Michigan Employment Relations Commission Invalidates A Ten-Year Union Security Clause Designed To Circumvent The Right-To-Work Law Applicable To Public Sector Employers

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In December 2012, Michigan enacted separate right-to-work statutes for both the private sector, Public Act 348, and the public sector, Public Act 349. But the right-to-work statutes did not take effect until March 28, 2013, and they permitted employers and unions to retain and enforce union security clauses that were contained in agreements before March 28, 2013. For that reason, before that March 28, 2013 effective date, labor unions, in both the private sector and the public sector, sought to negotiate lengthy extensions of the union security clauses, which require an employee to become and remain a union member as a condition of employment. The unions' purpose was to delay the effect of the right-to-work law and, consequently, the ability of union members to discontinue their mandatory union membership under that law.

On February 13, 2015, however, the Michigan Employment Relations Commission ("MERC"), in a 2 to 1 decision, ruled that a ten-year extension of the union security clause in a collective bargaining agreement between the Taylor School District and the Taylor Federation of Teachers, AFT, Local 1085 was unlawful. That extended union security clause would have prevented union members from discontinuing their mandatory union membership until 2023. This MERC ruling, which the school district, the union, or both may appeal to a Michigan state court, represents a defeat for the labor union tactic of negotiating lengthy extensions of union security clauses before the effective date of the right-to-work laws in order to delay the impact of the right-to-work laws.

The Taylor School District and Local 1085, on February 7, 2013, negotiated a "Union Security Agreement" that required "Union members to pay either dues or service fees to the Union" until after July 1, 2023. Three Taylor teachers filed unfair labor practice

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charges challenging the ten-year extension of the union security clause. In December 2013, a MERC Administrative Law Judge dismissed the teachers' unfair labor practice charges. The ALJ ruled that the Legislature, not MERC, should decide whether to impose a limit on the length of a union security clause.

Reversing the ALJ, MERC ruled that the "ten-year duration of the Union Security Agreement" was "excessive and unreasonable" and violated the Public Employment Relations Act ("PERA"), which PA 349 amended, by compelling "bargaining unit members to either remain in or to financially support a labor organization…" The action of the Taylor School District and Local 1085 "was intended to delay the application of PA 349 for ten years beyond its legislatively mandated effective date," which "effectively compelled unwilling" Taylor teachers, in violation of PERA, "to financially support the Union for the next decade." Both the Taylor School District and Local 1085 committed unfair labor practices by that action.

In addition, MERC ruled that Local 1085 violated its duty of fair representation toward its members:

> "The Union acted arbitrarily, in a manner that discriminated against some bargaining unit members and was indifferent to the interests of those members. It was aware that PA 349 was pending when it negotiated for and ratified a Union Security Agreement that it knew would compel unwilling members to support it financially for ten years… Imposing a lengthy financial burden on bargaining unit members, in order to avoid the application of a state law for ten years, is arbitrary, indifferent and reckless."

The dissenting MERC Member stated that by "finding the Union Security Agreement excessive, the majority has altered the terms of the contract," which MERC lacks the authority to do. The dissent also noted as follows: "The majority has stated that ten-year contracts are excessive, but has not stated what term of years it would find acceptable."

This MERC ruling only directly affects the Taylor School District – Taylor Federation of Teachers' ten-year union security clause. Yet its reasoning will also apply to similar extensions negotiated by other public sector employers and their unions before March 28, 2013.

Because PERA does not apply to Michigan private sector employers, however, MERC's ruling will have no direct effect on private sector employees whose employers and unions similarly negotiated lengthy contract or union security clause extensions before March 28, 2013 to delay the impact of the right-to-work law. Michigan state courts have the authority to rule on issues under PA 348, and those Michigan courts could apply to PA 348 the reasoning of the MERC decision about PA 349, although that MERC decision is not a legally binding precedent on Michigan courts regarding PA 348. Similarly, private sector employees could file unfair labor practice charges with the National Labor Relations Board ("NLRB") alleging, as in the Taylor School District case, that their unions violated their legal duty to fairly represent employees by seeking and agreeing to lengthy extensions of agreements before the effective date of the right-to-work law in an effort to delay its effect on those employees' ability to end their union membership. But whether the current pro-union NLRB would agree with the reasoning of the MERC majority opinion on the duty of fair representation issue is, at best, uncertain and, at worst, unlikely. In sum, the extent to which the MERC ruling about the Michigan public sector right-to-work

statute, PA 349, will affect the interpretation and the enforcement of the Michigan private sector right-to-work law, PA 348, is unknown at this time.

If you have any questions about these decisions and the Michigan right-to-work law, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.