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Budget Bill Eliminates Domestic Partnership Benefits

The 2017–2019 Wisconsin state budget (Act 59) eliminated the state's domestic partnership registry. The stated purpose for the change was that the legalization of same-sex marriage made the legal status of domestic partners duplicative and if a person involved in a domestic partnership wanted to secure various legal benefits, including those arising from an employment relationship, the avenue to do so would be through marriage.

Act 59 also made changes to statutory provisions that permitted domestic partners of municipal employees to access various insurance and other employee benefits through private plans and plans sponsored by the State of Wisconsin Department of Employee Trust Funds (ETF). Municipalities should review their plans to determine if any changes need to be made.

Act 59 amended Chapter 40 to preclude any insurance plan administered through ETF (health, life, duty disability, supplemental benefits, and long-term care) from providing coverage to domestic partners. WRS death, life insurance, and deferred compensation benefits will continue to be paid pursuant to the most recent, valid beneficiary designation on file with ETF, including domestic partners. If there is no designation on file, life insurance death benefits will be paid to an employee's registered, surviving domestic partner according to standard sequence. Duty disability benefits which begin prior to January 1, 2018 will be paid to a domestic partner, but not benefits that begin after that date. ETF sent out a letter to its participating municipalities further explaining the impact of Act 59. It can be found at: http://etf.wi.gov/publications/et7385.pdf.

For those municipalities which maintain employee benefit plans not provided through ETF, Act 59 amended Chapter 66 to preclude a "local government unit" from providing hospital, surgical, and other health and accident and life insurance to domestic partners. A "local government unit" is defined by statute to include a "political subdivision of this state, a special purpose district in this state, an agency or corporation of a political subdivision or special purpose district, or a combination or subunit of any of the foregoing." This includes school districts, counties, cities, villages and towns. The Chapter 66 amendments also provide that a local government unit may not provide benefits to domestic partners under an "employee

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Department of Labor Overtime Rule Halted

The saga regarding attempts to change the regulations related to overtime exemptions under the Fair Labor Standards Act (FLSA) continues. In order for an employee to be exempt from the FLSA overtime provisions, an employee must meet both the salary basis and duties tests.

Proposed changes set forth in final regulations issued in 2016 made a number of amendments to the overtime exemptions, including increasing the salary threshold for key exemptions from $455 to $913 per week. The final regulations were to take effect on December 1, 2016, however, as reported in our January 2017 Municipal Law Newsletter, a federal district court in Texas issued a temporary injunction in November 2016, preventing the DOL from enforcing these regulations nationwide. *See Nevada et al. v. United States Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). The Department of Labor (DOL) appealed the temporary injunction to the United States Court of Appeals for the Fifth Circuit.

While the appeal of the temporary injunction was pending, the DOL asked the federal district court to wait to issue its final decision on the validity of the final regulations until the appeal of the decision to impose a temporary injunction was decided. The district court

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benefit plan" as defined by 29 USC §1002 (3) of ERISA. This would generally include flexible spending account benefits, long-term disability benefits (unless funded as a payroll practice), AD&D coverage, group term life insurance coverage, and any health plan benefits (e.g., major medical, dental, prescription drug, or vision).

The Chapter 66 changes not only impact contractual plans, but also municipal employment policies that come within the definition of an "employment benefit plan" under ERISA. Examples include post-retirement sick leave conversion provisions that provide for the payment of health insurance premiums to beneficiaries after the death of the retiree or parts of Section 125 plans. The Chapter 66 changes prohibit the payment of these types of benefits to domestic partners. Therefore, municipalities will want to review their policies with legal counsel to determine if any changes are required.

The Act 59 changes become effective at different times:

The changes to ETF-sponsored plans become effective January 1, 2018. ETF is taking steps to modify their plans to terminate domestic partnership coverage as of that date.

The Chapter 66 changes are effective the seventh month after publication (April 2018), but first apply to any benefit contract in place that covers domestic partnerships at such time as that contract expires or is terminated, extended, modified or renewed. This timing is dependent on the plan year renewal date or the date of any mid-contract changes which occur after April 1, 2018. Thus, if a municipality has a health insurance plan in place on January 1, 2018 with a renewal date of January 1, 2019 that covers domestic partners, Act 59 first impacts the plan as of January 1, 2019 to require removal of domestic partner coverage. Municipalities that have collective bargaining agreements with protective services bargaining units would be able to change coverages under those agreements to coincide with the timing of changes made to non-represented coverage because municipalities are able to change plan design without bargaining those changes with the collective bargaining unit.

Municipal employment policies that provide a non-contractual "employee benefit plan" are subject to Act 59 as of April 1, 2018 and municipal policies must be changed by that date.

Municipalities should confer with their plan sponsors (ETF or otherwise) and legal counsel to set in motion the changes necessitated by Act 59, including amending plan eligibility provisions, providing appropriate COBRA notices, addressing open enrollment issues, amending employment policies, and appropriately communicating any changes to their employees.

— Steven C. Zach

denied that request and issued a decision on August 31, 2017, invalidating the final regulations. The court held that the amended changes to the salary basis test in the final regulations were inconsistent with Congress' intent to give the DOL the authority to issue regulations defining the exemptions, including both the salary basis and duties tests. Specifically, the court concluded that by setting such a high dollar amount to satisfy the salary basis test (generally $913 per week), the new regulations essentially supplanted the duties test, which was contrary to Congressional authority.

While the court did not conclude that the DOL could not set a salary level to qualify for exempt status, it did not opine as to what dollar figure would be permissible under the salary basis test.

Following the district court's decision, the DOL filed an unopposed motion with the Fifth Circuit seeking dismissal of the appeal of the temporary injunction. The DOL argued that the appeal was moot because the district court invalidated the regulations. On September 6, 2017 the Court of Appeals granted this motion to dismiss.

In light of the district court's decision invalidating the final overtime regulations and the dismissal of the appeal, the 2016 final regulations that increased the salary levels are invalid. As a result, the regulations as they existed prior to the 2016 final regulations are still in effect until further rulemaking by the DOL under the Trump administration. Employers can continue to rely on the existing regulations, including the salary basis test which requires earnings of $455 per week for exempt status.

The DOL issued a Request for Information in June 2017, seeking public input concerning these FLSA regulations. In doing so, the DOL, now staffed by Trump administration appointees, stated that the salary level in the 2016 final regulations was likely too high. Responses to the Request for Information were due by September 25, 2017. Indications from the new DOL Secretary Alexander Acosta are that the DOL will seek to raise the dollar threshold in the salary basis test, but will likely propose a level in the mid-$30,000 range rather than the $47,476 that was included in the 2016 regulations.

— Richard F. Verstegen & Brian P. Goodman

Court Rejects Claim that Right-to-Work Law Is an Unconstitutional Taking

The Wisconsin Court of Appeals recently reversed a circuit court decision holding Wisconsin's right-to-work law, 2015 Wis. Act 1, to be an unconstitutional taking of the private property of unions. *International Ass'n of Machinists v. State of Wisconsin*, 2016AP820 (Sept. 16, 2017) (recommended for publication). Act 1 makes it a crime for employers or unions to require employees to become members of a union or to pay any sums to a union in return for the union's representation of them.

The court of appeals began with a discussion of the history of federal and state labor laws prior to the adoption of Act 1. A union may become the exclusive representative of all employees in a bargaining unit. As such, it has the authority to negotiate the terms and conditions of employment binding on all employees in the unit regardless of union membership. Concomitantly, the union has the duty to represent all employees equally without discrimination as to union membership. Prior to Act 1, employers and unions in Wisconsin could require employees who are not union members to pay unions an equivalent of the union dues attributable to the unions' costs of representing the employee.

The U.S. Constitution bars the government from taking private property without paying just compensation. The court of appeals found that Act 1 does not take unions' property for several reasons. First, the statute imposes an obligation of equal representation on unions; it does not concern itself with how that obligation will be funded. The Act does not confiscate any funds in unions' accounts. Second, the duty is owed to third parties, not to the government itself. Third, the law does not mandate that unions represent employees. Rather, a union undertakes that obligation when it voluntarily chooses to become the exclusive representative of employees.

The court then addressed whether Act 1 constitutes a regulatory taking. In brief, a regulatory taking occurs when the government imposes regulations that "go to far." The primary factors in analyzing whether a regulatory taking has occurred are: (a) the

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Wisconsin Court of Appeals Clarifies Municipal Authority to Issue Raze Orders

In a recent decision, *Auto-Owners Insurance Company v. City of Appleton*, 2017 WI App 62, the Wisconsin Court of Appeals upheld a raze order issued by the City of Appleton in the face of a multi-pronged challenge initiated by the property owner's insurance carrier. This decision provides some clarity about the scope of a municipality's authority to issue a raze order under Wis. Stat. § 66.0413(1)(b)1, which provides, in relevant part, that a municipality may issue a raze order "if a building is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and unreasonable to repair."

In 2015, the McLarty family home in Appleton caught fire and suffered structural damage to the attached garage. The home itself suffered extensive non-structural damage as a result of the fire, including water and smoke damage. The McLartys contacted a damage restoration company, which provided an estimate for the damage restoration totaling over $130,000. Under Wis. Stat. § 66.0413(1)(c), there is a general presumption that repairs are "unreasonable" when the municipality determines that the cost to repair a building would exceed fifty percent of the building's value, according to a specified formula. Because property records showed the home's assessed value was only $124,000, the McLartys contacted the City's building inspector to inquire whether the City would issue a raze order for the building, as repairs appeared unreasonable under the formula set out in the statute.

After reviewing the restoration company's repair estimate and the home's property records, the building inspector concluded that repairs were not reasonable and issued an order for the McLarty home to be razed within thirty days. Razing the home would have required the McLartys' insurance carrier, Auto-Owners Insurance Company, to pay the homeowner policy limits, so Auto-Owners challenged the raze order in circuit court under Wis. Stat. § 66.0413(1)(g).

Auto-Owners first argued that language in the raze order statute referring to "out of repair" buildings only authorized municipalities to raze "old" buildings that had deteriorated over time, not buildings that had suffered non-structural damage resulting from a sudden fire. The Court of Appeals rejected this argument, finding that the statute does not require that the condition rendering the building "out of repair" have existed for any particular length of time. Instead, "out of repair" can simply mean that some aspect of the building required fixing or was non-compliant with relevant housing codes for any number of reasons, including a sudden fire or rapid exposure to some other damaging condition or element.

Next, Auto-Owners argued that the City acted unreasonably in issuing the raze order because the raze order was instituted at the homeowner's request, the building inspector did not personally inspect the property before issuing the raze order, and the City included remediation of smoke and water damage in its calculations of the cost of repairs. The Court of Appeals rejected each of these arguments in turn. It concluded that a raze order is not per se unreasonable simply because a municipality undertakes a raze analysis at the initial request of the homeowner. Similarly, the court found that nothing in Wisconsin's raze statute requires a building inspector to personally visit the damaged property before issuing a raze order. In this case, the evidence available to the building inspector (which included the repair estimate and the property records) was sufficient to allow him to conclude that the home had suffered extensive fire and smoke damage that rendered it uninhabitable and that repairs would be unreasonable under the formula set forth in the statute, so there was no need for a site visit. Finally, the court concluded that the "cost of repairs" under the statute includes all repairs necessitated by the condition justifying the razing, including, in the case of fire, the costs to remediate smoke and water damage necessary to make the building habitable. In all, the court found that Auto-Owners' interpretation of the raze order statute was "unsupported by the statute's plain language and evident purpose" and would "produce[] an absurd result."

This case provides useful guidance regarding the scope of a municipality's statutory authority to issue raze orders. First, Wisconsin's raze order statute is not merely aimed at eliminating old, dilapidated buildings within communities, but is also applicable to buildings that suffer sudden, unexpected damage. Second, the statute is applicable regardless of whether it was the homeowner or the municipality who initiated

discussions about the issuance of a raze order. Third, the statute does not require a personal inspection of the property, so long as the municipality's decision to issue the raze order is based on sufficient other evidence, which can include repair estimates and property records. Finally, when calculating repair estimates for the purposes of determining whether repair is presumptively unreasonable under the statute, municipalities may consider all costs associated with making the building safe and habitable, including remediation of smoke or water damage resulting from a sudden fire.

— Julia K. Potter

Right-to-Work Claim

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economic impact on the challenger, (b) whether the regulation interferes with the challenger's "reasonable investment-based expectations," and (c) the nature of the government's actions. The analysis focuses on what the government actual takes, not on what the owner loses.

The court of appeals found that there was no regulatory taking , because the unions did not have a reasonable expectation that Wisconsin's labor laws would remain the same. Federal law has allowed right-to-take laws for decades. By the time Act 1 was enacted, half the states and the federal government had adopted similar right-to-work laws. The court rejected the unions' analogy to cases finding an unconstitutional taking where regulatory bodies for public utilities impose customer rates that are too low to compensate the utilities for the costs of providing the services. The court reasoned that, unlike regulated utilities, unions have broad discretion to set the amount of dues they charge members. Utilities must always charge their customers reasonable rates. In addition, the court found that non-union members are not the equivalent of utility customers, because the function of labor unions is to serve the collective good of the bargaining unit rather than individual employees.

— Mark J. Steichen

City of Madison Kicks Off 100% Renewable Energy Resolution Efforts

In March of this year, the City of Madison Common Council generated national attention by passing a resolution committing the City to achieving 100% renewable energy and zero net carbon emissions. The Resolution did not set out a timetable for reaching its goals, but appropriated $250,000 for hiring a consultant to advise the City on when and how the goal could be achieved, both for city operations, and, more broadly, for the community as a whole.

After engaging Navigant and the Sustainable Engineering Group to assist in its efforts, the City began its public engagement campaign by holding a public forum on September 27th at the Central Public Library and asking attendees, "What does a 100% Renewable Energy Madison Look Like to You"? The event drew about 75 engaged community members, who offered suggestions on how the City's goals could be achieved in four broad areas: Energy Conservation, Renewables, Transportation and Community Partners.

WKOW TV Chief Meterologist Robert Lindmeier gave a keynote address highlighting the impacts of climate change here in Wisconsin, with an emphasis on the use of carbon dividends as a bipartisan solution to address the problem.

In a wide-ranging and spirited discussion, participants urged the City to pursue its 100% renewable goals by undertaking such actions as installing solar panels in green spaces; utilizing existing biomass energy resources in its lakes and refuse; making use of existing rail corridors to enhance public transportation options; promoting bike safety and reducing vehicular traffic; protecting the urban tree canopy; providing monetary incentives for residents and businesses to conserve energy; revising the building code to promote green construction practices, and enlisting public and technical schools, the Ho Chunk nation and local churches to promote the City's renewable efforts.

Additional meetings in locations around the City are planned as the City aims to finalize a plan in early 2018 that will lay out a clear and achievable pathway for achieving the goals of the Resolution. Madison is one of about three dozen cities nationwide with a formal commitment to achieving 100% renewable energy, and the first in Wisconsin. Additional information and opportunities for public comment may be found at www.madison100renewableenergy.com.

— Richard A. Heinemann

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