs raised several novel constitutional challenges to Act 10 involving **freedom of association** and **equal protection**. The Supreme Court majority rejected these state and federal constitutional challenges, in what concurring Justice Patrick Crooks stated was "not a close call."

Background

In 2011, Madison Teachers, Inc. and Public Employees Local 61 sued Governor Walker and WERC Commissioners by challenging several provisions of Act 10. Dane County Circuit Court Judge Colas decided in favor of the unions in September 2012, but he did not hold Act 10 unconstitutional in its entirety. Judge Colas 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.
- **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.
- **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.

While this decision was pending before the Wisconsin Supreme Court, the Seventh Circuit Court of Appeals upheld Act 10 under the federal constitution.

The Wisconsin Supreme Court's Decision

The Wisconsin Supreme Court reversed Judge Colas's decision and found that each of these parts of Act 10 are enforceable. The Court's 90-page majority opinion can be well summarized as follows:

collective bargaining remains a creation of legislative grace and not a constitutional obligation. . . . If a general employee participates in collective bargaining under Act 10's statutory framework, that general employee has not relinquished a constitutional right, they have only acquired a benefit to which they were never constitutionally entitled.

The Court's decision means the employer generally retains the unilateral ability to manage employees, control work environments, determine benefits levels, and change nearly all other aspects of compensation for represented general municipal employees. The current practice of negotiating in good faith with general municipal employee unions regarding only "total base wages," and then, absent a voluntary agreement, implementing the employer's last best final offer after impasse is reached, is the process that employers and general municipal employee unions must follow. Bargaining with general municipal employee unions is limited to only "Total Base Wages." Employers may not make fair share deductions or union dues deductions from compensation of general municipal employees. If employees want to pay the bargaining representative for services rendered, then that payment arrangement must be between the bargaining representative and employee and the employee must "show the initiative and pay [the union] on their own." Moreover, the collective bargaining representative must participate and win annual certification elections if it wants to serve as the certified bargaining representative.

As a result of the Supreme Court's decision, many employers throughout Wisconsin can have confidence in their decisions where they changed their organizations,

including restructuring, implementing employment policies, developing competitive employee compensation and benefit structures consistent with the interests of employees and the public, and changes to the workplace culture to favor empowered supervisors and valued employees.

What Should Employers Prepare for Next?

We expect that many administrators, human resources professionals, and Chiefs will be contacted by employees and local elected leaders about the Wisconsin Supreme Court's decision. For most employers who did not extend pre-Act 10 contracts with general municipal employee unions and continued to operate as if Act 10 was fully enforceable, the response from the employer will likely be quite simple—this decision changes nothing for the employer or employees. For others, the decision may raise different consequences that should be addressed by the employer.

Other issues may arise that employers should consider and prepare for:

Increasing Local Advocacy. Now that Act 10 has been upheld in the federal courts and by the Wisconsin Supreme Court, challenges to Act 10 will take a greater political focus. We envision this activity will likely occur at the local government level. Employers should expect that employees may form groups to petition and pressure the employer, for example at City Council meetings and through other political avenues, to enhance benefit and compensation levels and to establish enforceable contract obligations. This right of the employees is preserved and identified by the Wisconsin Supreme Court majority when it stated:

Represented municipal employees, non-represented municipal employees, and certified representatives lose no right or ability to associate to engage in constitutionally protected speech because their ability to do so outside the framework of statutory collective bargaining is not impaired. Act 10 merely provides general employees with a statutory right to force their employer to collectively bargain; outside of this narrow context, to which the plaintiffs freely concede public employees have no constitutional right, every avenue for petitioning government remains available.

Employers should continue to monitor workplace culture and compensation and benefit structures to remain competitive and attractive to high quality employees and applicants. By continuously monitoring these areas and updating employer policies, employers can address employee dissatisfaction before it rises to political levels. Employers should also develop communication plans and actively work to retain confidence and respect with the workforce.

Fair Share Challenges. The Wisconsin Supreme Court implied that the door is open for challenges to fair share agreements in public safety and transit bargaining units—whether in the legislative arena or through court challenge by represented employees forced to pay fair share contributions to public safety and transit unions. Citing the recent United States Supreme Court decision, *Harris v. Quinn*, the Wisconsin Supreme Court signaled that "fair share agreements are constitutionally suspect beyond the context of quasi-State employees." The Court also stated that the "First Amendment does not compel government to subsidize speech. . . . [and]

[b]y logical extension, the First Amendment does not compel the government to compel its employees to subsidize speech." While this issue may be raised in other states and is a national issue, it is conceivable that Wisconsin is a breeding ground for a lawsuit or political change in this area.

Obtain Notice of Consequences. Effective July 1, 2014, WERC finalized permanent rules regarding annual certification elections. If a bargaining unit of general municipal employees did not seek an annual certification election during the last rounds of elections in winter 2014 for municipal employees and fall 2013 for school district employees, then no certified collective bargaining representative exists for that group of general municipal employees. Upon request of the employer, WERC should issue a notice of consequences to the employer so the employer and employees have certainty that no certified collective bargaining representative exists.

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