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Legal Opinion 2010-013

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Brentt Ramharter, Finance Director; Gail Verlanic, Human Resource Director; Marty Rehbein, City Clerk

CC: Employee Benefits Committee; Department Heads; Legal Staff

FROM: Jim Nugent, City Attorney

DATE: December 6, 2010

RE: Montana laws pertaining to public employees' health insurance

FACTS:

During the Monday, September 13, 2010 city council public hearing discussion and debate pertaining to city budget adoption for Fiscal Year 2011, several city council members commented on the City of Missoula's group health insurance plan. The discussion included comments asserting city employees have a "Cadillac" health insurance plan as well as suggestions of reducing property taxes by decreasing the City's contribution to the health plan. As a caveat for the future, it should be noted Mont. Code Ann. § 39-31-305 provides that public employers have a duty to "negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment." Pursuant to Montana's statutes, "fringe benefits" include health insurance. The State of Montana currently contributes more money per month, per employee than the City of Missoula does for health insurance premiums.

If a majority of city council members are interested in considering reducing property taxes by reducing the City's contributions to the health plan, several important state laws and attorney general opinions must be called to the attention of city officials.

ISSUES:

1. Pursuant to Montana law, do public employers in Montana have a mandatory duty to collectively bargain in good faith with unions representing its employees concerning health insurance as a fringe benefit?
2. Is a public employer's group health insurance benefit plan expected to be a single group plan, which is the same for all employees?

CONCLUSIONS:

1. Mont. Code Ann. § 39-31-305 imposes a statutory duty for public employers to bargain collectively in good faith pertaining to wages, hours, fringe benefits, and other conditions of employment with unions representing their employees. Pursuant to several sections of Montana law, the term *fringe benefits* is defined as including health insurance. Former Montana Attorney General Mike Greely stated in 42 Op. Atty. Gen. 37 (1987) that in Montana there is no dispute that “group health insurance coverage is a mandatory subject of bargaining.” Further, AG Greely stated that public employers are obligated to bargain over health insurance matters such as: a) monetary coverage limits; b) deductible amounts; c) the level of employee contributions; d) and other matters which may involve modification of an existing group health insurance plan.

2. The statutory intent appears to be that a public employer provide a single group health insurance plan to cover its employees. Mont. Code Ann. § 2-18-702 provides that cities shall upon approval of two-thirds (2/3) vote of their respective officers and employees enter into group hospitalization and medical health plans for the benefit of their officers and employees and their dependents. Mont. Code Ann. §§ 7-32-4117 and 7-33-4130 expressly provide that if a city provides group health insurance to other city employees pursuant to Montana Code Annotated Title 2, chapter 18, part 7, the city shall provide the same health insurance to city police and firefighters. Further, AG Greely pursuant to 42 Op. Atty. Gen. 37 held that a county with general government powers may not establish a separate health benefit plan for certain employees in a collective bargaining unit when a county employee wide group health insurance plan adopted in accordance with Mont. Code Ann. § 2-18-702(1) already exists.

LEGAL DISCUSSION:

Title 2, chapter 18, part 7, Montana Code Annotated is entitled *Group Insurance Generally*. Mont. Code Ann. § 2-18-702 entitled *Group Insurance for Public Employees and Officers* provides that public employees may vote by a two-thirds (2/3) vote to have their public employer provide group health insurance to the public employees and the public employer shall provide group insurance for the employees as well as their dependents.

2-18-702. Group insurance for public employees and officers. (1) (a) Except as provided in subsection (1)(c), all counties, cities, towns, school districts, and the board of regents shall upon approval by two-thirds vote of their respective officers and employees enter into group hospitalization, medical, health, including long-term disability, accident, or group life insurance contracts or plans for the benefit of their officers and employees and their dependents. The laws prohibiting discrimination on the basis of marital status in Title 49 do not prohibit bona fide group insurance plans from providing greater or additional contributions for insurance benefits to employees with dependents than to employees without dependents or with fewer dependents.

Mont. Code Ann. § 2-18-702(1)(a).

Mont. Code Ann. § 2-18-703(2) specifically identifies the monthly contributions the State of Montana and Montana University System must make to each public employee's monthly group health insurance premium to be as follows:

- (1) \$626 a month from January 2009 through December 2009
- (2) \$679 a month from January 2010 through December 2010; and
- (3) \$733 for January 2011 and for each succeeding month

Mont. Code Ann. § 2-18-703(4)(a) and (b) provides:

(4) (a) For employees of political subdivisions, as defined in 2-9-101, except school districts, the employer's contributions may exceed but may not be less than \$10 a month.

(b) Subject to the public hearing requirement provided in 2-9-212(2)(b), the amount in excess of the base contribution of a local government's property tax levy for contributions for group benefits as determined in subsection (4)(c) is not subject to the mill levy calculation limitation provided for in 15-10-420. (Emphasis added.)

The required city monthly health insurance contribution is not statutorily established. However, health insurance coverage has been a regular topic of city collective bargaining for more than 35 years. City employee wage demands have been less in collective bargaining negotiations over the years in exchange for city monetary contributions to the group health insurance plan. City contributions to the health plan are less costly than higher wages. Historically there are no additional matching dollars for social security, PERS, etc. paid by the city on health insurance contributions. The current city monthly monetary contributions to group health insurance are lower than the State of Montana and Montana University System monthly contributions. Currently city contributions are generally established through city administration recommendations after consultation and discussion with the City of Missoula Employee Benefits Committee, a committee which includes a city council member designated to attend.

The City of Missoula currently negotiates with respect to nine collective bargaining agreements with a majority of city employees. Mont. Code Ann. § 39-31-305 imposes a duty on public employers to bargain collectively in good faith with unions representing its public employees. A duty of good faith bargaining exists "with respect to wages, hours, fringe benefits, and other conditions of employment. (Emphasis added.) Mont. Code Ann. § 39-31-305 provides:

39-31-305. Duty to bargain collectively -- good faith. (1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public

employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

(3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith. (Emphasis added.)

Mont. Code Ann. § 1-2-107 of Montana's statutory rules of construction with respect to laws provides:

1-2-107. Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. (Emphasis added.)

Health insurance is an employment fringe benefit. Three Montana statutes define fringe benefits including Mont. Code Ann. § 18-24-401 (construction contract standard prevailing wages); Mont. Code Ann. § 20-4-204 (teachers, superintendants and principals); and 39-2-903 (wrongful discharge from employment). All three definitions identify medical or health insurance as a fringe benefit.

Montana Attorney General Mike Greely pursuant to 42 Op. Att'y Gen. 37 (1987) stated:

Montana recognizes and protects the right of state and local government employees to organize themselves for collective bargaining purposes. See §§ 39-31-101 to 409, MCA. Central to this right is the employer's and labor organization's mutual obligation to bargain in good faith "with respect to wages, hours, fringe benefits, and other conditions of employment[.]" § 39-31-305(2), MCA. There is accordingly no dispute that group health insurance coverage is a mandatory subject of bargaining. See 38 Op. Att'y Gen. No. 20.

Nonetheless, it is equally well established that, when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization. 39 Op. Att'y Gen. No. 116 at 408 (1980); 38 Op. Att'y Gen. No. 20; 37 Op. Att'y Gen. No. 113 at 486 (1978). This conclusion derives not from any express provision in the public employee bargaining statutes but from general principles of statutory construction. . . . (Emphasis added.)

A.G. Greely went on to explain that Mont. Code Ann. § 2-18-702(1), quoted earlier herein, pertaining to the establishment of public employee group health insurance plans was mandatory. AG Greely also noted and emphasized that modification to group health insurance plans, such as monetary coverage limits, deductible amounts, employee contributions and other modifications, the public employer “remains obligated to bargain over.

The language of this provision is mandatory and clearly contemplates, inter alia, county-wide group health insurance plans upon the necessary employee approval. See 37 Op. Att’y Gen. No. 54 at 213 (1977). The apparent purpose of employee-wide coverage is reduction of insurance costs through creation of a risk pool which is as large as possible. See Feb. 8, 1979 Minutes of Select Committee on Employee Compensation at 5-6. Irrespective of the precise reason for the comprehensive coverage requirement, the provision neither expressly nor impliedly authorizes excision of one employee group from that coverage merely because its terms and conditions of employment are subject to collective bargaining. Since section 2-18-702(1), MCA, is the more specific statute with respect to the issue presented and speaks in mandatory terms, I conclude that a county with general government powers may not enter into a group health insurance plan, separate from that covering its other employees, for individuals who are part of a collectible bargaining unit. It must be emphasized, however, that such a county remains obligated to bargain over other health insurance matters, such as monetary coverage limits, deductible amounts, or the level of employee contributions, which may involve modification of an existing group plan. (Emphasis added.)

A.G. Greely concluded his opinion with:

A county with general government powers may not establish a separate health benefit plan for certain employees in a collectible bargaining unit when a county employee-wide group insurance plan adopted in accordance with section 2-18-702(1), MCA, already exists.

Mont. Code Ann. § 2-9-212, entitled *Political subdivision tax levy to pay contributions*, authorizes tax levies for local government insurance, which tax levy “is not subject to the mill levy calculation limitation provided for in 15-10-420.” Mont. Code Ann. § 2-18-701 specifically pertains to *Group insurance generally*. This section, pursuant to Mont. Code Ann. § 2-18-701(2)(a)(v), defines “employee” as including “elected officials” for purposes of health insurance, such as the group health insurance plan that is mandatory pursuant to § 2-18-702 if two-thirds (2/3) of the employees vote for group health insurance. Mont. Code Ann. § 2-9-212 provides:

2-9-212. Political subdivision tax levy to pay contributions. (1)
Subject to 15-10-420 and subsection (2) of this section, a political subdivision, except for a school district, may levy an annual property tax in the amount necessary to fund the contribution for insurance, deductible

reserve fund, and self-insurance reserve fund as authorized in this section and to pay the principal and interest on bonds or notes issued pursuant to 2-9-211(5).

(2) (a) If a political subdivision makes contributions for group benefits under 2-18-703, the amount in excess of the base contribution as determined under 2-18-703(4)(c) for group benefits under 2-18-703 is not subject to the mill levy calculation limitation provided for in 15-10-420. Levies implemented under this section must be calculated separately from the mill levies calculated under 15-10-420 and are not subject to the inflation factor described in 15-10-420(1)(a).

(i) Contributions for group benefits paid wholly or in part from user charges generated by proprietary funds, as defined by generally accepted accounting principles, are not included in the amount exempted from the mill levy calculation limitation provided for in 15-10-420.

(ii) If tax-billing software is capable, the county treasurer shall list separately the cumulative mill levy or dollar amount on the tax notice sent to each taxpayer under 15-16-101(2). The amount must also be reported to the department of administration pursuant to 7-6-4003. The mill levy must be described as the permissive medical levy.

(b) Each year prior to implementing a levy under subsection (2)(a), after notice of the hearing given under 7-1-2121 or 7-1-4127, a public hearing must be held regarding any proposed increases.

(c) A levy under this section in the previous year may not be included in the amount of property taxes that a governmental entity is authorized to levy for the purposes of determining the amount that the governmental entity may assess under the provisions of 15-10-420(1)(a). When a levy under this section decreases or is no longer levied, the revenue may not be combined with the revenue determined in 15-10-420(1)(a).

(3) (a) For the purposes of this section, "group benefits" means group hospitalization, health, medical, surgical, life, and other similar and related group benefits provided to officers and employees of political subdivisions, including flexible spending account benefits and payments in lieu of group benefits.

(b) The term does not include casualty insurance as defined in 33-1-206, marine insurance as authorized in 33-1-209 and 33-1-221 through 33-1-229, property insurance as defined in 33-1-210, surety insurance as defined in 33-1-211, and title insurance as defined in 33-1-212. (Emphasis added.)

Also Montana municipal budget and tax law expressly authorizes that tax levies for group health insurance may be separate and in addition to the general municipal government tax levy calculation. See Mont. Code Ann. § 15-10-420 entitled *Procedure for calculating levy* subsection(9)(a)(vi).

(9) (a) The provisions of subsection (1) do not prevent or restrict:
... (vi) the portion that is the amount in excess of the base contribution

of a governmental entity's property tax levy for contributions for group benefits excluded under 2-9-212 or 2-18-703

CONCLUSIONS:

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