



**Buelow Vetter**

Buikema Olson & Vliet, LLC

**League of Municipalities**

**2012 Annual Conference**

**Act 10 One Year Later:  
Court Challenges, WERC  
Interpretations, Grievance  
Procedures and Life  
Without Union Contracts**

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# Topics to be Addressed

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- Court challenges to 2011 Wisconsin Act 10
- Decisions from the WERC and the Courts After Act 10
- Bargaining Health Insurance for Public Safety Employees
- WERC Rules on Calculating a CPI Increase
- Management Experience with:
  - Grievance Procedures
  - Employee Handbooks
  - Compensation Studies and Pay Plans
  - Life without Union Contracts

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# **COURT CHALLENGES TO 2011 WISCONSIN ACT 10**



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# COURT CHALLENGES TO ACT 10

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## Federal Court Decision

- On March 30, 2012, U.S. District Judge Conley issued a decision holding parts of Act 10 unconstitutional.
- Judge Conley held that the requirement for annual recertification elections is a violation of the Equal Protection Clause.
- Judge Conley also held the prohibition on employers collecting union dues violates the First Amendment rights of public sector unions.
- The decision requires voluntary dues deduction resume by May 31, 2012.

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# COURT CHALLENGES TO ACT 10

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## Order Granting Stay

- On April 27, 2012, Judge Conley issued a partial stay of his decision.
- The Judge refused to issue a stay of his entire decision, but did agree to a stay for those bargaining units decertified under Act 10 by March 30, 2012.
- In effect, this maintains the “status quo” for those units where the union did not seek recertification or where the union did not prevail in the recertification election.

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# COURT CHALLENGES TO ACT 10

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## Order Clarifying Issuance of Stay

- On May 18, 2012, Judge Conley issued a 2-page decision clarifying the motion for a stay.
- Judge Conley agreed that voluntary dues deduction requires an authorization by individual employees.
- In effect, voluntary dues deduction requires an “opt-in” action rather an “opt-out” action.
- Judge Conley also agreed that a dues authorization could be valid for up to one year.
- Judge Conley would not agree to permit voluntary dues deduction for those units who have been decertified.

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# COURT CHALLENGES TO ACT 10

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## State Court Decision

- On September 14, 2012, Judge Colas issued a decision overturning certain provisions of Act 10.
- The following provisions of MERA were held unconstitutional:
  - § 111.70(1)(f) which prohibits fair share provisions;
  - § 111.70(3g) which prohibits voluntary dues deductions;  
and
  - § 111.70(4)(d)3 which requires annual recertification elections.

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# COURT CHALLENGES TO ACT 10

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## State Court Decision

- Other provisions held unconstitutional:
  - § 111.70(4)(mb) which limits bargaining to base wages only
  - § 66.0506 and § 118.245 which limits wage increases for municipalities and school districts to the Consumer Price Index (CPI) unless a referendum is passed.



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# COURT CHALLENGES TO ACT 10

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## State Court Decision

- What is left of Act 10 after the Colas decision?
  - The definition of “collective bargaining” is limited to “wages” only.
  - The elimination of interest arbitration.
  - The limit on collective bargaining agreements to one year in duration.
  - Employees contributing one-half of the WRS contribution rate.
  - The requirement that municipal employers adopt a grievance procedure.

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# COURT CHALLENGES TO ACT 10

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## What is the Duty to Bargain in Light of this Decision?

- “Wages” are a mandatory subject of bargaining.
- All other items from the expired union contract are permissive subjects of bargaining.
- Question is how the WERC will define “wages.” Prior WERC decisions have taken a broad view of what MERA defines as “wages.”

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# COURT CHALLENGES TO ACT 10

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## Legal Status of the Dane County Decision

- An appeal has been filed with the Court of Appeals
- The Attorney General has filed a motion for a stay of the decision. The case has been fully briefed and we are expecting a decision from Judge Colas any day now.
- As a general rule, a circuit court decision is only binding on the parties to the lawsuit and does not apply outside the county in which the court sits.

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# COURT CHALLENGES TO ACT 10

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## What Should Employers Be Doing in Light of this Decision?

- Is it wise for municipal employers to be engaging in bargaining right now?
- Not if the bargaining is restricted to the wage increase.
- Bargaining over any other item is premature until a decision from either the Seventh Circuit Court of Appeals (the Conley decision) or the Wisconsin Court of Appeal (the Colas decision).
- WERC decision involving Richland Center stated that it is “prudent” for an employer to determine the status of Act 10 before returning to the bargaining table.

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# **DECISIONS FROM THE WERC, COURTS AND ARBITRATORS AFTER ACT 10**

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## Interest Arbitration Decisions

- Only two interest arbitration decisions have been issued since Act 32 took effect (one win for employer; one win for union).
- Many more cases expected to end in arbitration if public safety unions unwilling to make WRS and health insurance contributions.

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# DECISIONS FROM THE WERC, COURTS AND ARBITRATORS AFTER ACT 10

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## WERC Decisions

- Two decisions have been issued by the WERC on whether corrections officers are public safety employees or general employees.
- In Winnebago County, the WERC concluded that the employees remain classified as public safety employees. In Douglas County, the employees' status was changed to general employees. Note – a Dane County judge just overturned this WERC decision.

The outcome in these two decisions turned on the power of arrest.

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# BARGAINING OVER HEALTH INSURANCE AFTER ACT 32

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## CHANGE TO BARGAINING LAW

- Under Act 32, the design and selection of the health care coverage plan, and its impact of same on wages, hours and working conditions, is a prohibited subject of bargaining.
- In Eau Claire County, the WERC determined that the county could change the deductibles on the health insurance plan and the union had no right to bargain this change.
- The Eau Claire County decision is being appealed by the deputy sheriffs union.



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# **BARGAINING OVER HEALTH INSURANCE AFTER ACT 32**

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- The WERC also held that the union could not bargain over the maximum out-of-pocket payment that employees would make to the health insurance plan.
- A Milwaukee County circuit court judge reached the opposite conclusion in a case filed by the Milwaukee Police Association. The judge issued a permanent injunction. This decision has been appealed.
- There is litigation pending in Brown County on this same issue filed by Green Bay police officers and firefighters, and Brown County deputy sheriffs.



# WERC RULES ON CALCULATING THE CPI INCREASE

## Requirements of Act 10

- Bargaining is restricted to base wages only.
- Under MERA, the wage increase is capped at the increase in the Consumer Price Index (CPI), unless the employer passes a referendum.
- Under MERA, the Department of Revenue must calculate the CPI and notify the WERC of the maximum allowable wage.
- The WERC recently issued rules on how to calculate the CPI increase. **Note – These rules expired on September, 15, 2012.**

# WERC RULES ON CALCULATING THE CPI INCREASE

CPI Increases Certified by the WERC:

Contract Effective Date	CPI Increase
January 1, 2011	0.97%
July 1, 2011	1.64%
January 1, 2012	2.01%
July 1, 2012	3.16%
January 1, 2013	2.96%

The WERC issued emergency rules (approved by the Governor) on calculating the CPI increase. **These rules expired on September 15, 2012.**

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# ACT 10 LANGUAGE ON CALCULATING THE CPI INCREASE

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## What is Excluded from Base Wages?

Act 10 Exclusions [Note –bolded words are different than WERC rules]

- Supplemental compensation;
- Overtime;
- Premium pay;
- Merit pay;
- Performance pay;
- **Pay schedules; and**
- **Automatic pay progressions.**

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# WERC RULES ON CALCULATING THE CPI INCREASE

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## What is Excluded from Base Wages?

Exclusions from base wages identified in WERC Rule 90.03(2)  
[Note-bolded words are new or different than Act 10]:

- Supplemental compensation;
- Overtime;
- Premium pay;
- Performance pay;
- **Lump sum** merit pay;
- **Education credits or credentials in pay schedules;**  
**and**
- **Extra duty pay.**

# WERC RULES ON CALCULATING THE CPI INCREASE

## Steps in Calculating the Base Wage Increase

- Take a “snapshot” 180 days before contract expiration of the “filled” positions in the bargaining unit.
- Calculate the annual salary for the employees in that snapshot (excluding any supplemental compensation, like overtime, shift differential, out-of-class pay, etc.)
- Calculate the total dollars available for the wage increase, by multiplying the total bases wages by the CPI increase.
- Determine how to distribute those total dollars within the unit (i.e., equally to all employees or different amounts to different employee groups).

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# WERC RULES ON CALCULATING THE CPI INCREASE

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- Under the WERC rules, the employer does have a duty to bargain over the distribution of wage increase.
- Best practice is to provide costing data to union and attempt to reach agreement on method for calculating the available dollars.
- Under Act 10, once an impasse is reached the employer can implement its last offer.

# WERC RULES ON CALCULATING THE CPI INCREASE

## Unanswered Questions

- Should the union contract include a summary of the costing methodology used?
- What is the impact of new hires after the snapshot is taken?
- Is there a mechanism for the union to challenge the costing?
- How broadly will the WERC define supplemental compensation?
- What is the impact of a salary or compensation study on base wages?



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**WHAT HAS  
THE PAST YEAR  
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# WHAT HAS THE PAST YEAR BEEN LIKE FOR EMPLOYERS?

## Grievance Procedure

- Very few grievances have been filed under the new statutory procedure.
- No court decisions as of yet, but one court action filed in Dodge County circuit court (but there may be others).
- Expect challenges to:
  - Personnel actions excluded from discipline and termination.
  - Selection of the impartial hearing officer (IHO).
  - Procedures followed at the hearing before the IHO.

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# WHAT HAS THE PAST YEAR BEEN LIKE FOR EMPLOYERS?

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## Employee Handbooks

- Very few little controversy over the adoption of employee handbooks.
- No court decisions challenging personnel policies or employee handbooks.
- Most vocal objections have been in the following areas:
  - Just cause being removed from discipline policy.
  - Loss of overtime (applying FLSA standard to overtime).
  - Loss of seniority protections.
  - Benefits upon retirement – severance pay or retiree health insurance plans.

# WHAT HAS THE PAST YEAR BEEN LIKE FOR EMPLOYERS?

## Compensation Studies and Pay Plans

One of the most controversial areas has been the adoption of new pay plans.

- Controversies include:
  - Major changes to salary structures ( i.e. pay reductions).
  - Reductions in salaries for existing employees vs. new hires only.
  - Changes to job classifications, job descriptions/duties, combining pay grades.

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# WHAT HAS THE PAST YEAR BEEN LIKE FOR EMPLOYERS?

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## Life Without Union Contracts

- Everyone is apprehensive, but things are running smoother than anticipated.
- Resumption of dues deduction will make the unions more active.
- As time goes on, employers will begin to make more drastic changes – paid time off plans or consumer-driven health plans.
- Time will tell if public employees can survive without unions or whether there will be a resurgence in union activity.
- The 2013 municipal budget will be critical -- potential layoffs without seniority, changes to job duties etc.



**Questions?  
Concerns?  
Comments?**

