

Cutting Off Your Nose To Spite Your Face? How Ending Collective Bargaining in Wisconsin and Beyond Could Damage Federal Transit Assistance.

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Dramatic events unfold at state legislative levels, as governors and legislators debate how best to achieve a level of budget balance. Competing demands, often based on political outlooks, drive legislative agendas. Stark conclusions have been reached in the state of Wisconsin, with Ohio and others close behind. There, the Republican legislature voted to greatly reduce, and for some categories eliminate, the collective bargaining rights of public employee unions. Absent this result, governors claim that massive layoffs of public employees will follow.

Yet the important budget issues and decisions are not without important economic pitfalls, which may not be readily apparent. Based on an inquiry from the Wisconsin Legislative Fiscal Bureau, the U.S. Department of Labor ("DOL") issued a letter, dated February 16, 2011, that raised the latent issue of a loss of federal transit funds if existing collective bargaining rights were extinguished. The impact of the DOL letter was immediate: the Appleton, Wis., area stated, in an alert, that "We need to find a solution or transit agencies in Wisconsin will lose \$46.6 million in federal funding"; and in Ohio, the Cleveland Plain Dealer, in an article dated February 23, 2011, cited a potential loss of up to \$171 million in federal transit money.

The Potential Federal Grant Issue

The issue identified by DOL resides in what is informally known as "Section 13(c)" collective bargaining rights, established under the Federal Transit Act. Essentially, as DOL stated, "Section 13(c) requires governing bodies to continue 'collective bargaining rights' that existed at the time of the initial influx of Federal assistance." The Federal Transit Administration ("FTA") cannot release grant funds until the DOL reviews and approves the protective collective bargaining rights arrangements when federal monies are to be used to "acquire, improve, or operate a transit system." The proposed Wisconsin legislative plan, and the proposed plans of

other states, do not currently make provision to protect transit employees' collective bargaining rights (which the state does protect for police and fire employees).

Ambiguities and a Possible Fix

Wisconsin is a pioneer state in the protection and codification of public employee collective bargaining agreements. However, the language of Section 13(c) and its application to the current legislative programs remains unclear. The original intent of the FTA law was to protect private employees who worked for private bus companies purchased by public transit agencies. This statute does nothing, however, to suggest ways to reconcile statutory, and grant-based, labor protections (*i.e.*, "13(c) rights") with a state ban on collective bargaining with public employees or their union. Yet, an approach may be found in long-ago administrative workings of the FTA program, assuming that the FTA itself decides to withhold grant approvals for states with such new laws.

Under the so-called "Memphis Plan," a public transit operating agency might hire a private management company, which then becomes, in effect, the "employer." The affected transit workers can then bargain with the private manager for future benefits. This approach was used for Memphis, Tenn., where state law forbade public-employee collective bargaining. Of course, a transit agency that uses this approach is free to disregard the private manager's handling of these negotiations, and can then change managers, if desired (although there may be certain issues in doing so). Nonetheless, a "Memphis Plan" approach might provide a quick fix to permit ongoing grant relationships for transit funds, which can be substantial.

Who Might be Affected?

In addition to public transit agencies, and public transit employees and their unions, transit and transportation companies that might provide detailed management services could have an interest in the FTA approach in this matter. The demands of the FTA could result in immediate contracting out opportunities to private sector companies with these skills. Additionally, likely legislation and rulemaking to "fix" the conflicting federal and state statutes could provide an opportunity for both public and private sectors.

The Reed Smith Public Policy & Infrastructure practice monitors such federal and state legislation and contract and grant requirements. Please contact one of the authors, below, with



any questions regarding the FTA program, and transit and transportation funding and requirements, as well.

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