What's New On The Legal Front: Update on Employment Law Issues in Higher Education

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Implications for Employee Benefits of *United States v. Windsor* (U.S. 2013)

- Court declared provision in the Defense of Marriage Act (DOMA) that denied federal benefits to legally married, same-sex spouses unconstitutional
  - Left DOMA provision relating to state refusal to recognize same-sex marriage in place
- Significant consequences for employers that sponsor retirement and health benefit plans in states that permit same-sex marriages
Adjunct Instructors, Student Workers, and the Affordable Care Act

- Employers must provide health insurance to employees who work 30+ hours per week
- Guidance explains working hours calculation for adjunct and student workers
  - **Adjuncts:** 1 ¼ hours of preparation time for each classroom hour per week, plus office hours and required meetings
  - **Student workers:** Work-study employees not covered under mandate, but otherwise no exemption for student workers
NLRB to Decide Whether Adjuncts at Religious College Can Unionize

- Union petitioned to organize non-tenured adjuncts at Pacific Lutheran University
- NLRB requested briefs on several questions
  - Are religiously-affiliated universities subject to the NLRB’s jurisdiction?
  - Are adjuncts excluded from NLRA protection under “managerial employees” exception?
Student Athletes as “Employees” Under the NLRA

- Scholarship football players at Northwestern filed NLRB petition in January 2014 seeking certification
- NLRB faced question of whether student athletes are “employees” under the NLRA
- Institutions with athletic programs
Student Athletes, cont’d.

- NLRB decided that scholarship athletes are “employees” and thus may unionize
  - NLRB focused emphasized that athletes provide services to university in exchange for compensation (room, board, travel, etc.)
  - According to NLRB, these athletic services are not related to academics, so earlier decision dealing with graduate assistants not applicable
- This landmark decision will likely wind its way through the courts
New Guidance Regarding Retaliation

- Retaliation claims on the rise
- Dep’t of Educ., Office for Civil Rights issued guidance clarifying principles of retaliation law
  - Defines retaliation
  - Lays out potentially serious consequences for retaliatory conduct
- Guidance reminds that OCR is vigorously enforcing prohibition against retaliation
Retaliation, cont’d.

  - Nassar claimed job offer was withdrawn after he complained about supervisor’s harassment
  - 5th Cir. held that Nassar only had to show that unlawful retaliation was a *motivating factor* for withdrawn job offer to prove retaliation under Title VII
  - Supreme Court rejected motivating factor standard and held Nassar must prove offer would not have been withdrawn *but-for* his discrimination complaint
Who is a “Supervisor” for Purposes of Establishing Title VII Employer Liability?

- **Vance v. Ball State Univ.** (U.S. 2013)
  - Supreme Court decided who qualifies as a supervisor for purposes of Title VII workplace harassment claim
    - Employer strictly liable for supervisor’s conduct when harassment results in tangible employment action
  - Definition of “supervisor” narrowed to cover only employee empowered to effect significant change in another’s employment, including hiring or firing
    - A supervisor is not merely an employee with day-to-day oversight of others employees’ activities
Background Checks

- Guidance from the Federal Trade Commission & EEOC identifies pitfalls to avoid when using background checks as part of hiring process
  - Identifies requirements for complying with the Fair Credit Reporting Act as well as EEO laws
- EEOC beefing up enforcement efforts with respect to background checks, so guidance is important
New Minimum Wage Requirement for Federal Contractors

Higher education institutions that qualify as federal contractors will face new minimum wage obligations beginning January 2015
New Affirmative Action Rules for Federal Contractors

- New OFCCP affirmative action regulations for federal contractors with respect to individuals with disabilities and certain veterans
  - Utilization goals
  - Recruitment efforts
  - Record-keeping
- Effective March 2014, institutions covered by new OFCCP rules must offer applicants and employees the opportunity to self-identify as individuals with disabilities or as veterans
Academic Free Speech

- Ninth Circuit ruled in *Demers v. Austin* (Sept. 2013) that tenured professor’s speech was protected by First Amendment
  - Professor claimed retaliation after he distributed pamphlet critical of university
  - University argued that pamphlet was part of professor’s official duties, so not protected
- Ninth Circuit decided pamphlet was matter of public concern, so protected by First Amendment
Academic Free Speech and Social Media (Public Sector)

- In December 2013 Kansas Board of Regents adopted social media policy which allowed universities to fire employees for “improper use” of social media.
- In response to pushback, Board announced in March 2014 that it was working on a new policy that will allow employees more substantial online freedom.
Academic Free Speech and Social Media (Private Sector)

- NLRA protects rights of private sector employees to act together to address conditions at work (concerted activity)
- NLRB increasingly scrutinizing employer social media policies and finding that some policies violate NLRA’s protection of concerted activity
EEOC Challenges to Settlement/Severance Agreements

- String of recent EEOF enforcement actions challenging common provisions in agreements
  - Covenants-not-to-sue
  - Non-disparagement clauses
- Agreements need to be drafted with care to avoid inviting litigation
Act 10 Litigation Update

- **Background**
  - Sea change in collective bargaining system for public employees

- **Direct Challenges**
  - Challenges to the validity of the law itself

- **Application Challenges**
  - Challenges to the application of Act 10’s provisions to certain employees or subjects
Helpful Background

- Public sector collective bargaining is authorized by chapter 111 of the Wisconsin Statutes
  - It is a matter of state (not federal) law
  - It includes different provisions for municipal employees (MERA) and state employees (SELRA)
- 2011 Wisconsin Act 10 (Act 10) revised ch. 111
  - Created Public Safety Employee and General Employee designations
  - Left mostly intact collective bargaining for Public Safety Employees
  - Substantially pared back collective bargaining for General Employees
Helpful Background (cont.)

- General Employee provisions of Act 10:
  - Limits bargaining to “total base wages”
  - Requires a referendum to authorize increases > CPI
  - Prohibits bargaining over any factor or condition of employment except wages
  - Mandates annual recertification elections (51% eligible voters)
  - Prohibits “fair share” agreements
  - Prohibits dues checkoff
  - Limits collective bargaining agreements to 1-year terms
  - Eliminates interest arbitration as an impasse procedure
Direct Challenges

- *Ozanne ex rel. State of Wisconsin v. Fitzgerald, etc. al*
- *WEAC v. Walker, et al*
- *Laborers Local 236 v. Walker (federal)*
Wisconsin Education Association Council, et al. v. Walker, et al. (W.D. Wis. Federal Court)

- Challenged differential treatment of Public Safety Employees and General Employees for both local (MERA) and state (SELRA) employees
- District Court upheld most challenged provisions
- District Court found unconstitutional and enjoined enforcement of two provisions:
  - mandatory annual recertification elections; and
  - prohibition on dues checkoff for General Employees
- The Seventh Circuit Court of Appeals reversed the decision and upheld Act 10 “in its entirety”
(Dane County Circuit Court)

- Challenged Act 10’s limits on collective bargaining on a cumulative penalty theory
- Challenged the limitation on City of Milwaukee contributions to the Milwaukee Employee Retirement System
- Challenged the entirety of Act 10 as being improperly adopted during a special session
- All claims based only on the Wisconsin Constitution
(Cont.)

- Circuit Court held the following features of MERA are unconstitutional:
  - Limiting bargaining to total base wages
  - Requiring a local referendum to authorize wage increases greater than the CPI increase
  - Prohibiting dues checkoff
  - Prohibiting fair-share agreements
  - Requiring annual certification elections

- Confused Union membership with membership in a collective bargaining unit

- The case is at the Wisconsin Supreme Court
  - Decision no later than this summer
Effect of the decision at this time (as to parties):
- Wages remains the only mandatory subject of bargaining
- “Hours” and “conditions of employment” are now *permissive* subjects of bargaining
- Local municipal employers may (but are not required to) agree to deduct General Employee union dues
- Local municipal employers may (but are not required to) negotiate fair share agreements with unions
- WERC may not conduct automatic recertification elections
- There is no provision for interest arbitration
- Collective bargaining agreements may not exceed a 1-year term
Uncertainty created by the decision:

- It is not binding on any municipality that was not a party
  - WERC argued that it only applies to the parties
  - City of Milwaukee has asserted it does not apply to Milwaukee
    - Contempt order was overturned
- The term “wages” is undefined; it is likely that unions will push municipalities to define it very broadly
- The status of unions that were decertified prior to March 30, 2012 is uncertain
(W.D. Wis. Federal Court)

- Raised the same penalty theory as MTI but under the federal constitution.
- Federal District Court dismissed the case
- Plaintiffs Appeals to the Seventh Circuit
  - Oral argument held last month
(Dane County Circuit Court)

- Asserts many of the same claims made by WEAC and MTI, with a focus on state employees
- Asserts claims under the Wisconsin Constitution; no federal constitutional claims
- Dane County Circuit Court Judge expressly rejected the reasoning of his colleague and dismissed the claims
- Appeal is stayed pending the outcome of MTI
Application Challenges

- Validity of CBAs settled during periods when courts had ruled parts of Act 10 unconstitutional (i.e. “GAP CBAs”)
- Legality of bargaining over health care costs for public safety employees
- Applicability to Technical College employees
Validity of “gap” CBAs

- **Marone v. Milwaukee Area Technical College**
  - MATC and AFT settled a gap CBA that contained provisions and covering subjects that were prohibited by Act 10
  - Employee who does not want union representation filed suit
  - Case is stayed pending the outcome of MTI

- **Lacroix v. Kenosha Unified School District**
  - KUSD and KEA settled a gap CBA that contained provisions and covering subjects that were prohibited by Act 10
  - Employee who does not want unionization filed suit
  - Judge has ruled that Act 10 applies to KUSD despite Judge Colas ruling in MTI
  - Case IS NOT stayed pending MTI
Health Care Costs for Public Safety Employees

- 111.70(4)(mc)6. – prohibits bargaining over “the design and selection of health care coverage plans … and the impact of the design and selection of the health care coverage plan on the wages, hours and conditions of employment of the public safety employee.”

- Key question becomes what features are part of the “design” of a plan?
Direct v. Indirect Impacts on Wages


- Question presented: Does 111.70(4)(mc)6. prohibit bargaining over the direct impact of a plan design (i.e. deductibles, premiums, co-pays, out of pocket maximums) or only the indirect impact (i.e. additional travel and missed work expenses for having to travel to find an in network doctor)?

- Court held that it clearly applied to direct impacts.

- Petition for review pending – on hold awaiting MTI
Direct v. Indirect part 2

- **Green Bay Pro. Police Assoc., et al v. Green Bay, et al.**
  - Same argument (same plaintiffs lawyers)
  - Court of Appeals decision pending – was stayed to allow Milwaukee Pro. Police Assoc. decision to issue.
  - Likely same result
Deductible Allocation prohibited?

- *Wis. Pro. Police Assoc. v. WERC* – Wis. Ct of Appeals
  - Is the allocation of responsibility for the payment of deductibles between employee and employer a prohibited subject of bargaining? (i.e. is who pays the deductible part of the plan design?)
  - No – the deductible itself is part of the plan design who pays it is not.
  - But doesn’t that impact the wages of the employee?
  - Its does; but 111.70(4)(mc)6. only applies to impacts of the plan design on wages …
  - How do you square this case with Milwaukee Police Assoc.?
Technical College Employees

- **MATC Part-Time Teachers Union v. MATC**
  - Union argued that because technical colleges are not specifically listed in the definition of municipal employer, technical college employees were not bound by MERA.
    - They would effectively be treated like private employers
  - Huge problem for Unions – Tech Colleges have been included under MERA since the beginning - 1959.
    - First union organizing election at tech college was held in 1961
  - “other political subdivision or instrumentality of one or more political subdivisions of the state.”
  - Circuit Court found that tech colleges were municipal employers; Union has not appealed.