

New Legislation May Allow Carve-Out for Bypassing Wisconsin Court of Appeals

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In an unprecedented deal for the state of Wisconsin, Foxconn, a Taiwanese electronics company, has been offered an incentive package worth an estimated \$3 billion to bring a manufacturing plant to southeast Wisconsin. Part of that incentive package was new legislation governing judicial procedures for cases involving an electronics and information technology manufacturing zone ("EITM zone"). The future location of Foxconn's plant is the only EITM zone in the state. The legislation specifies the following changes:

- Any judgment or order of a trial court ruling on a decision by a state or local official, board commission, condemnor, authority or other department concerning an EITM zone is eligible for an expedited appeals procedure;
- The court of appeals must certify an appeal to the Wisconsin Supreme Court following the parties' completed briefing to the appellate court. The Wisconsin Supreme Court must give preference to certifications in cases regarding EITM zones; and
- Any judgment or order by a trial court regarding an EITM zone is automatically stayed upon filing an appeal. Any party may petition the appellate court to modify or vacate the stay in the meantime.

Debate is growing as to the constitutionality of the new legislation, as some argue that these procedures infringe on the separation of powers enumerated in Wisconsin's constitution. Wisconsin law holds that all legislative acts are presumed constitutional; however, a showing of unconstitutionality beyond a reasonable doubt can defeat the presumption. *See, e.g., Wisconsin Retired Teacher's Ass'n v. Employee Trust Funds Bd.*

A three-part test is used to determine whether a legislative action infringes on the separation of powers implicit in Wisconsin's constitution. *See, e.g., State v. Horn.* The first step is to determine whether the subject matter of the legislation falls within the legislature's enumerated powers. The next step is determine whether the legislation's subject matter is within the judiciary's powers. If the subject matter is exclusively within the judiciary's role, as proscribed in the constitution, the analysis stops here, as any legislative exercise within this exclusive area is unconstitutional.

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If the subject matter is within both the legislature's and the judiciary's purview, then the third step of the test is to determine whether the legislation unduly burdens or substantially interferes with the judiciary's function. If the court finds the judiciary is burdened or interfered with, the legislation is unconstitutional.

This one-of-a-kind legislative carve out in exchange for Foxconn's business in Wisconsin will surely impact future negotiations with businesses looking to establish a presence in Wisconsin in the future.

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