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2011 WISCONSIN ACT 10 -- THE WALKER BILL

LABOR'S FALL FROM GRACE IN THE FIRST STATE TO ENACT A PUBLIC SECTOR COLLECTIVE BARGAINING LAW

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OVERVIEW

In 1959 Wisconsin became the first state to pass legislation that established the right of public employees, some 24 years after private sector employees, to elect representatives of their own choosing for the purpose of collective bargaining.[1] In 1979 it was the first state to adopt a law that provided all municipal employees other than police and firefighters with the right to

[1] Slater, J., *Public Workers: Government Employee Unions, the Law, and the State*, 1900-1962, Cornell University Press, 2004.

proceed to interest arbitration to resolve an impasse in collective bargaining.[2] These enactments followed a history of pioneering social and labor legislation. Wisconsin was the first state to enact a workers' compensation law in 1911 and an unemployment compensation law in 1932. In 1942 it was among the first to pass legislation prohibiting discrimination in employment and in 1982 it was the first to prohibit discrimination in employment on the basis of sexual orientation.[3]

Barack Obama's candidacy energized the democratic base in 2008 and lifted a sufficient number of democratic candidates into state legislative offices such that the history of labor progress continued through the 2009-2010 legislative session. The legislature enacted a wide range of pro-labor laws including those that provided UW faculty and staff, UW research assistants and home health and child care workers with the right to bargain collectively. Unfortunately, the elections of November, 2010 presaged an abrupt reversal as both houses of the legislature and the governor's office flipped parties. While not yet history, the damage that will be done by Act 10 to public sector unions in Wisconsin is likely to be catastrophic.

The outpouring of support to oppose Act 10 has been extraordinary. The Wisconsin AFL-CIO organized and coordinated the efforts of nearly all state unions by establishing a coalition of them and setting up war rooms in Milwaukee and Madison. Leading the coalition were the state affiliates of the NEA, AFSCME, AFT and SEIU which represent 193,000 Wisconsin public employees—roughly 90% of the whole. For three weeks as many as 100,000 citizens protested in and around the capitol. First, Madison's teachers announced their intention to exercise their right to petition their government to defeat a law that they believed would adversely affect their students. The superintendent shut the school district down. Thousands more joined as Mary Bell, WEAC's president, called for all teachers to protest. The Professional Fire Fighters of Wisconsin, even though protected by the Act, publicly condemned it and its members led the protest marches, bagpipes first.

The attorneys and law firms representing the state affiliates of the NEA, AFSCME, AFT and SEIU, at the direction of the State AFL-CIO, formed a task force to meet the legal needs of the coalition of their clients. One group helped staff and coordinated legal services needed for the demonstration. A second committee drafted amendments to be available to labor's friends in the legislature. A third prepared preliminary research, pleadings and briefs to "kill the bill." As many as 50 attorneys volunteered as legal observers on the premises of the capitol to advise and counsel union protestors. A number of activist locals including AFT's affiliate, the Teaching Assistants Association at UW-Madison, had made clear their members' intention to remain in the capitol even if directed by the police to leave. A group of lawyers working with coalition of labor unions provided instructions on the legal consequences of behaviors associated with civil disobedience. The services of the members of another AFT affiliate, the Association of Public Defenders, were particularly helpful in this effort. The protestors did stay in the capitol. They stayed there for three weeks. They slept there. They set up headquarters in hearing rooms that

[2] Sec. 111.70(4)(cm), Wis. Stats. Police and fire fighters obtained that right, with the exception of Milwaukee's fire fighters, in 1971.

[3] For a thumbnail historical timeline of Wisconsin's history of progressive labor legislation see: http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/wis_indstrl_comm.htm.

remained occupied for twenty-fours a day for twenty-one days. They set up cleaning crews, quiet study areas and training corners.

The participation, enthusiasm and youth of the protestors augurs well for the future of the labor movement in Wisconsin even if the law becomes effective. Still, there should be no misunderstanding about the damage the will cause; nor should there be any misunderstanding that the law was designed to cause this damage. The state employee unions serve as a useful example. On the first day of the first pay period following the effective date of the Act, the State will terminate dues deduction and agency fees. None of the state employee unions have a contract. Their last contract expired on June 30, 2009. Tentative agreements reached between the former gubernatorial administration and state employee unions failed to be ratified by the legislature in November, 2010 following aggressive opposition by then governor-elect Walker. The Walker administration terminated the contract extensions on March 13, 2011. So Act 10 will apply to the state employee unions immediately upon its effective date.

WSEU, AFSCME's District Council 24, represents 24,000 state employees. All pay their dues through dues deduction from their paychecks. About two weeks after Act 10 takes effect **90%** of WSEU's revenues will cease. AFT-Wisconsin represents 10,000 state employees. Two weeks after Act 10 takes effect it will lose about **50%** of its revenues.

Meanwhile, the Act requires that they undergo a "recertification"[4] election prior to May 1, 2011. One AFT-W state employee affiliate's bargaining unit has 5,000 eligible voters. AFT advises that the cost to organize a successful campaign in this bargaining unit is in the area of $1.5 million. Under this law even if the union wins, it must undergo the same election one year later. Under this law if the union wins, it wins only the right to bargain collectively over base wages, and then not more of an increase than the consumer price index as any greater increase must be approved by referendum.

It is the synergetic effect of the loss of bargaining rights, the loss of revenues and the obligation to undergo annual elections that most clearly spells the demise of the public sector labor movement in Wisconsin. In the near term. If the law takes effect.

I. CREATION OF TWO CLASSES OF PUBLIC EMPLOYEES – GENERAL AND PUBLIC SAFETY EMPLOYEES

a. Act 10 creates two broad classes of public employees among all state, municipal and school district employees:

1. A favored class of public sector employees called "public safety employees" consisting of municipal (but not state) firefighters and police officers, deputy sheriffs, and State Patrol troopers and inspectors (but not the Capitol Police, UW Police or Department of Justice Special Agents) as to whom none of the deleterious collective bargaining, union organization or financial concessions apply; and

[4] Our clients' staff refer to these as "decertification" elections.

2. A disfavored class called "general employees" which includes all other employees who work for the state, cities, villages, counties, school districts, plus other formerly "protective" occupations including University of Wisconsin (UW) police, Wisconsin capitol police, conservation warden, state probation and parole officers, all of whom were previously fully covered by Wisconsin's collective bargaining laws.

b. Act 10 also fully abolishes collective bargaining rights for several groups of employees, including:

1. UW Hospital & Clinics Authority employees formerly covered by the Wisconsin Employment Peace Act (Secs. 188, 265, 279) (AFT affiliates' represent approximately 210 UWHCA employees, SEIU-Healthcare represents nearly 2,000 and WSEU), and all AFSCME employees of the UWHCA Board; and

2. Several groups of employees who recently received collective bargaining rights under state law, including UW faculty and academic staff, home health care workers, and child care providers (Sec. 229).

3. For more than forty years a major legislative goal of AFT-Wisconsin and its local affiliates, Association of University of Wisconsin Professionals and United Faculty and Academic Staff, had been the passage of legislation to provide faculty and academic staff of the University of Wisconsin System with the right to engage in collective bargaining. In the spring of 2009 that goal became a reality as the State's budget bill adopted the Faculty and Academic Staff Labor Relations Act (FASLRA.) During the last two years AFT and AFT-Wisconsin have conducted a major organizing drive among UW faculty and staff. FASLRA created separate bargaining units for the faculty and staff at each of the UW systems institutions. AFT/AFT-W won all five elections to represent 1,675 faculty by not less than 87% of the vote. The units and number of employees in them are: UW-Superior (112), UW-Eau Claire (372), UW-LaCrosse (339), UW-River Falls (224), UW-Stout (283) and UW-Stevens Point (345).

II. ACT 10 BANS VIRTUALLY ALL COLLECTIVE BARGAINING FOR GENERAL STATE AND LOCAL EMPLOYEES

a. For general employees, Act 10 prohibits collective bargaining over **any** issue except what is characterized under the law as "total base wages." Health insurance, pension, vacation, holidays, hours of work and any other conditions of employment (promotions, evaluations, safety, grievance/arbitration procedures and just cause standards for discipline) will be prohibited subjects of bargaining. (Secs. 210, 245, 303-310, 314)

1. "Total base wages" excludes overtime, premium pay, merit pay, performance pay, supplemental pay, pay schedules and pay progressions. Changes in the total base wages are limited to the amount of any increase or decrease in the

consumer price index unless approved by referendum. Total base wages means the total wages payable to the bargaining unit as a whole.

2. Only teachers within Milwaukee County who became "permanent employees" prior to Dec. 21, 1995 (those employed prior to September, 1992) retain just cause protection in Sec. 118.23. [Sec. 326] All other teachers become "at-will" employees, subject to adoption of some sort of civil service-like procedure.
3. All other issues outside total base wages are prohibited subjects of bargaining under Act 10.

b. State Employees: The Office of State Employment Relations ("OSER") under Ch. 230 now governs the working conditions of all classified staff that were formerly covered by collective bargaining contracts under SELRA.

1. The compensation provisions of 230.10 and 230.12 apply, [Sec. 359] along with hours, leaves of absence and holidays. [Sec. 367-368].

2. Ch. 230.34 provides a just cause standard in suspension, discharge, and demotion; however, the statutory protections have been less effective than collectively bargained just cause provisions and do not apply to teaching assistants and public defenders.

III. FAIR SHARE ABOLISHED AND MUNICIPAL AND STATE EMPLOYERS PROHIBITED FROM DEDUCTING UNION DUES: General employees cannot be required to pay dues, even to cover the fair share of union representation, i.e. they can be "free-riders." Municipal and state employers are prohibited from deducting union dues from *any* general employee paychecks, even for employees who wish to belong to the union representing them. The bill does allow dues deduction and fair share agreements with unions representing police and firefighters. [Secs. 213 and 227, 298, 258]

IV. TERMS OF CONTRACTS:

a. Pre-Act 10: Municipal employers were obligated to bargain 2-year contracts, school districts could bargain up to 4 year contracts, state employer could bargain contracts coinciding with 2-year fiscal biennium, and all others could have 3-year contracts. Sec. 111.70(3)(a)(4), (4)(cm)6.d.

b. Act 10: Collective bargaining agreements for all general employees may be for only one year and cannot be extended (Secs. 221, 238, 320), but public safety employee

(municipal police and firefighters, and state traffic patrol and motor vehicle inspectors) contracts are not limited to one year. [Sec. 319]

V. INTEREST AND GREIVANCE ARBITRATION AND CONTRACT ENFORCEMENT ELMINATED: The dispute resolution procedure for contracts is eliminated, including mediation and interest arbitration. [Sec. 214] Grievance arbitration over contract disputes is prohibited and general Wisconsin arbitration statutes are inapplicable to general employees covered under the state's public employee bargaining laws. [Secs. 239 and 245]

VI. ANNUAL DECERTIFICATION ELECTION:

a. Pre-Act 10: Similar to most bargaining laws, a union could be decertified based upon petition by employer, one or more bargaining unit members, or another union supported by showing of interest of 30% of represented employees or in case of employer petition "objective considerations" providing reasonable cause that the certified collective bargaining representative no longer enjoyed majority support and union failed to obtain majority of those voting in an election.

b. Act 10 Annual Decertification Elections: Unions representing general employees must undergo an annual decertification election, must be conducted on an annual basis, with first elections to be held in April 2011 for those units with expired contracts (including all state employee contracts and a smaller percentage of municipal and county contracts) to determine whether a 51% super-majority of all employees in the bargaining (not just a majority of those voting) still support the union as their bargaining representative (Sec. 9155).

c. If the union does not receive the support of at least 51% of the entire bargaining unit in any annual election, the employees will be non-represented for at least a year. (Sec. 242). Thus, in an election with 70% turnout, the union would need 70% of those voting to win the election.

d. The first decertification election in each bargaining unit not covered by a current collective bargaining agreement has to occur by May 1, 2011. (Sec. 9132)

e. The Wisconsin Employment Relations Commission (WERC) is the state agency responsible for administering the state collective bargaining laws, and for conducting such elections. It has already indicated that it cannot administratively conduct elections for all such bargaining units in the spring of 2011, but only intends to conduct elections for those units (primarily state units currently) in contract hiatus.

For the large number of teacher contracts which expire at the end of June 2011, it is unclear when the WERC would conduct such elections.

VII. NO LOCAL COLLECTIVE BARGAINING ORDINANCES: Act 10 prohibits local governments from adopting ordinances or resolutions granting more generous collective bargaining rights for their general employees. (Sec. 169)

VIII. EFFECTIVE DATES: To avoid an unconstitutional impairment of existing contracts, Act 10 applies to existing bargaining units and their collective bargaining agreements "on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." [Sec. 9332]

a. Expiration and Termination: clearly refer to the conclusion of the contract

b. Extensions and Renewals: clearly relate to changing the end date of the contract, providing that the collective bargaining agreements of general municipal employees (not school board employees) who are under extensions of their contracts "shall have their collective bargaining agreements terminated as soon as legally possible." [Sec. 9132]

c. Modifications:

1. Definition: Has a broader and less clear scope in terms of triggering the application of the Act. The definition of "modification" under traditional labor law has been defined as "any change in the basic terms and conditions of employment existing at the time the collective bargaining agreement was executed but which were not incorporated into the written instrument." Jacobs Mfg. Co., Case No. 175 (NLRB 1994).

2. How a modification will trigger application of Act 10 is unclear, and will likely require judicial interpretation as to whether it simply means a change to the duration of the contract or whether it applies to any variance or deviation from an existing contractual term.

3. Unions have serious and legitimate concerns about entering into mid-term agreements or MOUs which include concessions, variances, or other terms inconsistent with existing contractual relations which might be construed as a modification and thereby trigger the application of the Act.

d. State Employees: Act 10 applies to state employee collective bargaining agreements "on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." [Sec. 9332] If the 2011-2013 state compensation plan has not been established at the time CBAs terminate, OSER may continue to administer "those provisions of the collective bargaining agreements . . . necessary for the orderly administration of the civil services system." [Sec. 9143]

IX. ACT 10 MANDATES CREATION OF CIVIL SERVICE SYSTEM BY JULY 2011 IF LOCAL GOVERNMENT DOES NOT HAVE ONE IN PLACE:

a. State employees currently have extensive civil service provisions which remain in place under Act 10.

b. One of few amendments to the original Act introduced by Gov. Walker was requirement for municipal civil service systems to ensure that employees had some grievance procedure to address termination, discipline and workplace safety. (Sec. 170).

c. The civil service systems which must be adopted by municipalities must also provide for at least one of the following: (1) A written document specifying the process that a grievant and an employer must follow; (2) A hearing before an impartial hearing officer; and/or (3) An appeal process in which the highest level of appeal is the governing body of the local governmental unit. (Sec. 170)

d. If a local government has an existing civil service system that has one of the above provisions which already applies to an employee, that provision continues to apply to the employee. (Sec. 170)

X. CHANGES TO WISCONSIN RETIREMENT SYSTEM (WRS) AND OTHER PROGRAMS ADMINISTERED BY DEPARTMENT OF EMPLOYEE TRUST FUNDS (DETF) UNDER CH. 40

1. Requires Half of Wisconsin Retirement System (WRS) Contributions To Come From Employee Paychecks:

    a. 5.8% Required Employees Contributions: Currently, contributions to the WRS for general employees, including teachers, are comprised of an employer cost (5.1%), a benefit adjustment contribution (1.5%) and an employee cost (5%). Employers may agree to cover all or part of the employee cost and benefit adjustment contribution. The bill eliminates the breakdown and requires employees to contribute "an amount equal to one-half of all actuarially

required contributions" out of their paychecks: 5.8% for 2011. Except in the case of public safety employees, the bill forbids employers from covering any part of the employees' portion.

b. Effective Date: these changes would take effect the first pay period after March 13, 2011, or upon expiration of an existing collective bargaining agreement. (Secs. 67, 69-76, 9115, and 9315)

2. Same for Milwaukee City and County Employees Participating in the Municipal Employees Retirement System (MERS):

a. City of Milwaukee and Milwaukee County employees do not participate in WRS and have their own retirement systems established and governed under the statutory home rule powers of the City of Milwaukee. Thus, even though they do not participate in WRS, their general employees will also have to contribute "an amount equal to one-half of all actuarially required contributions" out of their paychecks.

b. Act 10 forbids the City and County from covering any part of their employees' portion.

c. The City Attorney of the City of Milwaukee has opined in formal opinion letter stating that such requirement mandating the 5.8% contribution for MERS participants is unconstitutional because it runs afoul of the home rule provisions of the Wisconsin Constitution since the legislature has declared that the establishment of the 5.8% contribution not only violates the constitutional home rule powers of the city of Milwaukee, but also is an impairment of contract based upon sec. 36 of the city charter and the global pension settlement (GPS) in case No. 00-CV-003439, as well as substantive due process violation based on the GPS (Secs. 166 and 167)

3. Group Health Insurance Premiums:

a. Current law: Currently state employee unions and local government employee unions that participate in the State's group health insurance program are entitled to collectively bargain with regard to the employee premium contribution. All CBA's include an employee payment but most are stated in flat dollar amounts and are less than 5% of the total cost of the premiums.

b. Cap on Employer-Paid Premiums: Effective January 1, 2012 the bill caps employer premiums at 88% of the lowest cost premium (employees opt for

coverage in one of three tiers). For premiums for April 2011 through December 2011, the Act sets transitional employee contribution amounts.

c. Effective Date: These changes would take effect the first pay period after March 13, 2011, or upon expiration of an existing collective bargaining agreement. (Sec. 77, 81, 88, 89, 9115, and 9315)

XI. LEGAL CLAIMS AND CHALLENGES TO THE VALIDITY OF ACT 10

1. Open Meetings Act: Section 19.84(3), Wis. Stats., the Open Meetings Law, provides that all meetings of a governmental body must provide 24 hours notice, which was violated by the Joint Conference Committee of the legislature in reconciling the Assembly and Senate versions of the Act. On March 18, 2011, Dane County circuit court judge Maryann Sumi enjoined publication of the Act, and the matter was certified to the Supreme Court. Even if Supreme Court voids law, legislature will be able to re-enact same law with appropriate notice if it can retain same voting bloc.

2. Potential Federal and State Constitutional and State Claims: Assuming that the Open Meetings Act lawsuit does not permanently kill Act 10, the coalition of public employee unions adversely impacted by Act 10 will file alegal challenges under various constitutional and statutory provisions. In addition a number of other plaintiffs either have or will step forward to advance state law challenges to the Act. It is too early to discuss the details of the union coalition's litigation theories. Among the claims already filed, or we anticipate will be filed, are these:

   a. A claim that the Conference Substitute for SB/AB 11, which was intended to remove subjects that amounted to a "fiscal impact" failed in it its purpose, resulting in the continued application of the Wisconsin Constitution's requirement that there be a supermajority quorum for passage.

   b. A claim that the legislature acted beyond the scope of the Wisconsin Constitutional requirement that it not legislate in areas beyond the purpose of the special session, namely "budget repair", when it enacted Act 10.

3. Home Rule Claims: A number of municipalities will likely challenge the law under the state's constitutional home rule provisions contending that the prohibition on collective bargaining for cities and villages, as well as the requirement for employer pension contributions with respect to the city of Milwaukee MERS, violates the constitutional home rule powers of cities and villages to regulate their own affairs.

XI. This IS What Democracy Looks Like…Wisconsin

a. http://vimeo.com/21141080