boardman & clark llp
LAW FIRM

Steven C. Zach, Attorney

1 SOUTH PINCKNEY STREET, FOURTH FLOOR, P.O. BOX 927, MADISON, WI 53701-0927
Telephone 608-283-1736
Facsimile 608-283-1709
szach@boardmanclark.com

MEMORANDUM

TO: Boardman & Clark Municipal Clients

FROM: Steven C. Zach

DATE: September 15, 2012

RE: Dane County Circuit Court Decision re Acts 10 and 32

Dane County Circuit Court Judge Juan Colas, in a written decision issued September 14, 2012, found several provisions of 2011 Wisconsin Acts 10 and 32 ("the Acts") unconstitutional. He declared those provisions null and void. Much needs to be sorted out yet, but what follows are my initial thoughts and reactions.

I. Procedure

The Governor's office has already said there will be an appeal of the decision. I assume that there will be a petition filed to stay the effect of Judge Colas' decision pending appeal. The ruling on these petitions will have significant impact on how matters proceed in the short-term. I will keep you updated on this status. With respect to timing, I anticipate some attempt will be made to by-pass the Court of Appeals and move the appeal directly to the Wisconsin Supreme Court. Again, this is an issue I will follow and keep you up-to-date on.[1]

On a side note, oral argument will be held this week in the Seventh Circuit Court of Appeals with respect to the Western District federal case in which Judge Conley upheld the constitutionality of the Acts with the exception of the dues deduction and annual certification elections. Both sides appealed that decision and all aspects of Judge Conley's decision are before the Seventh Circuit. A question will arise if the Seventh Circuit affirms Judge Conley's decision finding the Acts constitutional and whether that decision has a preclusive effect with respect to the Dane County Circuit Court decision and subsequent appeals.

---

[1] Upon my initial review of Judge Colas' decision, I am not impressed with the legal analysis supporting his finding portions of the Acts unconstitutional. In addition, as evidenced by its past decision on the Acts, the Wisconsin Supreme Court, in its current composition, will be inclined to support their constitutionality.

2. Duty to Bargain

A. Scope of the Ruling

The plaintiff in the Dane County Circuit Court case did not seek to overturn all of the provisions in the Acts which impact municipal collective bargaining. The only provisions which were found unconstitutional related to municipalities were:

- §66.0506 which requires a referendum for wage increases in excess of the certified CPI index;
- §111.70(1)(f) prohibiting "fair share" dues provisions except for public safety bargaining units;
- §111.70(3g) prohibiting voluntary dues deductions;
- §111.70(4)(mb) prohibiting bargaining on anything other than base wage rates; and,
- §111.70(4)(d)3 which requires annual certification elections.

The decision's greatest potential impact relates to Judge Colas' conclusion that the prohibition on bargaining any subject other than base wage rates is unconstitutional. What is significant related to this finding, however, are those provisions of the Acts which remain:

- The decision does not affect the change to the definition of "collective bargaining" found in §111.70(a) which establishes a mandatory duty to bargain. The Acts modified that definition to mandate bargaining only for "wages" and eliminated that duty as to "hours and conditions of employment." It is my initial thought that under Judge Colas' decision, a municipality only has a mandatory duty to bargain "wages" and a permissive ability to bargain "hours and conditions of employment." Thus, a municipality can decide whether it will bargain any provision which relates to any subject other than "wages." We are currently reviewing WERC and other case law to determine the scope of the definition of "wages" and the extent to which that might extend to other monetary benefits. But under our current reading of Judge Colas' decision, subjects such as grievance procedures ("just cause") and hiring/layoff are permissive subjects of bargaining which a municipality is not required to bargain.
- Even if the scope of the subjects of bargaining returns to the status prior to the adoption of the Acts, the changes in the resolution procedures upon impasse made by the Acts are still in place. Specifically, the Acts eliminate binding arbitration. Upon impasse under the Acts, a municipality can implement its final proposal

rather than submitting it to binding arbitration. That continues to be the case as I read Judge Colas' decision.

- The provision limiting collective bargaining agreements to one year is still in place.

- The provisions related to WRS contributions are still in place. Municipalities are prohibited from bargaining anything other than a fifty percent employee contribution.

- The mandate of municipal grievances systems still exists.

Thus, even if Judge Colas' decision stands, it appears on first blush that the ability of municipalities to effectively dictate the terms of collective bargaining agreements is unchanged.

B. Timing of the Ruling

Judge Colas ruled that the provisions identified above were null and void from their inception. Without a stay, unions can request immediate bargaining under the Acts without the unconstitutional provisions. As indicated, I anticipate that there will be petitions for a stay to forestall such requests and I will monitor the status of those efforts.

Even without a stay, a municipality may be able to respond to a request for bargaining by temporarily declining that request pending a decision on appeal based upon a recent ruling by the Wisconsin Employment Relations Commission. *IBEW Local 695 v. Public Utility Commission of the City of Richland Center* Case 71, No. 70666, MP-4655 Decision No 33281-B (June 13, 2012).[2] The case involved the Utilities' stance not to bargain with the IBEW during the time between passage of Act 10 and the Wisconsin Supreme Court's decision overruling another Dane County Circuit Court decision which held such passage violated Wisconsin's Open Meetings Law. During this time, the circuit court imposed a stay on the implementation of Act 10. The WERC ruled that:

> Under the unique circumstances here we believe a temporary suspension of negotiations to allow for the resolution of significant matters of law with a direct impact on the bargaining process does not constitute an unlawful refusal to bargain.

We would contend in response to any request to bargain during the time Judge Colas' decision is on appeal falls within the same scope and that a municipality could temporarily refuse to meet pending appeal without committing an unfair labor practice.

[2] I represented the Utilities in this matter.

C. Decertified Units

Judge Colas found that the annual certification provisions in Act 10 were unconstitutional. Judge Conley held similarly in the federal case, however, Judge Conley stayed the impact of his decision as it relates to units which were decertified prior to his ruling. Judge Colas' decision does not contain the same judicial-imposed delay in its application and a question exists whether those units decertified for any reason under the Acts' annual certification election provisions are now reconstituted. I will continue to monitor this issue as it will be impacted on whether a stay is issued.

II. Status of Agreements Negotiated Under the Acts

If Judge Colas' decision stands, unions could argue that any collective bargaining agreement negotiated under the rules established by the Acts are void and that municipalities have a duty to bargain under the Acts absent the unconstitutional provisions. I am in the process of assessing a response to this potential request.

III. Status of Handbooks

Upon the expiration of collective bargaining agreements under the Acts, most municipalities adopted handbooks which address terms and conditions of employment outside of base wage rates. A question exists if Judge Colas' decision stands as to whether those handbooks, or portions of them, will be subject to a union unfair practice charge alleging unilateral implementation with respect to mandatory subjects of bargaining under this ruling. The resolution of this issue rests upon the scope of bargaining that exists under Judge Colas' decision as discussed in Section I.

IV. Conclusion

This is obviously a fluid situation, but I wanted to give you the insight of my immediate thoughts on the impact of the recent Dane County decision. I will continue to monitor this and update you as we proceed through the legal process and further review and interpretation of the decision and its potential impact.

If you have any questions about this, please feel free to call.

SCZ