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Public Employers May Reduce Non-Pension Retiree Benefits

On December 30, 2008, the Wisconsin Supreme Court issued a significant decision that will help municipalities control the crushing costs of health care and bring the benefits more in line with those in the private sector. Alan Levy of Lindner and Marsack, S.C. represented the City of Milwaukee in the case which will have significant ramifications for all governmental employers.

Private employers subject to the Employee Retirement Income Security Act ("ERISA") have long been permitted to modify, reduce, or eliminate non-pension retiree benefits such as health insurance by amending the program pursuant to the procedures in its plan document. However, because ERISA does not cover "governmental plans," Wisconsin courts have frequently held that similar savings were not possible for municipalities, school districts, and other local governmental entities. This inflexibility affected more than 14% of Wisconsin's workforce. Courts have said such changes are inequitable if implemented after the employee has performed the work required for the benefit.

Now, in Loth v. City of Milwaukee, the Wisconsin Supreme Court has held that such retiree benefits do not automatically vest as soon as an active employee has satisfied a minimum service requirement. The Court of Appeals had held below that work performance alone earned a retiree the earlier version of health insurance benefits. Now, in a unanimous decision written by Chief Justice Abrahamson, the Supreme Court has reversed that decision and held that a benefit which was payable upon completing 15 years of service, reaching age 60, and actually retiring could be reduced for any employee who had met the service criteria but not the age and/or retirement requirements when the change was implemented.

The City of Milwaukee benefit change at issue in Loth had an estimated value of \$6,800,000.00 over ten years. Citing rulings that Wisconsin public employee benefits are vested based solely on work performance, even if the employee's union agrees to a change, the Court of Appeals said Loth had an unrestricted right to receive the more expensive benefit. The Supreme Court, however, held that while public employees who have already retired must receive whatever benefit was in effect for them when they retired, a municipality may alter the benefit program under which active employees are working, even if they have accrued the service credits needed for that benefit.

The crucial test will now be whether eligibility criteria for the benefit include requirements other than service, such as minimum age and/or receipt of a particular form of pension. Benefits for active public employees do not vest until

all eligibility criteria are met, and those benefits can be reduced or eliminated as to these non-vested active employees.

A copy of the Supreme Court's decision is available here. If you have any questions about the case or how these principles may apply to your specific circumstances, please contact Alan Levy directly.

If you have any questions about the issues raised by this e-alert, please feel free to contact Alan M. Levy at (414) 273-3910 or by e-mail at alevy@lindner-marsack.com

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