



Judge Denies Stay of Decision Striking Down Parts of Act 10 on Constitutional Grounds

On October 22, 2012, Judge Colas issued a decision denying the State's motion to stay his September 14, 2012 decision striking down parts of Act 10 on constitutional grounds. If it has not yet happened, counties should anticipate receiving demands from unions to reinstate obligations under prior collective bargaining agreements and to collectively bargain new agreements. Unions may also threaten legal challenges if counties do not immediately respond to their demands.

Counties should carefully evaluate union demands to bargain in light of the uncertainties that remain under Judge Colas' decision. Initially, there remains a question as to whether Judge Colas' decision, which is a circuit court decision, is binding on any county or local government beyond the parties to that action. Circuit court decisions typically are not binding outside of the jurisdiction in which they were issued. However, because the governor and members of the Wisconsin Employment Relations Commission (WERC) were parties to the action, there is some uncertainty as to the statewide application of Judge Colas' decision.

Second, Judge Colas' decision has been appealed and will be reviewed by appellate courts. It is possible that a higher court will stay the decision pending appeal which will reinstate the prohibition on bargaining over subjects other than total base wages. A higher court could also reverse Judge Colas' decision and formally reinstate the limitations on bargaining with general municipal employees under Act 10. Therefore, before engaging in collective bargaining based upon Judge Colas' decision, it is prudent for counties to weigh the possibility that Judge Colas' decision may be stayed or reversed, Act 10 reinstated and any agreement regarding "wages" potentially rendered null and void.

Third, there is no clarity in Judge Colas' decision to require local governments to bargain over "wages" with general municipal employees. The term "wages" had a defined meaning when Act 10 was enacted, but Judge Colas' decision struck down that definition (which limited "wages" to "total base wages" and specifically excluded any other form of monetary compensation). The duty to bargain "wages" still exists, but it is unclear whether "wages" retains the same meaning that was intended by the legislature when Act 10 was passed, i.e., total base wages, or whether it takes on some other meaning after Judge Colas' decision. It is difficult to bargain "wages" without knowing the extent of the duty to bargain or whether a county has the statutory authority to bargain over anything more than total base wages.

Fourth, it is unclear how Judge Colas' decision affects bargaining units that were previously decertified and active bargaining units that negotiated total base wage contracts within the limitations of Act 10. Counties should not assume that because a prior, decertified,

union makes a demand to bargain that the union is authorized to do so following Judge Colas' decision. Chapter 111 of the Wisconsin Statutes contains very specific language requiring bargaining agents to be certified by WERC before a local government has any obligation to bargain with a union. The same uncertainty exists relative to total base wage agreements. Unions are likely to claim that previous total base wage agreements are now unenforceable but there is no support in Chapter 111 or Judge Colas' decision for this position.

Finally, if the decision is retroactive, it will take time to evaluate the beginning point for negotiations. One major issue will be whether the parties begin bargaining with a blank slate or are required to bargain off of the level of benefits provided under the previous agreement (i.e., the dynamic status quo). Additional issues include whether local governments who bargain based on new Act 10 handbooks are bargaining in "good faith," when an impasse may be declared in bargaining and the parties' relative obligations upon impasse. There will likely be legal challenges that ensue regarding all of these issues.

In short, there are significant legal questions surrounding the scope of Judge Colas' decision and its applicability to municipal employers statewide that must be resolved before counties engage in bargaining. Counties should strongly consider waiting for guidance from the Court of Appeals and the Wisconsin Supreme Court before bargaining with general municipal employees on any subject other than total base wages.