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Significant Home Rule Case Invalidates Milwaukee's Residency Requirement

In a decision widely seen as a blow to municipal home rule authority, the Wisconsin Supreme Court (Court) struck down the City of Milwaukee's longstanding requirement that all city employees reside within city limits. In *Milwaukee Police Association v. City of Milwaukee*, Appeal No. 2014AP400 (June 23, 2016), a majority of the Court clarified the Wisconsin Constitution's home rule amendment and held that Wis. Stat. § 66.0502 preempts a city ordinance requiring teachers, police officers, firefighters, and other public employees to be residents of the city.

Since 1938, the City of Milwaukee (City) has required its city employees to reside within city limits as a condition of employment. On June 20, 2013, as part of the 2013 State Budget Bill (Budget Bill), the legislature enacted Wis. Stat. § 66.0502, which, with some exceptions, prohibits cities, villages, towns, counties and school districts from imposing these types of residency requirements on their employees.

On the day the Budget Bill took effect the City of Milwaukee Common Council passed a resolution directing City officials to continue to enforce the City's residency requirement on the theory that the state law violated the City's home rule authority. Milwaukee police and fire fighters associations sued the City over the requirement, arguing that the state law trumped the City's requirement.

The home rule amendment to the Wisconsin Constitution provides that "cities and villages organized pursuant to state law may determine their local affairs and government, subject only to [the state] constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or village." Wis. Const. art. XI, § 3(1).

The City argued that the new state law should not trump its residency requirement under the home rule amendment because it was neither of statewide concern nor uniform. It argued that residency requirements are matters of local affairs, rather than matters of statewide concern, because the requirements are necessary to protect the City's tax base, deliver City services efficiently, and ensure that City employees are motivated and invested in the City and its future. In addition, the City argued that the state law was not uniform in its effect on all cities and villages because it would have a disproportionate impact on the City of Milwaukee. According to a report

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by the Legislative Fiscal Bureau, the law's impact on Milwaukee would be dramatic—the report warned that abolishing residency requirements could result in the same type of economic decline experienced by Detroit in recent years. The City argued, and the Court of Appeals agreed, that the law was designed to target Milwaukee in particular.

A majority of the Wisconsin Supreme Court disagreed, holding that the home rule amendment did not preclude enforcing Wis. Stat. § 66.0502 against the City of Milwaukee. The Court explained that "a legislative enactment can trump a city charter ordinance only when the enactment either (1) addresses a matter of statewide concern, or (2) with uniformity affects every city or village."

Under this "either-or" construction, the Court did not have to decide whether residency requirements are matters of statewide concern, but instead focused on the second element of the test—uniformity. The Court held that because the law prohibiting residency requirements was written to apply to "any city, village, town, county, or school district" it was "uniform" for the purposes of the home rule amendment. The majority opinion emphasized the law's *facial* uniformity as the relevant consideration, rather than the disproportionate effect it may have on any particular city. And because a state law need only be uniform or deal with a matter of statewide concern in order to trump a charter amendment, the Court's analysis ended there. Milwaukee can no longer enforce its residency requirement in the face of a uniform state law prohibiting such requirements.

This case has significant implications for municipalities in Wisconsin. It is the latest in a series of cases that have gradually eroded municipal home rule. In a dissent joined by Justice Shirley Abrahamson, Justice Ann Walsh Bradley observed that the majority's decision "turns [the purpose of the home rule amendment] on its head" and "threatens to give license to the legislature to invade any city it chooses with legislation targeted at matters of purely local concern."

— Julia Potter

Beware: The Duty to Preserve Electronic Evidence

Under Wisconsin and federal law, parties have strict obligations, even before a lawsuit is filed, to take reasonable steps to preserve evidence that relates to the subject matter of the litigation. This duty is especially important in an era when most of our communications are by way of email and most data is stored electronically. Federal law requires parties to take reasonable steps to preserve this electronically stored data in the anticipation or conduct of litigation. FRCP 637(e). This means that parties have a duty to preserve relevant information before a lawsuit is filed if litigation is reasonably foreseeable.

The need to preserve electronic data is important because, once litigation is commenced, a party has a right to this information from the other side. If the producing side claims that the requested communications or documents were deleted or lost, that party may face serious sanctions that range from dismissal of a lawsuit, judgment against it, or hefty monetary fines.

Figuring what triggers "anticipation of litigation" is not as easy as one may think and can vary significantly case-by-case. Courts consider a variety of factors, including who within the municipality anticipates the litigation and the clarity of any threat of litigation. For an employer in a discrimination case, one court held that the triggering event arose before an employee filed a complaint because most of the employees of the organization believed the employee was going to file a lawsuit. In a personal injury case, the triggering event may arise upon receipt of a demand letter.

What should municipalities do once they anticipate litigation? Best practices include taking steps to preserve data and issuing a litigation hold. With respect to preserving data, municipalities should make sure that any electronic data-deletion policies or programs are immediately stopped. A litigation hold notice is a useful tool to advise your municipality of the need to preserve electronic evidence. Ideally, this notice should be in writing and should be provided to the key players in the municipality, in addition to the records custodian. The notice should include clear instructions to stop automatic deletions and identify what documents should be preserved. It may also be helpful to remind the key players about the consequences for failure to comply with the litigation hold.

Finally, it is important to remember that while most people think preservation requirements apply only to emails, that assumption is incorrect. The duty is broad and

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Appellate Court Rules on Police Departments' Disclosure Obligations Under the Driver's Privacy Protection Act

The Wisconsin Court of Appeals has held that the Driver's Privacy Protection Act (DPPA) does not protect from disclosure under Wisconsin's Public Records Law personal information obtained from the Department of Motor Vehicles (DMV) contained in vehicle accident reports but that personal information obtained from the DMV that is contained in police incident reports may possibly be subject to disclosure. *New Richmond News v. City of New Richmond*, Appeal No. 2014AP1938 (Wis. Ct. App. May 10, 2016).

New Richmond News made public records requests for two accident reports and two police incident reports from the City of New Richmond Police. The Police Department redacted certain personal information contained in the reports before providing the newspaper with the records, claiming that the DPPA prevented the Department from disclosing the personal information. The newspaper responded by suing the City of New Richmond for violating the state public records law.

At issue, was the interaction between the Federal DPPA and state law. The DPPA prohibits the release of personal information obtained by or from the DMV, unless the release falls under one of several exceptions. One exception allows the disclosure of personal information "for any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14). Wisconsin law provides that any person may examine or copy uniform traffic accident reports retained by local authorities. Wis. Stat. § 346.70(4)(f).

The court held that mandatory disclosure of accident reports pursuant to this state law is a use specifically authorized by state law and that use is related to the operation of a motor vehicle or public safety. Therefore, police departments do not violate the DPPA if they release personal information obtained from the DMV that is contained in accident reports. The court did not decide whether the balancing test required by the Wisconsin public records law might have permitted the Department to redact the personal information. This issue was not raised by the parties.

The court reached a different conclusion regarding the release of personal information obtained from the DMV contained in police incident reports. Unlike accident reports, no state law authorizes the disclosure of police incident reports, so that exception to the DPPA did not apply. Instead, the court looked to the agency functions exception, which permits disclosure of personal information obtained from DMV records "[f]or use by any government agency including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1). The court held that this exception did not apply here. A law enforcement agency's disclosure of records pursuant to public records requests cannot constitute a "function" of a law enforcement agency. Such a result would require all governmental agencies, including the DMV, to disclose personal information contained in or from DMV records pursuant to public records requests. This requirement would eviscerate the protection provided by the DPPA. The court asked the circuit court on remand to consider if disclosure of police incident reports serves another function of the police department, other than compliance with public records requests. If disclosure serves another function of the police department, the police department may be required to disclose personal information obtained from the DMV in response to public records requests.

Finally, the court held that information that is obtained from another source and is verified, but not altered, by the Police Department using DMV records is not subject the DPPA. There was a factual question in this case about whether the information contained in the requested police incident reports was obtained from DMV records or merely verified, without alteration, using DMV records. The circuit court was directed to consider this issue as a threshold matter on remand.

— Brian Goodman

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may apply to calendar entries, contact lists, employee cell phones, text messages, voicemail messages, hard drives, thumb drives, laptops, and social networking sites.

The duty to preserve electronic data is constantly evolving. It is important for municipalities to stay on top of the changes and implement policies to avoid serious consequences down the road.

— Kathryn A. Harrell

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