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EMPLOYMENT LAWSCENE ALERT: DANE COUNTY JUDGE FINDS RIGHT-TO-WORK LAW UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit

court found that one important difference between the Indiana and Wisconsin laws is what qualifies as “just compensation.” Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as “just compensation;” whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating “just compensation” with the payment of money.

Wisconsin’s Attorney General and the Department of Justice have already stated that the State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.