A Service Program of The Pennsylvania Municipal League | Articles Provided by Campbell Durrant Beatty Palombo & Miller, P.C.

JUNE 2019

PELRAS UPDATE

Public Employer Labor Relations Advisory Service

414 North Second Street ◊ Harrisburg, PA 17101 ◊ (800) 922-8063 ◊ PML.org

INSIDE THIS ISSUE:

The Fallout from *Janus*: Is PERA's Maintenance of Membership Provision Next to Go?

by Paul Lalley, Esq.

The U.S. Supreme Court's decision last year in *Janus v. AFSCME, Council 31* ended fair share fees for public sector unions as unconstitutional. A group that has supported litigation against public sector unions in Pennsylvania—the Fairness Center—has taken aim at the constitutionality of the maintenance of membership provision in Act 195, in a lawsuit filed on March 27, 2019 in federal court, *Wessner v. AFSMCE, Council 13.*

As a quick refresher, Act 195 authorizes "maintenance of membership" provisions in collective bargaining agreements. This means that the public employer and the union that represents the bargaining unit employees can agree that a bargaining-unit employee who is a dues-paying union member at the beginning of the collective bargaining agreement ("CBA") must maintain his union membership for the duration of the agreement, with one narrow exception. The exception is that bargaining-unit employees must have the right to resign their union membership during the last 15 days of the CBA's term. In other words, if the CBA has a four-year term from January 1, 2019 to December 31, 2022, the person who is a union member on January 1, 2019, must remain a union member (and pay his union dues) until December 16, 2022, at which date he may finally resign his membership (of course, only if he is aware of his right to do so).

The plaintiff, Tammy Wessner, is a psychiatric aide at Wernersville State Hospital. She alleges that she tried to resign her AFSCME membership in 2018 but that AFSCME refused to recognize her resignation. AFSCME's CBA with the Commonwealth runs from July 1, 2016 to June 30, 2019, so Ms. Wessner's resignation did not fall within the 15-day period authorized by Act 195. Because the CBA also authorizes automatic union dues deductions from her paycheck, Ms. Wessner's AFSCME dues continued to be deducted from her pay after her attempt to resign her union membership. As the Fairness Center states in its description of the case: "Ms. Wessner seeks to establish that her constitutional rights cannot be limited to a 15-day resignation window every three or more years." The complaint asks the court to

The PELRAS Update is a bimonthly publication of the Public Employer Labor Relations Advisory Service, a program of the Pennsylvania Municipal League. It is published in February, April, June, August, October, and December. PELRAS membership information requests and other inquiries should be directed to 800-922-8063.

declare that Act 195's maintenance of membership provision violates Wessner's First Amendment right to freedom of association, and asks for a permanent injunction barring implementation of the CBA's "union security" (i.e., maintenance of membership) clause.

The *Wessner* case puts the ramifications of the *Janus* decision front and center. If, as *Janus* held, fair share fees unconstitutionally compel a person to associate with the union, then why is compulsory union membership for the duration of a CBA any different? The issue may very well revolve on whether the court finds that Act 195's 15-day window to opt out of union membership serves the state's interests in stability in employer-union relations, or whether it unduly burdens a public employee's right not to associate with the union when she decides she no longer wants to be a member. The case is worth following, and we will give updates on its status in future PELRAS presentations.

Website Accessibility Litigation Is On The Rise: Is It Time for Your Website to Get With the Times?

by Joshua C. Hausman, Esq.

It would be hopelessly anachronistic to begin this update by pointing out that websites and web-based services (such as "apps") have become the primary mediums by which many of us seek information, order goods and services, or engage with others. The same holds true for our interactions with local governments. Whether a person wants to know the date and time of the next council meeting, pay their taxes, or submit a complaint about the noisy neighbors next door, municipalities are increasingly choosing to provide these services over the internet. When municipal services are offered online, the result is often increased municipal efficiency and improved access for residents. However, if these web-based services are inaccessible or unusable to individuals with disabilities which limit their capacity to engage with the content, these advantages are not realized, and the municipality may be in violation of its legal obligations to provide equal access to its services.

Title I of the Americans with Disabilities Act ("ADA"), which applies to covered employers like local governments, provides that employers shall not discriminate against qualified individuals with a disability on the basis of such disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. Covered employers are further required to provide reasonable accommodation to qualified individuals with a disability, unless doing so would present an undue hardship or direct threat to the health or safety of the workplace. 42 U.S.C. § 12113. Title II of the ADA applies to "public entities" such as state or local governments, as well as departments, agencies, special purpose districts, or other instrumentalities of state or local governments, and provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of "public accommodations." 42 U.S.C. § 12182.

The ADA, which was signed into law by President George H.W. Bush in 1990, makes no specific reference to the internet, websites, or web-based services. However, the United States Department of Justice, which is the federal agency charged with enforcement of the ADA and with the promulgation of regulations interpreting the provisions of the law, has taken the position that the ADA applies to websites under both Title II and Title III, which applies to public accommodations. While the Department of Justice under President Trump in 2017 withdrew two (2) Advance Notices of Proposed Rulemaking which had been previously issued and which would have sought to establish standards for website accessibility under the ADA (including one (1) issued only the prior year), the Department's reluctance to provide clear guidance on the issue has

not stymied the steady rise of web accessibility lawsuits. According to recent reports, the number of website accessibility lawsuits filed in federal court increased to at least 2,258 in 2018 — a 177% increase over 2017. In September of 2018, Assistant United States Attorney General Stephen E. Boyd sent a letter to Congress in which he stated that it was the position of the Department of Justice that the lack of a specific regulation establishing website accessibility standards does not lessen the obligation to comply with the ADA.

Earlier this year, the Ninth Circuit Court of Appeals reinstated a complaint filed by a blind person against Domino's Pizza under Title III of the ADA, who alleged that Domino's had failed to design its website and its mobile app so as to be compatible with the screen-reading software which he used to navigate the web. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019). Domino's argued that the lack of clear Department of Justice standards deprived it of fair notice of what exactly it was required to do under the ADA to make its web-based offerings accessible. The Ninth Circuit rejected this argument on the basis that Domino's was required to comply with its statutory obligations under the ADA despite the lack of clear regulatory standards.

Website accessibility lawsuits are expected to increase again in total number in 2019, and the trend towards internet platforms for municipal services will only continue. Meanwhile, many municipal employers rely on web-based services for accepting applications from prospective employees and for managing payroll and other employment information for current employees. What is a state or local government supposed to do to ensure that its web-based services are accessible to disabled persons in the absence of regulatory action to establish standards on website accessibility? The Department of Justice has given no indication that it intends to revisit the potential issuance of regulations in the near future. However, guidance may be found in some of the earliest Department publications on the subject: *Accessibility of State and Local Government Websites to People with Disabilities* (June 2003) (available at https://www.ada.gov/websites2.htm) and *Website Accessibility Under Title II of the ADA* (May 2007) (available at https://www.ada.gov/pcatoolkit/chap5toolkit.htm).

The more recent of these publications identifies common barriers faced by persons with disabilities when interacting with web-based content. These include images without text-based equivalent content to aid the visually-impaired and those who rely on screen-reading software and documents which are not accessible in text format for the same reasons. Also identified are restrictions or barriers to allowing persons with visual impairments to adjust color schemes and fonts to increase readability. Video content may lack simple accessibility accommodations, such as captions to aid the hearing impaired. Beyond these common issues, the publication encourages web administrators to conduct a comprehensive review of their organization's web-based content in order to identify and correct other barriers to accessibility. The guidance document also encourages enlisting disability groups to test web content and to provide feedback and suggestions for improving accessibility. Additionally, the guidance document instructs organizations to ensure that there are alternative ways available for individuals with disabilities to access the information and services available on the website. However, as web-based content continues to increase in preeminence over alternative ways of doing business, the importance of ensuring that internet content is accessible will also increase.

The earlier of these publications provides additional guidance to website administrators and IT professionals for increasing the accessibility of websites and web-based services. The publication makes reference to both "Section 508 Standards," which are the standards which federal agencies must use in developing their own internet services, and the "Web Content Accessibility Guidelines." Now known as the "Web Content Accessibility Guidelines 2.0" ("WCAG 2.0"), these are recommendations issued by a collaboration of numerous member organizations, industry leaders, and experts in the field of web programming known as the World Wide Web Consortium ("W3C"). The purpose of WCAG 2.0 is to make internet content more accessible to a wider range of persons with disabilities, as well as to make web-based content more usable in general. In 2017, the United States Access Board revised the Section 508 Standards so as to incorporate WCAG 2.0 standards for measuring the accessibility

performance of web-based offerings. Given the widespread adoption of WCAG 2.0, as noted by the Ninth Circuit in *Domino's Pizza*, municipalities should ensure that those responsible for administrating web-based content are adhering to these standards in all matters of web development.

IRS Enforcement of ACA Employer Penalties Accelerates

by David E. Mitchell, Esq.

Although the government shutdown that ended in late January 2019 temporarily slowed enforcement of Affordable Care Act employer shared responsibility penalties, the Internal Revenue Service has renewed its efforts to collect those penalties. The IRS is currently collecting penalties for calendar year 2016 and employers will soon begin receiving notices relating to calendar year 2017. One public employer recently received an IRS notice asserting that they owed over $700,000 in ACA penalties.

If a Large Employer (50 or more full-time employees or full-time equivalents, based on a 30 hour per week standard) fails to offer coverage to at least 95% of its full-time employees and their dependents over the course of the entire year, it will be subject to a Section 4980H(a) penalty calculated by multiplying the number of its full-time employees (minus 30) multiplied by $2,500 for 2019. If a Large Employer offered coverage but that coverage was either not affordable or did not provide minimum value, the Employer will potentially be subject to the Section 4980H(b) penalty. The Section 4980H(b) penalty for 2019 is calculated by multiplying just the number of employees who were offered coverage that was not affordable or did not provide minimum value and who got a premium tax credit or subsidy for getting Marketplace or Exchange coverage by $3,750 if the deficiency continues for the whole year. Penalties are calculated on a monthly basis and it is not uncommon for an employer to owe a penalty for only part of the year.

There are three key points for employers to keep in mind. First, if you receive a notice from the IRS asserting that a penalty is owed, the clock is already running and legal counsel should be contacted immediately. Employers only have 30 days to respond to an IRS penalty notice. Second, it is critical to retain complete records of what coverage was offered and copies of the employer's 1094 and 1095 filings with the IRS in a readily accessible location. In many cases penalties can be successfully appealed or reduced if they are based on mistaken information, but an employer will not be in a position to do that if the necessary records cannot be located several years later when a penalty notice is received. Finally, "part-time" employees remain the biggest potential problem with respect to ACA penalties. Many part-time employees are actually full-time employees for ACA purposes and should be offered appropriate coverage because they average 30 or more hours of paid service per week. This can easily occur where a part-timer who was originally intended to work less than 30 hours per week is asked to take on additional shifts to cover for employees on medical leaves or vacation. Large Employers should continue to track the hours of part-time employees very closely and offer appropriate coverage to those who average 30 or more hours of paid service per week.