

July 10, 2020

Wisconsin Supreme Court Considers Separation-of-Powers Issues in Upholding Most of So-Called “Lame Duck” Legislation

In a series of opinions spanning more than 140 pages issued July 9, 2020, the Wisconsin Supreme Court largely upheld 2017 Wisconsin Act 369, concluding the legislation is not facially unconstitutional. Together with two other pieces of contemporaneous legislation, Act 369 came to be known as the “lame duck” legislation, so named because the legislation was enacted by the Legislature and signed by the Governor after the 2018 election and prior to the swearing in of the new Governor and Legislature.

In Act 369, the Legislature modified the balance of power between the legislative and the executive branch, raising sticky separation-of-powers questions. Among other things, Act 369 provided the Legislature with additional authority over certain areas of state government, including the right of the Legislature to intervene in certain litigation involving the state and approve some settlements of civil litigation where the state is a party. Act 369 also included provisions relating to agency guidance documents, deference to agency interpretations of state law, and suspension of administrative rules. The state’s then-incoming Governor, Tony Evers, and Attorney General, Joshua Kaul, criticized the legislation as an attempt to strip authority from their positions.

The majority opinion of the court was presented in two parts—one authored by Justice Brian Hagedorn and another authored by outgoing Justice Daniel Kelly. Justice Kelly’s opinion includes the majority’s opinion as to certain provisions of Act 369 relating to agency guidance documents.

Hagedorn’s lead opinion contains the majority’s decision on all other issues. As discussed below, the court largely upheld the challenged provisions of Act 369, but it did strike down certain provisions relating to agency guidance documents.

At the outset, it is important to note that the court only addressed challenges that were properly raised and

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developed by the challengers. Moreover, this case presented only facial challenges to provisions of Acts 369 and 370. In a facial challenge to the constitutionality of a statute, the challenger is faced with a very high burden. He or she must show that the statute is constitutional under any circumstances; put another way, he or she must show that there is no possible constitutional application of the statute. As a result, the court's decision is limited. Its decision to uphold provisions of Act 369 in this case does not foreclose the possibility that one or more provisions could be held unconstitutional in a fact-specific ("as-applied") challenge brought in the future.

Legislative Intervention in Litigation and Authority to Approve Settlements Upheld

Act 369 included changes creating a greater role for the Legislature in certain litigation. Specifically, three legislative committees have authority to intervene in actions in state or federal court when a party argues a statute is unconstitutional, preempted by federal law or "otherwise challenges [the statute's] construction or validity."

Act 369 also limited the authority of the Attorney General to settle or compromise civil litigation on behalf of the state. Prior law granted the Attorney General broad authority to settle civil actions. Under Act 369, in any civil action brought by the state, the Attorney General must obtain the approval of a legislative intervenor, or, if there is no legislative intervenor, the Legislature's Joint Committee on Finance (JFC). Moreover, if the settlement concedes that a statute is unconstitutional, invalid, or is preempted by federal law, the Joint Committee on Legislative Organization must also approve of the plan of settlement. Act 369 also placed similar limits on the ability of the Attorney General to settle actions seeking injunctive relief or involving a proposed consent decree.

The court held that the plaintiffs' challenges to these provisions failed because there are "at least some cases" in which the Legislature's involvement would be appropriate, and thus the statutes at issue could be constitutionally applied. "While representing the State in litigation is predominately an executive function, it is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature," the court wrote.

The court again emphasized the narrow nature of its decision: "We express no opinion on whether individual applications or categories of applications may violate the separation of powers, or whether the legislature may have other valid institutional interests supporting application of these laws."

On the ground, Act 369's provisions requiring approval of settlements by the Legislature's Joint Finance Committee (JFC) raised issues surrounding the exchange of confidential information between the Committee and lawyers at the Wisconsin Department of Justice. Those questions initially prompted public disputes between JFC and the Attorney General, and several settlements were held up in the process. More recently, the dam seems to have broken, and JFC has approved several settlements. Clients involved in civil enforcement actions or other litigation where the state is a party should keep this procedural step in mind, should a settlement be reached with the state.

The narrow nature of the court's ruling also invites future challenges to the legislative intervention and settlement approval portions of Act 369. These provisions implicate a shared sphere of executive and legislative authority, and the Supreme Court appears poised to ensure that the application of these provisions does not lead to constitutional overreach. At the same time, the decision can also be seen as endorsing at least a limited role for the Legislature going forward, particularly where the validity of statutes is at issue.

Agency Guidance Documents – Mixed Results, But a Clear Win for the Regulated Community

As noted above, the court struck down some provisions of Act 369 and upheld others. Act 369 purported to regulate the content and process for adopting agency guidance documents. Irrespective of the constitutionality of any specific provision, the court made clear that guidance documents are not law and cannot carry the force of law:

Our analysis on this point necessarily begins with the undisputed understanding that a guidance document does not have the force or effect of law. . . .

. . . They are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply "explain" statutes and rules, or they "provide guidance or advice" about how the executive branch is "likely to apply" a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself. They communicate intended applications of the law—they are not the actual execution of the law. **Functionally, and as a matter of law, they are entirely inert.** That is to say, they represent nothing more than the knowledge and intentions of their authors. . . .

SEIU, Local 1, et al. v. Vos, et al., 2020 WI 67, ¶¶ 100-02 (emphasis added).

Given the majority's clarification of what a guidance document is or can be, the specifics of which portions of Act 369 do or do not remain in effect is much less concerning.

Among other things, Act 369 required agency guidance to be posted for public comment for a period of time prior to its adoption. It also required the agency to "identify the applicable provision of federal law or the applicable state statutory or administrative code provision that supports any statement or interpretation of law that the agency makes in any publication," including guidance documents.

The court reasoned that imposing these "pre-clearance" and "content" limitations on agency guidance documents impinges upon the executive's core authority to create and disseminate guidance documents, and as a consequence, is facially unconstitutional.

The court reasoned that the executive, in the course of faithfully executing the laws, may disseminate his or her views about what the law is. Indeed, guidance documents simply advise the public about the executive's interpretation of the law; they are nothing more than "the written record of the executive's thoughts about the law and its execution." Guidance documents, the court writes, "cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything."

The court contrasts guidance with rulemaking authority. Agency rulemaking is a limited exercise of legislative power delegated by the legislature. It results in rules with the force and effect of law. Rulemaking authority, the court explains, is "borrowed" from the Legislature, and agencies have no inherent authority to make rules. If the Legislature must grant rulemaking power, it logically follows that it may take it away. The same is not true of guidance documents, which, as the court observes, agencies had been issuing long before the enactment of Act 369.

Perhaps more important are the guidance-related provisions of Act 369 that survived the court's decision. The court left untouched a provision of Act 369 that expressly confers a right to seek judicial review of agency guidance. As a result, regulated entities continue to have a clear right to seek judicial review of agency guidance or to allege that agency guidance is an illegal rule masquerading as guidance.

Multiple Suspensions of Administrative Rules

Under Wisconsin law, the Joint Committee for Review of Administrative Rules (JCRAR) may review and temporarily suspend an administrative rule. Under prior law, JCRAR was limited to one three-month suspension. Act 369 permits “multiple” three-month suspensions, with no limitation on the total time a rule may be suspended.

Relying on the posture of this case (a facial challenge), the court concludes that suspending a rule twice (for a total of six months) is not constitutionally problematic. The decision leaves unanswered the important question of how many times JCRAR could constitutionally suspend an administrative rule and invites further litigation along those lines.

Deference to Administrative Agencies

The court upheld a provision of Act 369 that partially codifies its holding in *TetraTech EC, Inc., et al. v. Wisconsin Department of Revenue*, 2018 WI 75. In *Tetra Tech*, the Wisconsin Supreme Court determined that Wisconsin courts would no longer defer to administrative agencies’ conclusions of law. Because the relevant provision in Act 369 merely instructed agencies not to ask for something (deference as to legal conclusions) that courts should not give, the court found the provision constitutional.

Conclusion

The case is *SEIU, Local 1, et al. v. Vos, et al.*, 2020 WI 67. For more information, please contact your Michael Best attorney or an attorney listed below.

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