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ADEA Applies to Local Governments Regardless of Their Size

In the recent U.S. Supreme Court decision, *Mount Lemmon Fire District v. Guido* (Nov. 6, 2018), the Court unanimously held the Age Discrimination in Employment Act (ADEA) covers state and local governments regardless of their size. After Mount Lemmon Fire District laid off its two oldest firefighters, the firefighters sued the Fire District for age discrimination under the ADEA. The ADEA specifies that "the term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." The Supreme Court held that the ADEA covers state and local governments regardless of their size because the 20-employee requirement is in a separate sentence from state and local governments, and the sentence including state and local governments begins with the phrase "also means."

In reaching this conclusion, the Court reasoned the use of the phrase "also means" indicated that Congress intended to add an additional category to the ADEA's definition of employer because the word "also" ordinarily means "in addition" and "likewise." Further, the Court believed that because Congress did not include the "twenty or more employees" language in the sentence discussing states and local governments, Congress did not intend to place a minimum employee requirement on state and local governments. Finally, the Court rejected the Fire District's belief that the ADEA should be read in line with Title VII, which only applies to state and local governments if they have 15 employees. Instead, the Court believed that the ADEA is more similar to the Fair Labor Standards Act (FLSA), which applies to all state and local governments regardless of their size, because Congress based many aspects of the ADEA on this law. The Court recognized that applying the ADEA to the state and local governments regardless of their size made the ADEA's application broader than Title VII's application; however, the Court noted that this was a result of the different language Congress used in Title VII and the ADEA.

The Supreme Court's decision in M*ount Lemmon Fire District v. Guido* greatly impacts small municipalities because it makes clear that the ADEA applies to all state and local governments regardless of their

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City Railroad Ordinance Preempted by Federal Law

In a recent case, *City of Weyauwega v. Wisconsin Central Ltd.*, Case No. 2017AP2298 (Sep. 20, 2018), the Wisconsin Court of Appeals held that federal railroad laws and regulations preempted a City ordinance that was designed to prevent trains from obstructing streets or highways for extended periods of time, rendering the ordinance unenforceable.

The ordinance was enacted in 2010 as an attempt to prevent the Wisconsin Central, a railroad whose tracks pass through the City of Weyauwega, from stopping its trains for extended periods within City limits and blocking vehicular traffic at one or more of the three crossings located within the City. Part of the City is located to the north of the railroad tracks, so the railroad's stopped trains regularly forced all motor vehicles, including the City's police, fire, and emergency services vehicles, to take lengthy detours to reach their destinations.

In response, the City enacted the ordinance at issue in this case, which provided:

> No person shall leave standing or stop or permit or allow to stand or stop any railroad train, engine, or car upon any street or highway crossing within the City so as to obstruct public travel for a greater period of time than 10 minutes, unless such train or engine care is continuously in motion.

The City issued numerous citations to the railroad under this ordinance, with forfeitures totaling over $25,000. The railroad acknowledged that it had violated the ordinance, but argued that the ordinance was invalid because it was preempted by federal law. The Wisconsin Court of Appeals agreed, and ruled against the City in its attempts to enforce the ordinance.

The Federal Railroad Safety Act (FRSA) is a broad and relatively comprehensive federal law that is designed to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. In order to promote uniform nationwide regulations and avoid a patchwork of contradictory state and local laws and ordinances governing railroads, Congress has declared that the states and local governments are prohibited (or "preempted") from enacting regulations on subjects covered by the FRSA or the regulations enacted under it. However, Congress carved out two exceptions, or "savings clauses," which set out narrow circumstances in which states and municipalities may validly enact regulations relating to railroad safety.

The first savings clause provides that a state or local government "may adopt or continue in force" an ordinance "related to railroad safety. . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter" of the ordinance. The Court of Appeals determined that the City's ordinance did not fall within this exception to FRSA's broad preemption because, while the ordinance was related to railroad safety, the Secretary of Transportation had already been prescribed regulations covering its subject matter. The court concluded that the ordinance was "related to" railroad safety for a number of reasons, including the fact that it did not contain any exception for a train stopped at a crossing because of accidents or other unsafe conditions. However, the court determined that the subject matter of the ordinance was best characterized as "the operation and movement of trains at crossings," and noted that there were numerous federal regulations that covered the same subject matter.

Similarly, the Court of Appeals concluded that the City's ordinance did not fall within the exception to FRSA preemption set out in the second savings clause.

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number of employees. The Wisconsin Fair Employment Act already applied to small municipalities and protected employees from age discrimination. However, this decision provides a federal cause of action for employees who are victims of age discrimination with the opportunity to receive compensatory damages under the ADEA. Additionally, this decision will affect how small municipalities draft separation agreements, agreements whereby the employee waives claims against the municipality in exchange for some type of severance pay or benefit. These agreements must comply with the strict requirements of the Older Worker's Benefit Protection Act (OWBPA) in order for an employee to waive federal age discrimination claims. The OWBPA is a portion of the ADEA that places very specific requirements on separation agreements, including, among other requirements, providing the employee with 21 days to consider signing the agreement and 7 days to revoke the agreement after signing.

— Brian P. Goodman

City of Madison Finalizes 100% Renewable Plan

In 2017, the City of Madison City Council passed a resolution committing the City to achieving 100% renewable energy and zero net carbon emissions, becoming the first Wisconsin municipality to do so (since then, the City of Middleton and the City of Eau Claire have passed similar resolutions). Public meetings were held to solicit community input (Municipal Law Newsletter, October, 2017). The City's consultants, Navigant and the Sustainable Engineering Group, then began working on a plan to implement the City's 100% goal. Preliminary drafts of the plan were provided to Sustainable Madison Committee (SMC) members for review.

At the November 26, 2018 SMC meeting, members of the public and SMC members reviewed a near final draft of the proposed plan, entitled "100% Renewable Madison: Achieving 100% Renewable Energy & Zero Net Carbon for City Operations & Leading the Community" ("Plan").

The 48 page Plan presents three scenarios for how the City of Madison can achieve its goals between 2020 and 2030 through a combination of actions designed to (i) reduce energy demand from city operations through energy efficiency and demand-side measures; (ii) increase the supply of clean energy by developing new renewable energy generation resources through the City's incumbent utilities, MGE and Alliant; and (iii) supply remaining energy needs through the use of renewable energy credits (RECs) and carbon offsets to bridge the City's efforts while it develops both the demand-side and supply-side efforts. The scenarios vary in terms of the level of required City investment in direct actions versus RECs and carbon offset purchases—the most accelerated scenario (15% carbon reduction by 2020, with 85% use of RECs and carbon offsets) requires less City investment and more reliance on REC and carbon offset purchases.

During the three hour public discussion, participants focused attention on several components of the plan, including the role of RECs as a "bridge" strategy; the need to further emphasize the impact of the City's leadership role on community-wide efforts to reduce the reliance on carbon-emitting sources; and the importance of highlighting the social equity and public health impacts of the Plan. In particular, SMC members pointed out that, even in the most aggressive direct action scenario (55% percent carbon reduction by 2030), an overall investment of $95 million into clean energy initiatives such as new solar installations; water distribution, building efficiency and LED streetlights; and new green and electric fleet and transit vehicle purchases, would still require significant purchases of RECs and other carbon offsets.

SMC members will be reviewing a final draft at its December meeting. Efforts will then be focused on developing an accompanying resolution to be considered by the City Council that would also allow the City to direct City staff to implement specific elements of the Plan.

— Richard A. Heinemann

City Railroad Ordinance Preempted by Federal Law

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The second savings clause states that an ordinance can survive FRSA preemption if it (1) is necessary to eliminate or reduce an essentially local safety hazard, (2) is not incompatible with a law, regulation, or order of the US government, and (3) does not unreasonably burden interstate commerce. The Court of Appeals determined that the ordinance did not meet the first element of the test because the safety hazard it addressed—increased emergency response time to certain parts of the City due to blocked crossings—was not an "essentially local safety hazard," but instead was a widespread problem that was capable of being adequately addressed by national uniform standards. Thus, because the City's ordinance did not fall within the narrow exceptions set forth in the first and second savings clauses, the court found that it was preempted by the FRSA and could not be enforced against the railroad.

This case should serve as a reminder to municipalities that local regulatory authority over railroads is often severely constrained by federal law. In addition to the FRSA, Congress has enacted the Interstate Commerce Commission Termination Act, which grants the federal Surface Transportation Board broad jurisdiction over "transportation by rail carriers" and preempts a wide variety of state and local attempts to regulate railroad operations, including many environmental, land use, and permitting requirements. Municipalities attempting to use local ordinances to exert control over railroads should pay careful attention to federal laws governing railroads (including the scope of and exceptions to the preemption clauses contained in these laws) in order to ensure their ordinances are enforceable and will not be preempted by federal law.

— Julia K. Potter

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Municipal Law Newsletter

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