



Buelow Vetter

Buikema Olson & Vliet, LLC

**WGFOA 2013 WINTER
CONFERENCE**

**UNION CONTRACT
NEGOTIATIONS
POST ACT 10**

Presented by: Nancy L. Pirkey

TOPICS TO BE ADDRESSED

- Court challenges to 2011 Wisconsin Act 10
- WERC Rules on Calculating a CPI Increase
- Police and Fire Negotiations
- Management Experience with:
 - Grievance Procedures
 - Employee Handbooks
 - Compensation Studies and Pay Plans
 - Life without Union Contracts

COURT CHALLENGES TO 2011 WISCONSIN ACT 10



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COURT CHALLENGES TO ACT 10

Federal Court Decision (*WEAC v. Scott Walker et al.*, 824 F. Supp. 856 (W.D. Wis. 2012)).

- “ On March 30, 2012, U.S. District Judge Conley issued a decision holding parts of Act 10 unconstitutional.
- “ Judge Conley held that the requirement for annual recertification elections is a violation of the Equal Protection Clause.
- “ Judge Conley also held the prohibition on employers collecting union dues violates the First Amendment rights of public sector unions.
- “ The decision required voluntary dues deduction resume by May 31, 2012.

COURT CHALLENGES TO ACT 10

Order Granting Stay

- “ On April 27, 2012, Judge Conley issued a partial stay of his decision.
- “ The Judge refused to issue a stay of his entire decision, but did agree to a stay for those bargaining units decertified under Act 10 by March 30, 2012.
- “ In effect, this maintains the “status quo” for those units where the union did not seek recertification or where the union did not prevail in the recertification election.



COURT CHALLENGES TO ACT 10

Order Clarifying Issuance of Stay

- ” On May 18, 2012, Judge Conley issued a decision clarifying the partial stay he issued.
- ” Judge Conley agreed that voluntary dues deduction requires an authorization by individual employees.
- ” In effect, voluntary dues deduction requires an “opt-in” action rather an “opt-out” action.
- ” Judge Conley also agreed that a dues authorization could be valid for up to one year.



COURT CHALLENGES TO ACT 10

7th Circuit Court Of Appeals Decision (*WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013)).

- “ On January 28, 2013, the 7th Circuit Court of Appeals reversed the Conley decision and determined that Act 10 satisfied the “rational basis” test.
- “ The Court of Appeals decided hat the recertification and dues deduction prohibition in Act 10 were not unconstitutional.
- “ Under this decision, the WERC was permitted to implement the annual recertification requirements and employers were permitted to stop dues deduction.

COURT CHALLENGES TO ACT 10

Additional Federal Court Decision, *Laborers Local 236, AFL-CIO v. Walker, et. al.*, No. 11-CV-462-WMC (W.D. Wis., 2013).

- “ On September 11, 2013, Judge Conley dismissed in its entirety a second case involving constitutional challenges to Act 10.
- “ The decision reiterated the 7th Circuit’s decision which found no First Amendment or Equal Protection infirmities.
- “ Additionally, the decision found that Act 10 did not improperly burden a municipal employee’s right to associate, assemble and express views.
- “ Judge Conley also ruled that the Equal Protection clause was not violated by treating individuals represented by a collective bargaining unit different than unrepresented individuals.

COURT CHALLENGES TO ACT 10

Dane County Circuit Decision – *Madison Teachers Inc., et. al. v. Walker*, (Dane County Circuit Court, Case No. 11CV3774,2012).

- “ On September 14, 2012, “Judge Colas found significant parts of Acts 10 and 32 unconstitutional.”
- “ Judge Colas ruled that limits on collective bargaining subjects (base wages only) required annual recertification elections, and the prohibition on fair share and dues deduction were unconstitutional.
- “ On October 22, 2012, Judge Colas denied a motion for a stay pending appeal.

COURT CHALLENGES TO ACT 10

- “ On March 12, 2013, the Wisconsin Court of Appeals denied a motion for a stay pending appeal.
- “ The Court of Appeals stated: “So far as we can tell, different courts might make different decisions on that topic and, in any event, this is not the sort of statewide effect that would justify a stay order in this case.” (Page 14, Footnote 1)
- “ On July 9, 2013, the WERC implemented emergency rules requiring annual certification elections to be held between November 1-21, 2013.
- “ On September 17, 2013, Judge Colas denied a subsequent plaintiff’s motion for injunctive relief.

COURT CHALLENGES TO ACT 10

What is Left of Act 10 After the Colas Decision?

- The definition of “collective bargaining” is limited to “wages” only.
- The elimination of interest arbitration.
- The limit on collective bargaining agreements to one year in duration.
- Employees contributing one-half of the WRS contribution rate.
- The requirement that municipal employers adopt a grievance procedure.



COURT CHALLENGES TO ACT 10

What is the Scope of the Duty to Bargain in Light of the Colas Decision?

- “Wages” are a mandatory subject of bargaining.
- All other items from the expired union contract are illegal subjects of bargaining.
- Question is how the WERC will define “wages.” Prior WERC decisions have taken a broad view of what MERA defines as “wages.”

COURT CHALLENGES TO ACT 10

- “ On September 24, 2013, several unions (including WEAC and AFSCME) filed a motion to hold the two WERC Commissioners in contempt of court.
- “ The motion asked that the Commissioners:
 - Cease and desist from implementing emergency rules for administration of annual certification elections; and
 - Cease and desist from implementing the terms of Act 10 ruled unconstitutional.

COURT CHALLENGES TO ACT 10

- “ On October 21, 2013, a hearing was held in front of Judge Colas on the contempt claims and Judge Colas issued the contempt order.
- “ On November 4, 2013, the Court of Appeals denied a stay of this contempt order.
- “ Thus, annual recertification elections for public employees have been postponed indefinitely.
- “ The Wisconsin Supreme Court granted certification by-passing the Court of Appeals. Oral arguments were held November 11, 2013 and a decision is expected next spring (or summer).

ACT 10: STATUS IN WISCONSIN

Not so clear from Judge Colas in *Madison Teachers, Inc. et. al. v Scott Walker et. al.*, September 17, 2013:

“ Defendants argue that a circuit court decision is not precedential. That is true and irrelevant. A court decision is precedential when it binds another court. The question here is not whether other courts or non-parties are bound by this court’s ruling. It is whether the defendants are bound by it. Plainly they are, as all parties to a lawsuit are, and in a case in which the statute was found facially unconstitutional they may not enforce it under any circumstances, against anyone.



ACT 10: STATUS IN WISCONSIN

Sound Advice from the Wisconsin Court of Appeals:

“ We acknowledge that the *respondents* argue that the circuit court’s decision here *is* binding state-wide. But we reject out of hand the proposition that the circuit court’s decision has the same effect as a published opinion of this court or the supreme court. A more interesting issue is whether, if a union sues, a different circuit court might exercise its discretion to apply the doctrine of issue reclusion or a similar doctrine and, thereby, effectively choose to follow the circuit court’s decision here. So far as we can tell, different courts might make different decisions on that topic and, in any event, this is not the sort of statewide effect that would justify a stay order in this case.



ACT 10: STATUS IN WISCONSIN

What Should Employers Be Doing in Light of this Decision?

- “ Is it wise for municipal employers to be engaging in bargaining right now?
- “ Not if the bargaining is limited to base wages only.
- “ Bargaining over any other item is premature until a decision from the Wisconsin Supreme Court.
- “ WERC decision involving Richland Center stated that it is “prudent” for an employer to determine the status of Act 10 before returning to the bargaining table.

NEGOTIATING OVER BASE WAGES



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WERC RULES ON CALCULATING THE CPI INCREASE

Requirements of Act 10

- “ Bargaining is restricted to base wages only.
- “ Under MERA, the wage increase is capped at the increase in the Consumer Price Index (CPI), unless the employer passes a referendum.
- “ Under MERA, the Department of Revenue must calculate the CPI and notify the WERC of the maximum allowable wage.
- “ The WERC recently issued rules on how to calculate the CPI increase. **Note – These rules expired on September, 15, 2012.**

WERC RULES ON CALCULATING THE CPI INCREASE

CPI Increases Certified by the WERC:

Contract Effective Date	CPI Increase
July 1, 2012	3.16%
January 1, 2013	2.96%
July 1, 2013	2.07%
January 1, 2014	1.66%
March 1, 2014	1.70%

The WERC issued emergency rules (approved by the Governor) on calculating the CPI increase. **These rules expired on September 15, 2012.**

ACT 10 LANGUAGE ON CALCULATING THE CPI INCREASE

What is Excluded from Base Wages?

Act 10 Exclusions [Note –bolded words are different than WERC rules]

- Supplemental compensation;
- Overtime;
- Premium pay;
- Merit pay;
- Performance pay;
- **Pay schedules; and**
- **Automatic pay progressions.**

EXPIRED WERC RULES ON CALCULATING THE CPI INCREASE

What is Excluded from Base Wages?

Exclusions from base wages identified in WERC Rule 90.03(2)
[Note-bolded words are new or different than Act 10]:

- Supplemental compensation;
- Overtime;
- Premium pay;
- Performance pay;
- **Lump sum** merit pay;
- **Education credits or credentials in pay schedules;**
and
- **Extra duty pay.**

EXPIRED WERC RULES ON CALCULATING THE CPI INCREASE

Steps in Calculating the Base Wage Increase

- Take a “snapshot” 180 days before contract expiration of the “filled” positions in the bargaining unit.
- Calculate the annual salary for the employees in that snapshot (excluding any supplemental compensation, like overtime, shift differential, out-of-class pay, etc.)
- Calculate the total dollars available for the wage increase, by multiplying the total bases wages by the CPI increase.
- Determine how to distribute those total dollars within the unit (i.e., equally to all employees or different amounts to different employee groups).



EXPIRED WERC RULES ON CALCULATING THE CPI INCREASE

- Under the WERC rules, the employer does have a duty to bargain over the distribution of the wage increase.
- Best practice is to provide costing data to union and attempt to reach agreement on method for calculating the available dollars.
- Under Act 10, once an impasse is reached the employer can implement its last offer.
- Mediation is helpful to establishing that an impasse has been reached.

EXPIRED WERC RULES ON CALCULATING THE CPI INCREASE

Unanswered Questions

- Should the union contract include a summary of the costing methodology used?
- What is the impact of new hires after the snapshot is taken?
- Is there a mechanism for the union to challenge the costing?
- How broadly will the WERC define supplemental compensation?
- What is the impact of a salary or compensation study on base wages?

BEYOND BASE WAGE NEGOTIATIONS

What role does a union contract (certified or not) have?

- “ Interest based bargaining with a noncertified union or association would violate Act 10.
- “ The WERC ruled in Dodge County that voluntary recognition of a union is not permitted under Act 10.
- “ A noncertified association would only have the authority that individual members give it. It would not “represent” a bargaining unit since none would exist. The union may still represent its members in grievance proceedings and other disciplinary matters, if the employee wishes.



BEYOND BASE WAGE NEGOTIATIONS

- “ If the union does not recertify, the employer must carefully evaluate the stature that it grants its leaders. The employees not in the union will have no voice in the selection of its leaders and the development of its positions. In essence, the employer could alienate the majority who choose not to join.
- “ It is a prohibited practice to interfere with or discriminate in regard to union activity or other lawful protected concerted activity engaged in by employees.
- “ Employers must not discriminate against an employee because he/she chooses not to join a union.

LAW ENFORCEMENT AND FIRE NEGOTIATIONS



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LAW ENFORCEMENT & FIRE NEGOTIATIONS

- Law enforcement and fire employees retained all of their bargaining rights under Act 10.
- Act 32 made the design and carrier of a health insurance plan, and its impact, an illegal subject of bargaining.



LAW ENFORCEMENT & FIRE NEGOTIATIONS

- There have been multiple court cases filed over the interpretation of the “design and selection” of “health care coverage plans.”
- Milwaukee Police Association case is pending before the Wisconsin Supreme Court.



LAW ENFORCEMENT & FIRE NEGOTIATIONS

- Very few interest arbitration decision since Acts 10 and 32 took effect (7/1/11).
- Most critical issue is internal versus external settlement patterns.
- Will arbitrators give weight (and how much) to the wage increases, benefits and WRS contributions for other municipal employees?



**WHAT HAS
THE PAST TWO YEARS
BEEN LIKE FOR
EMPLOYERS?**



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WHAT HAS THE PAST TWO YEARS BEEN LIKE FOR EMPLOYERS?

Grievance Procedure

- Very few grievances have been filed under the new statutory procedure.
- One court decision in Dodge County circuit court addressing scope of discipline subject to the grievance procedure.
- Expect legal challenges to:
 - Personnel actions excluded from discipline and termination.
 - Selection of the impartial hearing officer (IHO).
 - Procedures followed at the hearing before the IHO.

WHAT HAS THE PAST TWO YEARS BEEN LIKE FOR EMPLOYERS?

Employee Handbooks

- Very few little controversy over the adoption of employee handbooks.
- No court decisions challenging personnel policies or employee handbooks.
- Most vocal objections have been in the following areas:
 - Just cause being removed from discipline policy.
 - Loss of overtime (applying FLSA standard to overtime).
 - Loss of seniority protections.
 - Benefits upon retirement – severance pay or retiree health insurance plans.

WHAT HAS THE PAST TWO YEARS BEEN LIKE FOR EMPLOYERS?

Compensation Studies and Pay Plans

One of the most controversial areas has been the adoption of new pay plans.

“ Controversies include:

- Major changes to salary structures (i.e. pay reductions).
- Reductions in salaries for existing employees vs. new hires only.
- Changes to job classifications, job descriptions/duties, combining pay grades.

WHAT HAS THE PAST TWO YEARS BEEN LIKE FOR EMPLOYERS?

Life Without Union Contracts

- Everyone is apprehensive, but things are running smoother than anticipated.
- Resumption of dues deduction will make the unions more active.
- As time goes on, employers will begin to make more drastic changes – paid time off plans or consumer-driven health plans.
- Time will tell if public employees can survive without unions or whether there will be a resurgence in union activity.





**Questions?
Concerns?
Comments?**