von Briesen

von Briesen & Roper, s.c. | Attorneys at Law

WERC Clarifies the Scope of Health Insurance Components which are Prohibited Subjects of Bargaining

Nov 29 2016

WERC Clarifies the Scope of Health Insurance Components which are Prohibited Subjects of Bargaining

Posted By: Kyle J. Gulya & Ryan P. Heiden
Legal Update
School Law & Municipal Law & Government Law

Tags: werc

In 2011, the Wisconsin Legislature enacted Wis. Stat. § 111.70(4)(mc)6. 2011 Act 32 provided that municipal employers and unions were prohibited from bargaining over "[t]he design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee."

After much litigation over that original language, the Legislature amended this statutory language as a direct reaction to a Wisconsin Court of Appeals decision that, in the Legislature's view, was contrary to the purpose of the original statute implemented as part of 2011 Act 32. The amended version of Wis. Stat. § 111.70(4)(mc)6 states as follows with the following new underlined language:

> Except for 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.

Despite the Legislature's clarification via the enactment of the new version of Wis. Stat. § 111.70(4)(mc)6, governmental entities and unions have regularly disagreed over what portions of health care plans fall within the term "employee premium contribution."

On November 16, 2016, the WERC reaffirmed the Legislature's intention to broadly limit an employer's duty to bargain over proposals related to the provision of health insurance plans, clarifying what does and does not constitute an "employee premium

contribution" under Wis. Stat. § 111.70(4)(mc)6. *City of Monona v. Firefighters/EMT Employees, International Association of Firefighters Local 311*, Dec. No. 36748 (WERC 11/16). In that case, the City, which was represented by von Briesen & Roper, s.c., successfully argued that incentive payments to bargaining unit members who choose not to be covered by a health insurance plan operated by the City are prohibited subjects of bargaining under Wis. Stat. § 111.70(4)(mc)6, as such incentive payments are "costs and payments associated with health care coverage plans" and not "employee premium contributions."

In adopting the City's arguments, the WERC reasoned that incentive payments would be barred under all three categories of prohibited subjects of bargaining contained within Wis. Stat. § 111.70(4)(mc)6. First, incentive payments are literally "payments associated with health care coverage plans." Second, incentive payments infringe on the City's rights to design and select health care coverage plans because the incentives presume the existence of a plan and that any such plan allows employees the option to opt-out in return for cash. Third, incentive payments clearly have an impact on wages. Consequently, the WERC held that incentive payments do not fall within the definition of an "employee contribution" and, as a result, constitute prohibited subjects of bargaining.

The WERC's decision may likely have a wide-ranging effect on various components of health care coverage plans or payments or costs associated with health care coverage plans, such as Health Savings Account contributions and Flexible Spending Accounts contributions, as the WERC's decision raises legitimate arguments suggesting that these components of a health care coverage plan do not constitute "employee premium contributions" and, therefore, are prohibited subjects of bargaining. Ultimately, the *City of Monona* decision gives employers broader control over the overall design of health plans offered by the employer and incentives available to employees to participate or not participate in the plans.

As such, employers need to do two things. First, public-sector employers need to analyze existing language in collective bargaining agreements involving incentive payments, HSA contributions and other health care coverage plan elements to determine whether the existing language is possibly illegal under the WERC's interpretation of Wis. Stat. § 111.70(4)(mc)6 in *City of Monona* and, therefore, within the employer's unilateral authority. Second, employers need to analyze bargaining proposals involving incentive payments, HSA contributions and other health care coverage plan elements to determine whether the proposed language is possibly illegal under the WERC's interpretation of Wis. Stat. § 111.70(4)(mc)6 in *City of Monona* and therefore within the employer's unilateral authority.

Since collective bargaining language and proposals raised in collective bargaining are unique, public-sector employers should discuss the unique impacts of the *City of Monona* decision by contacting a member of the von Briesen & Roper Government Law Group.

---

411 East Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202

tel: 414.276.1122
fax: 414.276.6281

10 East Doty Street
Suite 900
Madison, WI 53703

tel: 608.441.0300
fax: 608.441.0301

2905 Universal Street
Suite 2
Oshkosh, WI 54904

tel: 920.233.0250
fax: 920.233.8528