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Court of Appeals Holds that DNR's Regulation of "Emerging Contaminants" Like PFAS Under the Spills Law are Invalid Unpromulgated Rules

The Wisconsin Court of Appeals issued its decision in the *Wisconsin Manufacturers and Commerce, Inc. and Leather Rich, Inc. v. Wisconsin Department of Natural Resources* case on March 06, 2024 affirming the circuit court's grant of summary judgment to Wisconsin Manufacturers and Commerce, Inc. ("WMC") and Leather Rich, Inc. ("LRI"). The court of appeals held that the DNR issued three "rules" as defined in Wis. Stat. ch. 227, without following the proper procedures for promulgating a "rule" under that chapter. The Wisconsin Department of Natural Resources ("DNR") has indicated that it will request review by the Wisconsin Supreme Court, so the court's decision will remain stayed until the Wisconsin Supreme Court either denies the petition for review or issues their own decision in the case. As such, nothing is changing at this time regarding the Spills Law and DNR's approach to "emerging contaminants" like PFAS.

"Emerging contaminant" is a term used to describe a previously unknown or presumed innocuous substance that is currently being researched and identified as potentially harmful. Per-and polyfluoroalkyl substances ("PFAS") are some of the "emerging contaminants" recently receiving a lot of attention from lawmakers and the public. Municipalities should keep an eye on this case as it has the potential to greatly affect the DNR's authority to regulate "emerging contaminants" such as PFAS, and could also affect some associated programs, like DNR's administration of emergency bottled water to homes with private wells contaminated with PFAS.

This case concerns LRI, a small family-owned dry-cleaning business located in Waukesha County. In 2018, LRI became aware that its property was potentially contaminated with certain Volatile Organic Compounds ("VOCs") that are commonly found at dry cleaning facility locations. LRI notified DNR of the VOCs as they are required to do by the "Spills Law" found in chapter 292 of the Wisconsin Statutes. In 2019, the DNR approved LRI's application to enter the Voluntary Party Liability Exemption ("VPLE") program—an environmental clean-up program monitored by the DNR where voluntary applicants can receive a Certificate of Compliance ("COC") protecting them from some liability related to contamination upon completion of the program. *See* Wis. Stat. § 292.15(2)(a)3.

At about the time LRI entered into the VPLE program, the DNR announced that, in its view, "emerging contaminants" like PFAS fall within the definition of a "hazardous substance" under the Spills Law. *See* Wis. Stat. § 292.01(5). The DNR indicated that it would be evaluating the potential for PFAS and other

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DNR's Regulation of "Emerging Contaminants" are Invalid

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emerging contaminants at properties already enrolled in the VPLE program. The DNR also explained that its interim decision was to offer only partial COCs for the individual hazardous substances investigated as part of the VPLE program instead of offering general COCs which provide complete liability exemption for all hazardous substances, whether investigated as part of the VPLE or not.

In 2020, the DNR required LRI to test for and create a remediation plan that included PFAS because PFAS contamination has historically been linked to dry cleaning businesses. In 2021, LRI withdrew from the VPLE program after attempting to satisfy the requirements for some time and filed a Complaint alleging that the DNR's policies regarding "emerging contaminants" were invalid unpromulgated rules that did not comply with Wis. Stat. ch. 227.

Applying the framework set out in *Citizens for Sensible Zoning, Inc. v. DNR,* 90 Wis. 2d 804, 280 N.W.2d 702 (1979), the court of appeals, like the circuit court before it, determined that there were three DNR policies that were in fact invalid unpromulgated rules. The first unpromulgated rule was the DNR's determination that "emerging contaminants" like PFAS fall under the definition of "hazardous materials" under the Spills Law. The second unpromulgated rule was the DNR's regulation/enforcement of "any standard, requirement, or threshold related to emerging contaminants, including PFAS, in the . . . VPLE programs." And the third unpromulgated rule was the DNR's interim decision indicating it would only issue partial COCs for VPLE program participants.

There is no dispute that the DNR did not go through the rulemaking process when issuing these three policies. As such, the holding that these three policies qualify as "rules" disposes of the case in WMC and LRI's favor.

The court of appeals decision was not unanimous. Judge Neubauer, dissenting, would have held that none of the three policies listed are rules, but rather constitute guidance documents merely informing the public of what the Spills Law already requires and allows.

With a request for review by the Wisconsin Supreme Court imminent, it seems likely that this issue will remain unsettled for a while longer. For now, under the stayed decisions, the DNR continues to regulate PFAS and other "emerging contaminants" as "hazardous substances" under the Spills Law. However, the DNR indicated by affidavit submitted in the case, that it has reversed course and plans to issue general COCs to sites currently in the VPLE program upon completion of remaining remediation requirements. Stay tuned for further updates.

—Liz Leonard

New Option for Obtaining Money for Private Lead Service Line Replacement Funding

Money is available from the Safe Drinking Water Revolving Loan Program ("SDWLP") to assist with the replacement of private lead service lines. A municipality may receive SDWLP funds as a loan or as principal forgiveness or as a combination, depending on eligibility.

A municipality receiving SDWLP funds as a loan must provide security for the loan. Security may be provided as a general obligation pledge or a revenue pledge. Typically, a revenue pledge is provided from a municipality's water utility charges. However, Public Service Commission approval under Wis. Stat. § 196.372 is needed to provide a revenue pledge based on water utility revenues.

Municipalities now have another option for providing a revenue pledge to secure a SDWLP loan to fund private lead service lines replacements.

Wisconsin Statute § 66.0627(8)(ag) permits a municipality to establish a loan program for property owners to replace private lead service lines. Going forward, the Wisconsin Department of Natural Resources and the Wisconsin Department of Administration will accept a municipality's pledge of these loan repayments as security for the SDWLP loan.

A municipality is authorized to collect loan repayments under Wis. Stat. § 66.0627(8)(ag) by placing a special charge on the property owner's tax bill. Special charges are then collected like taxes.

In order to use this alternative, a municipality should adopt an ordinance establishing a loan program under Wis. Stat. § 66.0627(8)(ag). It is important that this loan program be established and administered by the municipality, not the water utility. Because this is a municipal program and water utility funds will not be used, Public Service Commission approval is not required for this alternative.

A municipality may provide a property owner with a grant to cover a portion of the cost to replace their private lead service line and a loan to cover the remainder of the costs. Any grant funding can originate from awarded SDWLP principal forgiveness, or from other municipal funds.

A loan agreement between the municipality and the property owner should set forth the amount of

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Seventh Circuit Rules that the City of Madison's Physical Abilities Test did not Violate Title VII

Municipal employers should be aware of a recent ruling which is favorable to municipalities that use physical abilities tests to screen applicants for first responder positions. The case arose under Title VII, which is a federal statute that forbids public and private employers from enacting policies and practices that have the effect of discriminating more against one protected group than another. These are called disparate impact claims, and they can be a cause for concern for unwary employers because they do not require an employer to have intended to discriminate. Disparate impact claims focus on the *effect* of a practice rather than its *purpose*.

Title VII disparate impact claims are also unique because of the method of proof that is used. These claims generally progress in a three-stage burden shifting framework. At stage one, a plaintiff has the initial burden of demonstrating that a policy or practice has a disparate impact on a protected group. This is often done through statistical analysis. At stage two, the burden then shifts to the employer to demonstrate that the challenged policy/practice is job-related and consistent with business necessity. If the employer meets this second-stage burden, then the burden shifts back to the plaintiff to show that there is an alternative practice that is less discriminatory and can meet the employer's legitimate needs.

Recently, the Seventh Circuit affirmed a district court's ruling that the physical abilities test used by the City of Madison's fire department did not violate Title VII. In *Erdman v. City of Madison,* 91 F.4th 465 (7th Cir. 2024), a female firefighter applicant challenged the City's test on the grounds that it disproportionately screened out female candidates as opposed to male candidates. The plaintiff was screened out during the physical abilities test for failing to meet the required scores.

On review of the evidence, the district court concluded that the plaintiff had met her stage one burden and found that the test had a disparate impact on women. However, the court also concluded that despite this disparate impact, the test was job-related and consistent with business necessity and so the City met its burden at stage two. Thus, the case came down to stage three and whether the plaintiff could show that there was an alternative test that the City of Madison could have used that was less discriminatory and that met its needs. The district court and Seventh Circuit both ruled in favor of the City on this stage three issue.

At stage three, the plaintiff had attempted to argue that an alternative test called the Candidate Physical Abilities Test ("CPAT") would have been just as good as the City's test and would have met its needs. However, the City countered by pointing to substantial evidence that the City's test had been tailored to the City of Madison's needs and was developed to simulate the tasks that a firefighter in Madison would specifically be expected to perform, unlike the CPAT. As a result, both the district court and Seventh Circuit were persuaded that the City's own test was lawful. It also bears noting that in its opinion, the Seventh Circuit acknowledged that even using the City's own test, the City of Madison has a higher-than-average rate of maintaining female firefighters — 10-14% — as compared to the national average of 4%.

Disparate impact claims are challenging and complicated. It is therefore important for employers to be wary of policies and practices which may have the effect of discriminating even if their purpose is neutral and legitimate on their faces. We encourage municipal employers to reach out to a member of the Municipal Law Practice Group with questions.

—Storm B. Larson

New Option for Obtaining Money for Private Lead Service Line Replacement Funding

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the loan, the interest rate (not to exceed 4%), the length of the term (not to exceed 10 years), and collection of loan repayments as a special charge on the property owner's tax bill.

The municipality will use the loan repayments from property owners to pay off the municipality's SDWLP loan for private lead service line replacements. Stated another way, the source of repayment pledged to the municipality's SDWLP loan will be the revenues of the municipality's loan program (that is, the loan repayments received from property owners).

For more information about this option, contact DNR LSL program questions to Becky Scott, Environmental Loans Section Manager, at: Rebecca.scott@wisconsin.gov.

—Lawrie J. Kobza

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