

Municipal LAW

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May 17, 2019

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

**Re: Sales to Municipal Employees
Recent Legislation**

Dear Ms. Lauber:

For many years, since at least 1939, the State of Wisconsin has prohibited sale of municipal property to municipal employees, although there has been some confusion about how these laws should best be interpreted and the laws have not been well understood in many circles. The State has changed the law in this area by 2017 Wisconsin Act 65, but this change may have created additional confusion and misunderstanding. We continue to urge caution regarding sales of municipal property to employees. I am writing to describe the current state of the law in this regard:

1. General Rule: Plain Language: Sales to Employees Prohibited. Before turning to the significant newly created exception, we should start with the general rule. In general, sales of municipal property to employees is prohibited. Section 175.10 of the Wisconsin Statutes is entitled "Sale to Employees Prohibited." Subsection (1) states the following:

No department or agency of the state or any political subdivision thereof, or member or officer of any village, town or county board or common council of any city, or any purchasing agent or purchasing agency of the state or any political subdivision thereof, shall sell or procure for sale or have in its possession or under its control for sale to any employees of the state or any political subdivision thereof any article, material, product or merchandise of whatsoever nature, excepting meals, public services and such specialized appliances and paraphernalia as may be required for the safety or health of the employees. (Emphasis added.)

This prohibition is relatively clear on its face and, in my opinion, it would be difficult to find ambiguity in this language. It does not merely prohibit sale of merchandise, material or products, but broadly prohibits sale of "any article, material, product or merchandise of whatsoever nature." The prohibition is not limited to procuring items for sale, but broadly prohibits all sales by the language

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emphasized above. The statute declares such conduct to be a misdemeanor, punishable by a fine of up to \$500, 90 days in jail, or both.

For many years there have been two exceptions shown in the Statute that may be relevant in isolated circumstances. These long-standing exceptions remain in the statute. The first exception, found in subsection (1), is for “meals, public services and such specialized appliances and paraphernalia as may be required for the safety or health of the employees.” The second exception, found in subsection (3), is for sales that are made “while engaged in any recreational, health, welfare, relief, safety, or educational activities furnished by this state or any political subdivision thereof.”

As additional background, you may be aware that this statute has been interpreted to mean something that it does not say, from time to time, based on a 1939 opinion of the Wisconsin Attorney General. That opinion concluded that the statute only prohibits municipalities from acquiring products for resale to employees, to the detriment of private enterprise. I have been critical of any such interpretation in the past and have cautioned against reading the statute to mean anything other than what it says by its plain language. For purposes of this correspondence, let me merely say that the statute as quoted above, broadly prohibits sale of municipal property to municipal employees, and that is my general recommendation, unless an applicable exception applies. This leads to consideration of the newly created statutory exception, which we turn to next.

2. New Law: Some Sales are Excepted. The State has created an exception to this general rule, which reads as follows:

“175.10 (1m) (a) The prohibition under sub. (1) does not apply to a sale if any of the following applies:

- 1. The sale is of a surplus or discarded item that is no longer needed if the item is available for sale to the public using a publicly available method.*
 - 2. The sale is of an item that is regularly available from the governmental entity for sale to the public at the same cost.*
- (b) On its Internet site, the department of administration shall post a list of auction or sale Internet sites for compliance with par. (a)1. The department may limit the types of items that may be sold on any particular Internet site.*
- (c) A political subdivision may enact an ordinance that prohibits a sale that is otherwise permitted under par. (a)”*

Let me emphasize the several requirements that are necessary for this exception to apply:

- a. Must Satisfy Statutory Requirements. This exception only applies if the item satisfies one of the two categories under the following circumstances.

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- (1) Surplus or Discarded. It is “a surplus or discarded item;” in which case it can be sold to municipal employees only if:
 - (a) *Method*: The item is sold using “a publicly available method.”
 - (b) *Department of Administration List of Internet Sites*. The statute says, further, that the Department of Administration has a list of internet sites that can be used to comply with this method of sale.
 - (c) *Limitations*. The Department of Administration may limit the types of items that may be sold.
- (2) Regularly Available. As a complete alternative, municipal property can be sold to municipal employees if the item is regularly available for sale from the governmental entity to the public at the same cost. For example, if the municipality routinely sells copies of its Zoning Code for a set price, employees are welcome to make that purchase the same as any member of the general public.
- b. Municipality Can Be More Restrictive. The statute says, further, that municipalities may enact an ordinance that prohibits sales that are otherwise allowed by the statute. This is particularly significant because many municipalities have such an ordinance already in effect in their Code. You should not assume that the new statute allows sale of municipal property, therefore, unless you amend any such more restrictive local ordinance first.

I continue to recommend caution when considering any sale of municipal property to municipal employees. There is a broader ability to do so under the new law, but the requirements of the statute must be closely followed and any local ordinances must be followed as well.

If you should have any questions or concerns regarding these matters, please do not hesitate to contact me.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

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