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Wisconsin's Right-to-Work Law Upheld By Federal Court of Appeals

July 14, 2017 – On July 12, 2017, the Seventh Circuit Court of Appeals issued a decision in *International Union of Operating Engineers Local 139, et al. v. Schimel*, No. 16-CV-590, 2017 WL 2962896, affirming the Eastern District of Wisconsin's dismissal of a lawsuit filed by two units of the International Union of Operating Engineers (the "Union") challenging Wisconsin's "Right-to-Work" law (2015 Wisconsin Act 1). As a result of the Seventh Circuit's decision, Wisconsin's private-sector employers are one step closer to gaining clarity on the future of Wisconsin's Right-to-Work law.

Wisconsin's Right-to-Work Law

Wisconsin's Right-to-Work law, in relevant part, provides as follows:

No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

. . .

1. Become or remain a member of a labor organization [or]
2. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

Wis. Stat. § 111.04(3)(a). Under this law, Wisconsin private-sector employers could no longer enter into "union security agreements" with unions, which require employees, as a condition of employment, to become or remain members of the union or pay union dues.

The Decision

Soon after Wisconsin's Right-to-Work law went into effect, the Union challenged the law on two grounds: 1) it is preempted by federal law; and 2) it is unconstitutional. First, the Union argued the NLRA preempts Wisconsin's state law because it provides:

It shall be an unfair labor practice of an employer . . . to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein.

29 U.S.C. § 158(a)(3). Importantly, however, the NLRA also expressly allows states to enact laws prohibiting agreements requiring membership in labor organizations as a condition of employment. See 29 U.S.C. § 164(b).

The Union also argued the Right-to-Work law's restriction on the Union's ability to require dues or fees from all bargaining unit members as a condition of employment constitutes an unconstitutional taking of the Union's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution.

The Eastern District of Wisconsin disagreed with the Union's arguments and dismissed the Union's lawsuit, relying on an 2014 decision from the Seventh Circuit Court of Appeals in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014). In *Sweeney*, the Seventh Circuit considered whether a similar Indiana state law was preempted by the NLRA and whether the law was an unconstitutional taking in violation of the Fifth Amendment. The Seventh Circuit held the Indiana state law was not preempted by the NLRA because it expressly allowed the state to enact laws prohibiting agreements requiring membership in labor organizations as a condition of employment, which thus permits state laws prohibiting agreements that require employees to pay fees and dues to the labor organizations. The Seventh Circuit also held the Indiana state law did not effect a taking in violation of the Fifth Amendment because the labor organizations are "justly compensated by federal law's grant to [unions] the right to bargain exclusively with . . . employers." *Sweeney*, 767 F.3d at 666. The *Sweeney* decision became precedent the Eastern District properly relied upon in dismissing the Union's lawsuit in *International Union of Operating Engineers Local 139, et al. v. Schimel* in September of 2016.

In October of 2016, the Union appealed the Eastern District's dismissal of its lawsuit. On appeal, the Union argued that despite the Eastern District properly relying on the Seventh Circuit's precedent set in *Sweeney*, the Eastern District's decision dismissing its case should be reversed because the Seventh Circuit wrongly decided *Sweeney*. The Union essentially asked the Seventh Circuit to overturn its own very recent decision, telling the Seventh Circuit it got it wrong. However, in a rather critical response, the three-judge panel of the Seventh Circuit (Judges Flaum, Easterbrook and Kanne) found the Union had not provided "any compelling reason to revisit *Sweeney*, and we decline to do so." The Seventh Circuit held *Sweeney* remained good law and the Eastern District properly dismissed the Union's lawsuit, holding that Wisconsin's Right-to-Work law is not preempted by federal law and does not result in an unconstitutional taking in violation of the Fifth Amendment to the U.S. Constitution.

Practical Implications

Wisconsin's Right to Work law is presently in effect, though one of the two legal challenges to its enforceability has been struck down. What remains to be decided in order to clarify whether the law will remain in effect (pending appeals to the U.S. Supreme Court and Wisconsin Supreme Court, of course) is an appeal to Wisconsin's Court of Appeals of *Machinists Local 1061 v. Walker*, No. 15CV628 (Dane County, Wis., Cir. Ct., filed Mar. 10, 2015), appeal filed, No. 2016AP820 (Wis. Ct. App. Apr. 18, 2016), seeking to reverse a Dane County state circuit court judge's decision which held the Right-to-Work law was unconstitutional under Wisconsin state law. The Dane County circuit court found the law to be unconstitutional because the law's proscription against requiring union dues and fees as a condition of employment violated Wisconsin's state constitution as a taking without just compensation. The Wisconsin Court of Appeals has stayed the Dane County circuit court decision pending appeal, allowing Wisconsin's

Right-to-Work law to remain in effect despite the circuit court decision declaring the law to be unconstitutional under state law.

While we await a decision from the Wisconsin Court of Appeals, employers should operate as though union security agreements are prohibited, and union membership and dues deduction must be voluntary for all employees. If you are or will be negotiating a successor collective bargaining agreement, any provision regarding union membership and dues deduction should take into account the present state of the law and changes that may occur pending the outcome of the appeal before Wisconsin's Court of Appeal in Appeals of *Machinists Local 1061 v. Walker*.

If you have questions, please contact Joel Aziere jaziere@buelowvetter.com or 262-364-0250 or Claire Hartley at chartley@buelowvetter.com or 262-364-0260 or your Buelow Vetter Attorney.