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Legislature Amends Law Permitting Collective Bargaining Negotiations Involving Certain Aspects of Health Care Plan Design and Coverage

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On October 25, 2023, 2023 Act 34 became effective. Act 34 amends the statutory prohibition to negotiating health care plan design and selection between public sector employers and labor representatives of police, fire, and EMS unions. Specifically, the law amends Wisconsin Statute §111.70(4)(mc)6 in the following manner:

> **SECTION 1. 111.70 (4) (mc) 6.** of the statutes is amended to read: 111.70 (4) (mc) 6. Except for whether or not to provide health care coverage and the employee premium contribution, all costs and payments associated with health care coverage plans and the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of such costs and payments and the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee. For purposes of this subdivision, “design” does not include the decision as to who is

> covered by a health care coverage plan selected by the municipal employer.

The Legislature also included a statement of legislative intent as follows:

> **SECTION 2. Nonstatutory provisions.** LEGISLATIVE INTENT STATEMENT. The legislature intends that the treatment of s. 111.70 (4) (mc) 6. by this act is to clarify the intent of 2011 Wisconsin Acts 10 and 32 and that this act is to be considered a restatement of current law.

Act 34 does not address many questions that employers have associated with this law. It is apparent, however, the Legislature passed this law in response to litigation involving the City of Racine and the police and fire unions representing employees of the City of Racine. Act 34 appears to cover two issues from the *City of Racine* Wisconsin Employment Relations Commission ("WERC") cases: the questions of (1) whether or not to offer health insurance is a mandatory subject of bargaining and (2) whether the issue of who is covered by the plan is a mandatory subject of bargaining.

On Monday, October 30, 2023, the Dane County Circuit Court issued their decision in the *City of Racine* appeals concluding the pre-Act 34 statutory language required an employer to offer health care coverage to police, fire, and EMS unionized employees. The Court also directed the WERC to reissue its *City of Racine* decisions in accordance with the Circuit Court's decision. Notably, the Circuit Court did not address other issues such as bargaining over who is covered by the plan, such as retirees. The Circuit Court did not analyze Act 34 and the decision seemingly conflicts with the Legislature's modification of the law. WERC immediately asked the Circuit Court to correct an error in the Circuit Court's decision. WERC or City of Racine may appeal the Circuit Court's decision to the court of appeals.

It is yet to be seen how the *City of Racine* litigation will be affected by this statutory change, as the statutory change arguably conflicts with the Circuit Court's decision. It is also apparent that neither the statutory amendment, nor the Circuit Court's decision, address all of the issues associated with the *City of Racine* decisions issued by the WERC. Several issues found to constitute

prohibited subjects of bargaining by the WERC, including providing plan documents to employees, appear unaffected by this statutory amendment or the Court decision. As such, an appeal of the the *City of Racine* litigation or the reissuance of the decisions by WERC still need to be monitored.

The following questions and answers may provide some practical direction for public sector employers to consider as they navigate this issue.

Question 1: How does 2023 Act 34 affect collective bargaining negotiations between a public sector employer and a police, fire, or EMS union?

Answer: The collective bargaining law no longer prohibits negotiations over whether or not the employer will provide health care coverage. Now, a union or employer may request to bargain over whether the employer does provide or does not provide health care coverage. The parties can negotiate this issue to impasse and the issue may be litigated before an interest arbitrator. The law also clarifies that the design of a health care coverage plan—a decision belonging exclusively to the employer and one that is prohibited from being negotiated—does not include the decision as to who is covered by the health care plan, thus suggesting who is covered by the plan is also a mandatory subject of bargaining.

Although the Dane County Circuit Court concluded an employer must provide health insurance, because to withhold insurance would render the Wis. Stat. § 111.70(4)(mc)6 meaningless, the Court was interpreting the statute pre-Act 34. Following Act 34, the statutory language is clear the provision of health insurance is not required, but rather is just a mandatory subject of bargaining for the parties to address.

Question 2: Does this law mandate that an employer offer health care coverage to a police, fire or EMS union employee?

Answer: No, Act 34 merely addresses the duty to bargain by the parties. Whether the parties agree to language to require the employer to offer health care coverage is dependent on whether the union and employer agree to provide coverage and is part of the outcome of collective bargaining negotiations. However, nothing within the law mandates that an employer provide coverage or mandates that the union and employer come to agreement on this issue. Again, this outcome is despite the Dane County Circuit Court decision interpreting the

law pre-Act 34 for the reasons stated above.

Question 3: Are the statutory amendments found in 2023 Act 43 applied retroactively?

Answer: The legislative intent statement does not indicate that the law is to be applied retroactively. As such, this law is likely prospective only and does not disturb existing collective bargaining agreements. Thus, any existing language between the public sector employer and a collective bargaining unit covered by the collective bargaining agreement would likely need to be followed during the term of the agreement and thereafter unless the language is changed through subsequent collective bargaining negotiations between the parties.

Question 4: Our municipality entered into a side letter or other agreement with our union providing that "If the *City of Racine* decisions are overturned, then we will negotiate the issue of who participates in our health care plan." Does 2023 Act 34 require us to now bargain with the union?

Answer: The specific language your municipality agreed to with the union really matters, so read that specific language closely and don't overreact. With that said, the Dane County Circuit Court only overturned the *City of Racine* cases to require employers offer health insurance. If your agreement is premised solely on the fate of these *City of Racine* decisions to reach its final disposition, it is not clear if appeals will occur at this time. Furthermore, it remains to be seen if Act 34 impacts the Dane County Circuit Court's decision on an appeal or a remand to WERC given the new statutory language arguably conflicts with the Circuit Court's decision.

Other language contingent on the *City of Racine* decisions, such as plan design language, is likely unaffected at this time by the enactment of 2023 Act 34. Moreover, the employer and union through that agreement may have already fulfilled the duty to bargain the matters raised in Act 34 involving whether to offer and who can participate in the public sector employer's health plan.

Question 5: Our municipality has language in the collective bargaining agreement providing that "If the employer offers a health care plan, then the union will pay a certain amount toward the premium." Does 2023 Act 34 affect our language?

Answer: Likely no, unless, as noted above, the parties premised such language being impacted by the outcome of the *City of Racine* litigation and did not reserve the right to wait until full and final disposition. The parties through the "if ..., then" language have already negotiated whether or not the employer would provide health care coverage. The parties have agreed that the employer may choose to provide coverage and to whom coverage is provided by agreeing to the terms "if ..., then" and the parties have focused their negotiations on the premium share. We do not believe there is any reason for an employer to open the contract to address that particular language or to concede to alternative language in subsequent negotiations absent a compelling reason from the union and appropriate *quid pro quo* for the employer to commit to offering health care coverage.

Question 6: Our municipality gave notice of evaporation to the Union that we were removing language in the bargaining agreement that provided health insurance to retirees since *City of Racine* WERC decisions found that language may constitute a prohibited subject of bargaining. Does Act 34 now require we automatically put the language back in the contract?

Answer: Not necessarily. If the language properly evaporated from the collective bargaining agreement, Act 34 appears to have simply made that a bargaining issue prospectively between the parties. Each case will vary on its facts, but if the language was properly removed, then fulfilling the duty to bargain a request to put it back in or to bargain new language seems to be a logical approach. The Dane County Circuit Court decision did not address the retiree situation.

There are many other issues that individual public sector employers will face as a result of Act 34 and these litigation developments. Health insurance is an important benefit to employees and efforts by employers to respect labor-management relationships are important. Health insurance costs are also one of the employer's highest personnel costs, second only to wages, and as such, are an exceptionally important consideration for the employer in negotiations. We encourage employers to carefully address any language changes—if any language changes are even necessary—and consider the short-term and long-term implications of any language modifications associated with health insurance.

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