# Wisconsin Legislative Council

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Director

TO: SENATOR MELISSA AGARD

FROM: Margit Kelley, Senior Staff Attorney

RE: Union Negotiations With University of Wisconsin Hospitals and Clinics Authority

DATE: October 4, 2021

This memorandum, prepared at your request, briefly describes the options for the University of Wisconsin Hospitals and Clinics Authority (UWHCA) to negotiate with employees who are represented by a union. Very briefly, under current state law, UWHCA is not required to negotiate with employees on subjects of collective bargaining. A union representative of employees may, however, seek to meet and consult, informally, with UWHCA, may seek federal recognition, or may present arguments to seek voluntary recognition.

## EMPLOYMENT STATUS OF UWHCA EMPLOYEES

UWHCA is statutorily identified as a public body. Although not subject to all statutory provisions that apply to state agencies, it is a "public body corporate and politic," created by statute. As a public entity, its employees are public employees. [s. 233.02 (1), Stats.; and *Rouse v. Theda Clark Med. Ctr.*, 2007 WI 87.]

UWHCA was created in 1995 Wisconsin Act 27 (1995 Act 27) to operate and manage the University of Wisconsin (UW) Hospitals and Clinics, which had previously been part of the UW System.[1] The act moved professional represented employees to UWHCA, and moved nonprofessional represented employees to a similarly created UW Hospitals and Clinics Board (UWHC Board). [s. 15.96, 1995 Stats., created by SEC. 224m of 1995 Act 27; and ch. 233, 1995 Stats., created by SEC. 6301 of 1995 Act 27.]

Under that act, professional represented employees of UWHCA were no longer employees of the state,[2] and UWHCA was given all the powers of the employer in the relationship with those employees, subject to certain statutory requirements. [s. 233.10, 1995 Stats.]

[1] For more discussion about the restructuring of UW Hospitals and Clinics under 1995 Act 27, see Wisconsin Legislative Fiscal Bureau, *Comparative Summary of Budget Provisions (1995 Acts 27 and 113), Vol. 2* (December 1995).

[2] Compare, for example, the code of ethics for public officials, which was amended under 1995 Act 27 to identify separately both "state public officials and employes" and "all employes of the University of Wisconsin Hospitals and Clinics Authority." [s. 19.45 (11) (intro.), 1995 Stats., as amended by SEC. 451 of 1995 Act 27.] Similar changes were made throughout the statutes under 1995 Act 27 to identify UWHCA employees separately from state employees. However, UWHCA employees were included in the definition of "state employe" for purposes of benefits administered by the Department of Employee Trust Funds. [s. 40.02 (54) (h) and (54t), 1995 Stats., as created by SECS. 1951 and 1952 of 1995 Act 27.]

2011 Wisconsin Act 10 (2011 Act 10) eliminated the UWHC Board and transferred all employees to UWHCA.

Accordingly, UWHCA employees currently are employees of a statutorily created public body, but are not state or municipal employees.

# LABOR RELATIONS STATUS FOR UWHCA EMPLOYEES

Current law does not recognize a collective bargaining status for UWHCA employees. [s. 233.10, Stats.]

## Under 1995 Act 27

Under the prior structure of 1995 Act 27, until the enactment of 2011 Act 10, the Wisconsin Employment Peace Act governed collective bargaining contract negotiations for professional represented employees with UWHCA, and the State Employment Labor Relations Act governed negotiations for nonprofessional represented employees with the UWHC Board.

For purposes of collective bargaining, 1995 Act 27 modified the Employment Peace Act to include UWHCA in the applicable definition of an "employer," which otherwise excluded the state and any political subdivision. [s. 111.02 (7), 1995 Stats., as amended by SEC. 3782g of 1995 Act 27.] The act also specified that UWHCA's authority to govern its employees was subject to "the duty" to engage in collective bargaining with a recognized or certified collective bargaining unit under the Employment Peace Act. [s. 233.10 (2) (intro.), as affected by SEC. 6301m of 1995 Act 27.]

1995 Act 27 also modified the State Employment Labor Relations Act to include employees of the UWHC Board, who remained state employees in the classified service, in the applicable state employee bargaining units. The act specified, however, that the UWHC Board, rather than the state, was responsible for collective bargaining with those units, and further specified that the agreements were not subject to approval by the Joint Committee on Employment Relations, as were other state employee collective bargaining agreements. [ss. 111.815 (1), 111.825 (1m), and 111.92 (1), 1995 Stats., as affected by SECS. 3820, 3823b, 3841n, and 3841p of 1995 Act 27.]

## Under 2011 Act 10

As noted above, 2011 Act 10 eliminated the UWHC Board, and likewise eliminated the corollary provisions that governed collective bargaining with UWHC Board employees under the State Employment Labor Relations Act. [ss. 15.96 and 111.825 (1m), 2009 Stats., repealed by SECS. 12 and 279 of 2011 Act 10.]

2011 Act 10 additionally removed collective bargaining for all UWHCA employees.[3] The act specified that any collective bargaining agreements that had been in place with either entity were to remain in force until their expiration, and required UWHCA to establish the compensation and benefits of all employees from that point forward. [s. 233.10 (2), 2011 Stats.; and SEC. 9151 (2) of 2011 Act 10.]

More specifically, 2011 Act 10 deleted UWHCA from the applicable definition of an "employer" under the Employment Peace Act. [s. 111.02 (7) (a) 2., 2009 Stats., repealed by SEC. 188 of 2011 Act 10.] 2011 Act 10 also deleted the "duty" for UWHCA to engage in collective bargaining with a recognized or

[3] This change was described by the Wisconsin Legislative Reference Bureau in the analysis for the original proposed bill as eliminating the "rights" of UWHCA employees to collectively bargain, and was similarly described by the Wisconsin Legislative Council in the act memo for 2011 Act 10 as eliminating collective bargaining for UWHCA employees.

certified collective bargaining unit under the Employment Peace Act. [s. 233.10 (2) (intro.), 2011 Stats., as amended by Sec. 378 of 2011 Act 10.]

### Under Current Law

Under current law, as affected by 2011 Act 10, a collective bargaining status is not recognized for UWHCA employees. In particular, UWHCA does not have a **duty** to engage in collective bargaining with represented staff, and employees do not have a **right** to be recognized. There is no obligation on either party to meet and confer in good faith for purposes of collective bargaining.

## UWHCA Options for Union Recognition

As 2011 Act 10 removed the duty for UWHCA to recognize a union as an exclusive bargaining representative for employees, a union for UWHCA employees currently has no formally recognized powers to negotiate on subjects of collective bargaining, and it is possible that UWHCA does not have the authority to accord that status. This section briefly describes other options that may be available for union recognition at UWHCA and the analyses or considerations that may apply.

### Meet and Consult Alternative to Collective Bargaining

Although UWHCA has no duty to formally recognize a union, UWHCA may acknowledge an employee union and allow it to participate in **discussions** on wages, hours, and working conditions. A union in this circumstance would not have the power to negotiate or enforce any rights on behalf of union members, but could actively seek to take part in discussions on matters of interest to its members.

As an example, it has been reported that an automaker in Tennessee allows any union to meet with senior management at the plant to discuss salaries, benefits, and other working conditions, if union membership reaches certain threshold numbers. Without formal recognition as the exclusive bargaining representative, no action may be taken by a union to enforce the subjects of those discussions, but the union may be acknowledged and have a role in advancing the goals of its members.[4] [DePillis, Lydia, *The Strange Case of the Anti-Union Union at Volkswagen's Plant in Tennessee*, The Washington Post (Nov. 19, 2014).]

Representatives of UWHCA employees could similarly engage with management on the topics of wages, hours, and working conditions, to the extent permitted by UWHCA management. A request to "meet and consult" in this manner would not invoke the process of collective bargaining that is not recognized for UWHCA and its employees under current law.[5] Discussions may help inform management decisions, but the discussions may not create any duties or rights.

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[4] The employees in this example were allowed to be formally recognized for purposes of collective bargaining, but the workers had voted against certifying the union as the exclusive bargaining representative. Accordingly, the reason why the union could not be formally recognized differs from the statutory reason that applies to UWHCA employees, but the effect is the same, that in neither case is the union formally recognized for purposes of collective bargaining.

[5] By contrast, a request to "meet and **confer**" could cause some confusion. In the collective bargaining process, the bargaining occurs when the union representatives and management "meet and confer in good faith" on the subjects of collective bargaining. Compare, for example, the definition of "collective bargaining" for state employees, which means the performance of the mutual obligation for the parties to meet and confer at reasonable times, in good faith, with respect to the permissible subjects of bargaining. [s. 111.81 (1), Stats.] In other words, the phrase "meet and confer" carries a certain legal weight that invokes formal recognition and statutory obligations. In the context of UWHCA, an employees' union may seek to "meet and **consult**" with management, without invoking collective bargaining obligations.

## Recognition Under the National Labor Relations Act

The National Labor Relations Act (NLRA), as amended, generally governs collective bargaining for private sector employees. [29 U.S.C. ss. 141 to 191.] While it may be unlikely that a union for UWHCA employees would be recognized under the NLRA, a union could seek recognition under this law.

### NLRA Does Not Apply to Public Sector Employees

The NLRA generally does not apply to public sector employees, and explicitly excludes employers that are a "State or political subdivision thereof." [29 U.S.C. s. 152 (2).] The U.S. Supreme Court has held that an employer may be exempt under the exclusion for state and local employers if either: (1) the entity is created directly by the state, such that it constitutes an arm of government; or (2) the entity's administrators are responsible to public officials or to the general electorate.[6] [*Nat'l Labor Rel. Bd. (NLRB) v. Natural Gas Utility Dist.*, 402 U.S. 600, 604-605 (1971).]

In that case, the establishment of utility districts was authorized by law, but each district operated essentially as a private business. The Court held that a utility district was not subject to the NLRA, and among other facts considered in its holding, the Court noted that the utility district was designated as a body politic and corporate and the members of the board were appointed by elected officials. [*NLRB v. Natural Gas Utility Dist.*, 402 U.S. at 605 to 609.]

Later cases have noted, however, that the Court did not limit its review to the two parts of that test, and instead engaged in a review of the entity's characteristics. [See, for example, *Shannon v. Shannon*, 965 F.2d 542 (7th Cir. 1992).]

### NLRA Application to UWHCA

As a preliminary matter, it is arguable that UWHCA is exempt from the NLRA under both of the identified criteria. First, UWHCA is a public body corporate and politic, created by state law in ch. 233, Stats. Second, UWHCA's board of directors includes members nominated by the Governor with Senate approval, members of the Legislature, and various other appointees and officials. [s. 233.02 (1), Stats.] Members are each either responsible to public officials or are elected officials who are responsible directly to the general electorate.

Similarly, in a case on sovereign immunity, the U.S. Court of Appeals for the Seventh Circuit stated that the status of most hospital employees as state employees may enable the hospital to bargain with employees "without subjecting itself" to the jurisdiction of the National Labor Relations Board. On the other hand, for purposes of sovereign immunity, the court held that UWHCA was a privatized "independent" entity, for which the state bears no responsibility over personnel policies that were entirely within UWHCA's discretion.[7] [*Takle v. UWHCA*, 402 F.3d 768, 771 to 773 (7th Cir. 2005).]

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[6] In that decision, the Court noted that the legislative history of the NLRA showed that Congress exempted state and municipal governments because governmental employees "did not usually enjoy the right to strike." [*NLRB v. Natural Gas Utility Dist.*, 402 U.S. at 604.]

[7] Although the *Takle* decision held that UWHCA had sovereign immunity for purposes of a suit brought in federal court under the Americans with Disabilities Act, one year later the Wisconsin Court of Appeals held that UWHCA was a public body entitled to the procedural protections for governmental entities under s. 893.80, Stats. The Court of Appeals stated that the *Takle* decision was not dispositive for a suit brought in state court, and relied on the judicial notice taken in a Wisconsin Supreme Court decision that identified UWHCA as a "government-owned" facility. [*Rouse*, 2006 WI App 244, citing *Lewis v. Physicians Ins. Co.*, 2001 WI 60, fn 18.]

If NLRA status of UWHCA employees were addressed directly, arguments could be made in support of "private" over "public" employee status. In particular, the comments in the Seventh Circuit decision on "state employee" status were not central to its holding, and the holding of that decision was that UWHCA was a privatized independent entity. Furthermore, additional cases have been decided since the 1971 U.S. Supreme Court decision, which could provide alternative arguments and additional refinements in the analysis of the NLRA exemption for state and local governmental units.

## Voluntary Recognition by UWHCA

In some cases, an employer may "voluntarily recognize" a union to represent employees. Generally, this means that an employer would agree to accept the union's proof that the employees have agreed to the representation, without needing a union election. [*Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216 (7th Cir. 1997).] This type of voluntary recognition is not allowed for general municipal employees and general state employees in Wisconsin who are required to have an annual certification election. [ss. 111.70 (4) (d) 3. b. and 111.83 (3) (b), Stats.]

State law is currently silent on union recognition for UWHCA, which could allow an argument in favor of voluntary, though not mandatory, recognition.

### Fundamental Right to Self-Organization

The general purpose of the state and federal labor relations laws is to "preserve" the rights of a union to act without intimidation and to act in concert without being treated as an illegal conspiracy. [See, for example, *Int'l Union, UAWA v. Wis. Empl. Rel. Bd.*, 336 U.S. 245 (1949); and *Valley Mould & Iron Corp. v. NLRB*, 116 F.2d 760 (7th Cir. 1940).]

In that vein, courts have stated that the rights of self-organization and collective bargaining are a "fundamental right" that existed prior to state and federal labor relations laws. The rights are a "natural right," equal to the right of free speech, which are recognized and protected by labor relations laws. As stated by the U.S. Supreme Court, the labor relations laws did not "create" the right to self-organization, but were created to safeguard the fundamental right to organize. [*Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 263 to 264 (1940), citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 to 34 (1937); and see, for example, *Jefferson Elec. Co. v. NLRB*, 102 F.2d 949 (7th Cir. 1939); and *Inland Steel Co v. NLRB*, 170 F.2d 247 (7th Cir. 1948).]

### Limited Self-Organization Rights of Public Employees

Public employees, however, do not necessarily have that fundamental right. The cases where a fundamental right to self-organization has been recognized have been in the context of private sector employees.

In particular, the historical recognition of collective bargaining for public sector employees has been more complicated. Cases have intersected with issues of the government acting in its sovereign capacity and other limits on matters of "public concern." [See, for example, *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011); Catherine Phillips, *The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right*, 10 First Amend. L. Rev. 652 (2012); and Wm. A. Herbert, *Public Sector Labor Law and History: The Politics of Ancient History?*, Hofstra Labor and Empl. L. J., Vol. 28, Iss. 2, Article 5 (2011).]

For example, as discussed by the Florida Supreme Court, a city had no "legal duty" to recognize a union for the purposes of collective bargaining. In that case, the city charter did not impose a duty on the governmental employer to recognize a union, and instead established a civil service system for both

classified and unclassified employees that the Court stated provided a "complete plan" for protecting employees and fixing hours, wages, and conditions of employment. The Court held that the state's protections for private sector unions did not apply. [*Miami Water Works v. Miami*, 157 Fla. 445 (1946).]

### Application of Voluntary Recognition for UWHCA

As noted above in the description of UWHCA employees' labor relations status, 2011 Act 10 simply deleted the obligation and duty for UWHCA to engage in collective bargaining with its employees, and did not replace the former duty with language prohibiting collective bargaining. Under Wisconsin law, the elimination of a statutory provision often means that the subject of the law is thereafter prohibited. On the other hand, silence in state law may also mean that the subject is not regulated, and that the subject at issue is permitted.

Furthermore, arguments could be made to distinguish cases such as the *Miami Water Works* decision. In that case, although it was only one factor in its holding, the Florida Supreme Court was persuaded partially by the mandatory comprehensive civil service system; no such system is required for UWHCA employees.

Similarly, arguments could be made to distinguish the decision in *Rouse*, in which the Wisconsin Court of Appeals held that UWHCA is a public body entitled to the procedural protections for governmental entities under s. 893.80, Stats. For example, it could be argued that for purposes of labor relations, UWHCA has sole authority under s. 233.10 (2), Stats., and other provisions in ch. 233, Stats., to control its personnel policies. The only statutory limit on that authority is the requirement to participate in the benefits administered by the Department of Employee Trust Funds.

## SUMMARY

In summary, UWHCA has no duty to recognize a union for purposes of collective bargaining on wages, hours, and conditions of employment, but a union representing employees could have arguments for other alternatives. In particular, employees may seek to "meet and consult" with UWHCA to discuss those topics, may argue for NLRA coverage, or may seek voluntary recognition by UWHCA.

Please let me know if I can provide any further assistance.

MSK:jal