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Wisconsin

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WISCONSIN
POLICE & NON-POLICE COLLECTIVE BARGAINING
FACT SHEET

In 2011, Wisconsin enacted a law known as Act 10, which dramatically narrowed the scope of public sector collective bargaining for all employees, except public safety employees. After the enactment of that decision, there were virtually no cases addressing mandatory subjects of bargaining for "general" governmental employees, i.e., non-police. Thus, this fact sheet will focus on statutory changes, with only a small number of cases.

STATUTORY AUTHORITY FOR COLLECTIVE BARGAINING

Wisconsin passed its Municipal Employee Relations Act (MERA) in 1959, the first in the country. Six years later, Wisconsin enacted its State Employee Labor Relations Act (SERLA), governing collective bargaining for state employees. In 2011, Wisconsin enacted a law known as Act 10, which dramatically narrowed the scope of public sector collective bargaining for both state and local of employees. Act 10, however, excluded public safety employees essentially leaving those employees with all the former protections.

The summaries below will describe separately the protections for public safety and "general" employees, since Act 10 created two different systems. Then, the section will describe the constitutional challenges, including the recent successful Wisconsin State Constitutional claim.

Coverage.

MERA covers "municipal employers" defined statutorily to include local subdivisions like cities, counties, and towns.[1] Covered employees include "any individual employed by a municipal employer."[2] But then the statute divides covered employees into two main categories: "public safety employees" and "general municipal employees." Public safety employees are defined as municipal employees "[c]lassified as a protective occupation participant under . . . Section 40.02.48(am) 9., 10., 13., 15., or 22." of the Wisconsin Code.[3] Section 40.02(am), a provision related to the Wisconsin public employee trust fund, lists a total of twenty-two "protective occupations", but the MERA public safety employee definition includes only five of those twenty-two:

- Police officers
- Fire Fighters
- Deputy Sheriffs
- County Traffic police officers

[1] WIS. STAT. § 111.70(1)(j) (2024).
[2] WIS. STAT. § 111.70(1)(i) (2024).
[3] WIS. STAT. § 111.70(1)(mm) (2024).

- Anyone employed by a combined protective service[4]

A general municipal employee is "a municipal employee who is not a public safety employee or a transit employee." [5]

SELRA defines an employer as "the State of Wisconsin"[6] and "employees" as certain categories of employees employed by the State of Wisconsin.[7] SELRA also defines public safety employees with reference to section 40.02(am) but selects only two of the jobs listed: State Traffic Patrol and State Motor Vehicle Inspector;[8] it does not, for example, include Capitol Police or University of Wisconsin police. "General employees" under SELRA are defined as those who are "not a public safety employee."[9] In all other respects SERLA's coverage definitions are identical to MERA's.

Scope of Bargaining.

MERA and SELRA both guarantee the right of employees "to bargain collectively through representatives of their own choosing."[10] Collective bargaining is defined as the obligation of an employer to "meet and confer at reasonable times, in good faith, with the intention of reaching an agreement."[11] It is a prohibited practice under both statutes for an employer to refuse to bargain in good faith.[12]

The subjects over which the employer must bargain differ dramatically for public safety and "general municipal" or "general" employees. For public safety employees, the employer must bargain over "wages, hours, and conditions of employment."[13] MERA further requires that an employer "shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to any public safety employee under [Wisconsin's Law Enforcement Officers Bill of Rights]."[14] For general employees, however, the employer's obligation to bargain extends only to wages.[15] Indeed, MERA prohibits bargaining over "any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation" such as overtime, premium pay, performance pay, and the like.[16] Furthermore, employers are prohibited

[4] *Id.*; WIS. STAT. § 40.02(48am)(9)–(10), (13), (15), (22) (2024). "Combined protective services" are defined in WIS. STAT. §§ 60.553(1), 61.66(1), 62.13(2e)(a) (2024).
[5] WIS. STAT. § 111.70(1)(fm) (2024).
[6] WIS. STAT. § 111.81(8) (2024).
[7] WIS. STAT. § 111.81(7) (2024). These categories include those employed in the classified service of the state, those employed by the University of Wisconsin System. *See* WIS. STAT. § 111.81(7)(a)–(at) (2024). Each category has relevant exclusions.
[8] WIS. STAT. § 111.81(15r) (2024); WIS. STAT. § 40.02(48am)(7)–(8) (2024).
[9] WIS. STAT. § 111.81(9g) (2024).
[10] WIS. STAT. § 111.70(2) (2024); WIS. STAT. §111.82 (2024).
[11] WIS. STAT. § 111.70(1)(a) (2024). *See also* WIS. STAT. §111.81(1) (2024) (same).
[12] WIS. STAT. § 111.70(3)(4) (2024); WIS. STAT. § 111.84(1)(d) (2024). In one of many unique provisions, MERA and SERLA allow an employer to refuse to bargain if the employer has a "good faith doubt" of the union's majority support. If the employer has such a doubt, they are entitled to request an election be run and during the pendency of the election have no obligation to bargain.
[13] WIS. STAT. § 111.70(1)(a) (2024); WIS. STAT. §111.91 (2024).
[14] WIS. STAT. § 111.70(1)(a) (2024).
[15] *Id.*
[16] WIS. STAT. § 111.70(4)(mb) (2024); WIS. STAT. §111.91 (2024).

from entering into any agreement with general employee increasing wages at a rate higher than the consumer price index.[17]

Impasse Procedure.

The statutory procedures available to parties unable to come to an agreement are dramatically different for police and non-police units. For "general" employees, the statute first provides that the initial bargaining session, where the union presents it opening proposal, be open to the public.[18] Thereafter, if the employer and the union representing general employees are unable to reach an agreement, the Commission is authorized to provide access to mediation services.[19] Employees covered by SERLA then may petition the commission for non-binding fact finding.[20] General employees are prohibited from striking and the statutes authorize injunctive relief; MERA provides for penalties of $2.00 per member per day of the strike to a union that supports a strike among public employees.[21]

For police units, however, the process is quite different. There is no requirement for any negotiating session to be open to the public. If the employer and the union are unable to reach agreement, the Commission may offer mediation services.[22] Thereafter, if the parties continue to be at impasse, either party may petition the Commission to appoint a fact finding panel empowered to issue a non-binding recommendation as to the terms of the contract.[23] In addition, however, police have access to binding interest arbitration. For "members of a police department employed by cities of the 1st class," any negotiating impasse must be resolved through binding interest arbitration.[24] In that circumstance, the arbitrator has broad authority to address wages, benefits, promotions, merit increases, as well as "all work rules affecting" the employees.[25] The arbitrator is also directed to establish a system for the administration of the contract "by an employee of the police department who is not directly accountable to the chief of police," and the arbitrator must establish a system for interrogations of officers that is "limited to the hours between 7:00 a.m. and 5:00 p.m."[26] Once issued, the decision can be reviewed in superior court; however, "the court must enforce the decision, unless the court finds by a clear preponderance of the evidence that the decision was procured by fraud, bribery or collusion."[27]

In addition to these provisions apparently limited to first class cities, all other municipal public safety employees are given access to binding interest arbitration:

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[17] WIS. STAT. § 111.70 (2024); WIS. STAT. § 111.91(3)(b) (2024).
[18] WIS. STAT. § 111.70(4)(cm) (2024).
[19] WIS. STAT. § 111.70(4)(cm), .87, .97 (2024).
[20] WIS. STAT. § 111.88 (2024).
[21] WIS. STAT. §§ 111.70(L), .70(7m), .84(2)(e), .89 (2024).
[22] WIS. STAT. § 111.70(4)(b) (2024); WIS. STAT. § 111.87 (2024).
[23] WIS. STAT. § 111.70(4)(b) (2024) (allowing fact finder to make "recommendations for solution of the dispute"); WIS. STAT. § 111.88 (2024) (same).
[24] WIS. STAT. § 111.70(jm) (2024).
[25] *Id.*
[26] *Id.*
[27] *Id.*

> Where the [public safety] parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute.[28]

Strikes among public safety employees are prohibited,[29] but the penalty imposed by MERA on the union are more modest than for general employees. The union cannot collect dues from members for a year after the strike and it can be fined up to $10 per day during the strike.[30] Given the availability of interest arbitration, the employer is not permitted to implement its last, best offer.

Unfair Labor Practices

MERA and SELRA assume the presence of the Wisconsin Employment Relations Commission ("WERC" or "Commission"), which is defined by statute as follows:

> "Commission" means a 3-member governing body in charge of a department or independent agency or of a division or other subunit within a department, except for the employment relations commission which shall consist of one chairperson.[31]

WERC's website indicates that the commission "consists of the Chairman appointed by the Governor, subject to confirmation by the Senate, for a six-year term."[32]

WERC is authorized to determine whether prohibited practices—including the refusal to bargain in good faith—have occurred.[33] The Commission has the authority to conduct hearings, either before itself or a hearing examiner, issue subpoenas, and make decisions.[34] However, Act 10 added that allegations of the failure to bargain "shall be resolved by the commission on a petition for declaratory ruling," which appears to divest the commission of the ability to assess damages.[35]

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[28] WIS. STAT. § 111.77(3) (2024).
[29] WIS. STAT. § 111.70(3)(L) (2024) ("Nothing contained in this subchapter constitutes a grant of the right to strike by any municipal employee or labor organization, and such strikes are hereby expressly prohibited."); WIS. STAT. § 111.89 (2024) (titled "Strike Prohibited," the statute allows an employer to seek an injunction or file an unfair labor practice with the commission in the event of a strike).
[30] WIS. STAT. § 111.70(7m)(c) (2024); WIS. STAT. § 111.89 (2024).
[31] WIS. STAT. § 15.01(2).
[32] *About WERC*, WIS. EMP. RELS. COMM'N, http://werc.wi.gov/about-werc/ [https://perma.cc/L6MZ-QRYR] (last visited Oct. 13, 2024). According to the staff at WERC, the Commission experienced a "reduction in chairmen" from three members to one member in 2015 coincident with Act 150 limiting the scope of civil service protections.
[33] WIS. STAT. § 111.07 (2024).
[34] WIS. STAT. § 111.07(b) (2024).
[35] WIS. STAT. § 111.70(4) (2024) (the commission can assess a prohibited practice if the practice is part of a series of acts or a pattern of conduct).

Constitutional Challenges

Immediately after the passage of Act 10, several public sector unions challenged the law arguing among other things that the distinction between public safety and general employment violated the equal protection clause of the United States Constitution.

In *Wisconsin Education Association v. Walker*, 705 F.3d 640 (7th cir. 2013), a group of unions challenged the constitutionality of Act 10 arguing that the distinction between public safety and general employees violated the Equal Protection Clause.[36] Specifically, the unions argued for heightened scrutiny since the distinction amounted to a benefit to Governor Walker's political supporters and therefore viewpoint discrimination impermissible under the First Amendment.[37] Even if the distinction did not impermissibly burden First Amendment interest, the unions argued that the distinction lacked rational basis since it was baldly motivated by "rank political favoritism."[38] The court rejected these arguments, finding that the there was no First Amendment violation, that the terms of Act 10 were viewpoint neutral, and that the distinction between public safety and general employees survived rational basis review "because Wisconsin could rationally believe that Act 10's passage would result in widespread labor unrest, but also conclude that the state could not withstand that unrest with respect to public safety employees."[39]

In *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014), a union challenged Act 10 in state court on several constitutional grounds including an argument that the limitations on the scope of bargaining for general employees burdened their First Amendment right to association.[40] By limiting the scope of bargaining for union-represented employees to wages, which was far more restrictive than the scope of bargaining available to non-represented employees, Act 10 unconstitutionally burdened employees' right to organize together into a union, a First Amendment-protected activity.[41] The trial court agreed with this argument finding "Act 10 violated: (1) the plaintiffs' rights of association, free speech, and equal protection under both the United States and Wisconsin Constitutions."[42] The court of appeals certified the defendants' appeal to the Wisconsin Supreme Court. Five members of the seven-member court found a distinction between the right of association with others and the right to bargain collectively with a public employer. The majority opinion asserted—no fewer than five times—that there was no constitutional protection for a right to bargain collectively:

> [T]he "right" the plaintiffs refer to—the right to associate with a certified representative in order to collectively bargain on any subject—is categorically not a constitutional right.

[36] 705 F.3d at 644.
[37] *Id.* at 645.
[38] *Id.* at 653.
[39] *Id.* at 655.
[40] 851 N.W.2d at 346.
[41] *Id.* at 351.
[42] *Id.* at 348.

> General employees have no constitutional right to negotiate with their municipal employer on the lone issue of base wages, let alone on any other subject.
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> . . . .
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> . . . Act 10 provides a benefit to represented general employees by granting a statutory right to force their employer to negotiate over base wages, while non-represented general employees, who decline to collectively bargain, have no constitutional or statutory right whatsoever to force their employer to collectively bargain on any subject.[43]

All of the members of the majority have since moved off the court.

In 2023, in *Abbottsford Education Assn. v. Wisconsin Employment Relations Commission*, Case No. 23CV3152 (Dane County 2024), a group of unions challenged MERA's delineation of public safety employees for preferential treatment on the ground that it could not survive equal protection scrutiny under Wisconsin's Constitution. Specifically, the unions there argued that the inclusion of only five of the 22 categories of "protective occupations" did not survive even the lowest level of scrutiny.[44] On July 3, 2024, the trial court agreed, finding the distinction unconstitutional, "[t]he court can come up with no rational basis for excluding some police and fire employees from the public safety group while including all others and motor vehicle inspectors."[45] The court found that the unconstitutional distinction was not severable from the rest of the act and therefore invalidated the whole thing.[46]

Law Enforcement Officer Bill of Rights

Wisconsin's Law Enforcement Officer Bill of Rights (LEOBOR) sets out the rights of law enforcement officers.[47] The law protects law enforcement officers' rights to engage in political activity when not on duty;[48] sets out requirements for when and how to conduct investigations and interrogations of law enforcement officers that could lead to disciplinary action, demotion, dismissal, or criminal charges;[49] and protects the right of a law enforcement officer to run for elective public officer.[50]

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[43] *Id.* at 355.
[44] Decision on Motion to Dismiss at 16, *Abbottsford Educ. Ass'n v. Wis. Emp. Rels. Comm'n*, No. 2023CV003152 (Wis. Cir. Ct. Nov. 30, 2023) [hereinafter Order]; *see also* Complaint at 17, *Abbottsford*, No. 2023CV003152 (Wis. Cir. Ct. Nov. 30, 2023).
[45] Order, *supra* note 44, at 14.
[46] *Id.* at 23–24.
[47] WIS. STAT. § 164.01–.06 (2024). "Law enforcement officer" is defined as "any person employed by the state or by a city, village, town or county for the purpose of detecting and preventing crime and enforcing laws or ordinances, who is authorized to make arrests for violations of the laws or ordinances which [they are] employed to enforce." WIS. STAT. § 164.01 (2024).
[48] WIS. STAT. § 164.015 (2024).
[49] WIS. STAT. § 164.02 (2024).
[50] WIS. STAT. § 164.06 (2024).

If a law enforcement officer is interrogated for any reason which could lead to discipline, the law enforcement officer (1) shall be informed of the nature of the investigation prior to any interrogation, and (2) may be represented by a representative of their choice who, at the discretion of the officer, may be present at all times during the interrogation.[51] Any evidence obtained in the course of an investigation that is not compliant with the LEOBOR cannot be utilized in any subsequent disciplinary proceeding against the law enforcement officer.[52]

The rights set out in the LEOBOR "shall not be diminished or abridged by any ordinance or provision of any collective bargaining agreement," and the rights "may be supplemented and expanded" by ordinance or collective bargaining agreement.[53]

AGENCIES

Wisconsin Employment Relations Commission (WERC).

- **Statute**: WIS. STAT. § 15.01.
- **Website**: Information about WERC is available on their website (linked here).

Commission Member: James J. Daley. Commissioner since 2015. Formerly mayor of Oconomowoc, Wisconsin. Before that he was majority staff for the Wisconsin senate.[54]

COMMON LAW OF MANDATORY SUBJECTS

Because both MERA and SELRA prohibit bargaining over anything but base wages for general employees, there are no cases since 2011 defining further mandatory subjects in that context. In the police context, there are only a few, but they reflect the commission's conclusion that the standard for determining mandatory subjects is quite favorable to public safety unions.

In general, if an employer proposed change "primarily relata[s] to wages, hours, and conditions of employment" it is a mandatory subject, and if it primarily relates to the management direction of the governmental unit, it is a permissive subject.[55] Thus, the commission has wide discretion to determine which interest is primary. So, for example in *City of Manitowoc*, the Commission found changes to standard workday, parking privileges, compliance with safety rules, provision of linens and laundry all to be mandatory subjects of bargaining for public safety employees.[56] As to oversight, WERC has found a proposal made by the Milwaukee Police Association. requiring bargaining over the implementation of a system for tracking officer performance was a mandatory

[51] WIS. STAT. § 164.02 (2024).
[52] *Id.*
[53] WIS. STAT. § 164.04 (2024).
[54] *WERC Contacts by Name*, WIS. EMP. RELS. COMM'N, http://werc.wi.gov/directory/ [https://perma.cc/72BQ-QVFY] (last visited Oct. 13, 2024).
[55] *City of Manitowoc*, Dec. No. 38313, 4–5 (2020).
[56] *Id.* at 3.

subject.[57] As to transfers of work, WERC has recognized that the employer's decision to transfer work formerly performed by a public safety employee is a mandatory subject of bargaining.[58]

[57] *City of Milwaukee*, No. 63352 (2007) (the decision is difficult to follow, but it also seems to allow some of the system to be implemented pending bargaining, though it is not clear why).

[58] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, Dec. Nos. 33238-B and 332240-B (2011) (holding that because the disputed assignment was made to an unsworn employee, it was a by definition a different type of work and therefore there was no requirement to bargain); *cf. City of Waukesha*, Dec. No 37481 (2018) (finding that the ability to assign employees to an "acting" role in a higher position is not a MSB even though it affects pay).