

Bargaining Back to the Future: Managing the Unprohibiteds



Daniel R. Martin
January 26, 2024




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THESE SLIDES REFLECT GENERAL LEGAL STANDARDS FOR THE RELATED PRESENTATION AND ARE NOT INTENDED AS LEGAL ADVICE FOR SPECIFIC SITUATIONS

FUTURE LEGAL DEVELOPMENTS MAY AFFECT THESE TOPICS

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2023 PA 9 REPEALS “RIGHT TO WORK”

- Amends PERA Sections 9, 10, and 15 to state that Michigan law **does not** prevent public employer and union from entering agreement requiring employee to pay union dues or fees as a condition of employment


Effective *sine die* (without date) 91 days after Legislature’s final adjournment

February 13, 2024


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JANUS V AFSCME, COUNCIL 31, 138 S CT 2448 (2018)

“Neither an agency fee nor any other payment to the union may be deducted from [an employee’s] wages, nor may any other attempt be made to collect such a payment unless the employee affirmatively consents to pay.”



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PERA §10 IMMEDIATE EFFECT

IF EITHER

US Supreme Court reverses or limits *Janus* (2018),

or

Amendment to US Constitution is ratified to restore ability to require public employee to pay agency fees to bargaining representative

Now: no bargaining implications

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2023 PA 114 COLLECTING UNION DUES

- Removes PERA Section 10 prohibition against public schools collecting union dues or service fees

Effective *sine die* (without date) 91 days after Legislature’s final adjournment

February 13, 2024

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State School Aid Act §164h Repealed

2023 PA 103
2023 PA 144

5% penalty if CBA

- ▶ Deducts union dues
- ▶ Has compensation method that does not include merit pay
- ▶ Establishes racial or religious preferences for employees
- ▶ Conflicts with state or federal transparency standards

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BARGAINING IMPLICATIONS

- Not automatic! Dues collection *may* be bargained into CBA
- Unions have been collecting dues since 2012 through ACH, credit card, and other methods (including garnishment)
- If agree to deduct dues, insist on hold harmless/indemnification

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MEA PROPOSED LANGUAGE

Effective the 2024-25 school year, the deduction of membership dues *shall* be scheduled with the Board *by each member* for twenty (20) consecutive paychecks beginning in September or when designated by the Association; and the Board agrees to remit to the Association all monies deducted on its behalf, *accompanied by a list of members from who the deductions have been made within fourteen (14) days of deduction.*

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ISSUES WITH MEA PROPOSAL

1. Mandates that everyone pay dues
2. Ees "schedule" deductions with the employer; accounting nightmare?
3. Ees have to commit to dues deduction for the whole year
4. No indemnification clause
5. District has to produce list to Association; who keeps track?
6. Payment of Wages and Fringe Benefits Act issue?

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PAYMENT OF WAGES AND FRINGE BENEFITS ACT

Except for those deductions ***required or expressly permitted by law or by a collective bargaining agreement***, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount ... without the full, free, and written consent of the employee...

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SAMPLE LANGUAGE INDEMNIFICATION

In the event of any action against the Board brought in a court or administrative agency because of its compliance with this Article, the Association agrees to defend such action, at its own expense and through its own counsel, provided:

1. The Board gives notice of such action to the Association;
2. The Board gives full and complete cooperation to the Association and its counsel in securing and giving evidence, obtaining witnesses, and making relevant information available to both trial and appellate levels.

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SAMPLE LANGUAGE – INDEMNIFICATION CONT

The Association agrees that in any action so defended, it will indemnify and hold harmless the Board and its agents from any liability for damages and costs imposed by a final judgment of a court of administrative agency as a direct consequence of the Board's compliance with this Article but does not include any liability for unemployment compensation.

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PROHIBITED SUBJECTS

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Union Messaging

Mandatory/Permissive Subjects = Good

- ▶ Employees have a voice
- ▶ Labor/Management work out issues in grievance procedure

Prohibited Subjects = Bad

- ▶ Management has all control
- ▶ Labor cannot prove its worth (\$\$\$)

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Repeal of Various PERA §15(3) Prohibited Subjects

- 2023 PA 115
- Repeal prohibited subjects for:
 - Evaluation/Observation
 - Merit Pay
 - Teacher Placement
 - Layoff/Recall
 - Discipline
 - Ineffective Teacher Notice

Effective *sine die* (without date) 91 days after adjournment – February 13, 2024

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BARGAINING IMPLICATIONS

- Union will want protections, procedures, or standards beyond Board Policy and Tenure Act
- Timelines and procedures for observation, feedback, IDP, MYPR, evaluation, and appeal process
- Discipline: notice to employee, higher standard, timelines, progressive, appeals

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Mandatory Subject Of Bargaining	Legal Guardrails
Teacher Discipline	Teachers' Tenure Act <ul style="list-style-type: none"> • Probationary teacher discharge and nonrenewal • Tenured teacher discharge • Demotion • Leave of Absence Due Process
Teacher Observation	Section 1249 of RSC
Teacher Evaluation	Section 1249 of RSC Teachers Tenure Act re IDP for probationary teacher
Layoff/Recall	Amended Section 1248 of RSC
Teacher Placement	Amended Section 1248 of RSC Certification Requirements
Notice to Parents	Section 1249a of RSC

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Repeal of PERA §15(9) Prohibited Subject

- 2023 PA 115
- Repeal prohibited subjects for:
 - Intergovernmental agreement to consolidate, jointly perform, or collaborate about 1 or more functions or services

Effective *sine die* (without date) 91 days after adjournment – February 13, 2024

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Repeal of PERA §15(3)(f) Prohibited Subject

- 2023 PA 143
- Repeal prohibited subjects for:
 - 3rd-party contracts for noninstructional support services

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BARGAINING IMPLICATIONS

- Subcontracting = mandatory subject
- Union may challenge subcontract decision if
 - Work transfer causes significant adverse impact, *and*
 - Work transfer is amenable to resolution by bargaining, *and*
 - Bargaining unit *exclusively* performed subcontracted work

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SAMPLE LANGUAGE

The employer may contract or subcontract with a third-party to perform work that (1) is not exclusively performed by the Association and that (2) would not directly cause a reduction of a member’s regularly scheduled work hours.


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SAMPLE LANGUAGE

Nothing in this contract prevents or limits the Board from entering into and/or participating in cooperative educational or operational program with any entity. The bargaining unit waives any bargaining obligation to negotiate the impact of these programs on bargaining unit members and the bargaining unit.

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PERA:



STILL
MCL 423.215(3)

- Policyholder status
- School year start day
- School improvement committee composition
- Open enrollment decisions
- PSA authorizing body
- Volunteers
- Experimental and pilot programs
- Strike penalties

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MERC: PBS ARBITRATION

- Union ULP for PBS grievance arbitration
 - *Shiawassee Educ Ass'n* (2016)
 - *Ionia Pub Schs* (2015)
 - *Pontiac Sch Dist* (2014)
- No District ULP for not processing PBS grievance
 - *Detroit Pub Schs* (2015)

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WAGE AND BENEFITS FREEZE



2023 PA 113

Repeals PERA § 15b, which required wages and benefits freeze after CBA expires without new contract and prohibited retroactive application

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BARGAINING IMPLICATIONS

- Less employer leverage for CBA settlement
- Consider CBA language to clarify *no automatic* step, lane, longevity increase upon CBA expiration



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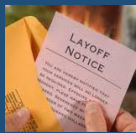
SAMPLE LANGUAGE

Other than the wages and benefits identified in this Contract for the Contract term, there shall be no material increase in wages or benefits unless ratified by both parties. Upon expiration of this Contract, the bargaining unit shall not receive longevity, lane, or step increases, or increased benefits, unless expressly ratified by both parties.

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LAYOFF & RECALL

TEACHER PLACEMENT



2023 PA 116

- Amends RSC § 1248
- Effective July 1, 2024
- CBA "must include, at a minimum, the standards in this section"
- Applies to teachers as defined in RSC § 1249

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RSC § 1248 APPLIES TO DECISIONS ABOUT


Filling vacancy

Placing teacher in classroom

Conducting staffing or program reduction

Any other personnel decision resulting in elimination of a position

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Board shall adopt “*clear and transparent procedures*” for all §1248 personnel decisions

Effectiveness measured by “Section 1249 **or** as otherwise collectively bargained **must be used**” as factor for personnel decisions

MCL 380.1248(3)

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LENGTH OF SERVICE




Shall not be “*the sole factor*” for personnel decisions

May be considered as tiebreaker if “*decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal*”

MCL 380.1248(2)

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Other Relevant Decision Factors May Include



Length of service in grade level/subject area

Disciplinary record

Completion of relevant special training and integration into instruction “in a meaningful way” other than required PD or continuing education

MCL 380.1248(3)

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WHAT FACTORS DO YOU THINK ARE RELEVANT IN PLACEMENT AND LAYOFF/RECALL?

- Certification/licensure/permit
- Qualifications/training
- Ability to get along with colleagues, students, parents
- Compliance with state and federal laws and regulations
- Attendance (excessive or unexcused absences)
- Professional judgment

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BARGAINING IMPLICATIONS

- CBA “**must include, at a minimum, the standards in**” §1248
- Danger – conflict potential for “effectiveness measures”
 - As in RSC §1249, **or**
 - As otherwise bargained

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PREPARE NOW FOR THE FUTURE

Prepare adequately to address the changes

- Revise and update Board Policies
- Understand Legal Guardrails
- Review current contract



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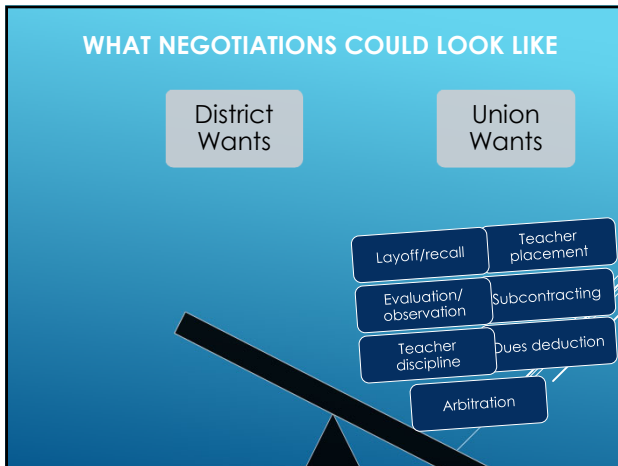
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Will Your Future CBA Address?

- Evaluation Standards
- Observation Limits
- Teacher Placement
- Layoff/Recall
- Discipline

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“TO BARGAIN COLLECTIVELY”

“meet at reasonable times and confer in good faith as to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement ... if requested by either party, **but this obligation does not compel either party to agree to a proposal or make a concession.**”

MCL 423.215(1)

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TRADE-OFFS

Condition your willingness to move on an issue to the other side's concurrent movement on one of your proposals.

Shows the other side the value that you place on their proposal and your own proposal.

An expression that the union's proposal could be acceptable if they agreed to your position.

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KEY STRATEGIES

- Work from current Board Policy as your "base"
- Limit Arbitrability of "Unprohibited"
- Legal guardrails
- No garbage/recycling
- Horizontal communications
- Give and take; no freebies

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TEACHER DISCIPLINE

<p>Red Flags</p> <ul style="list-style-type: none"> Reasonable and just cause standard Grieving/arbitrating low level discipline Grieving/arbitrating probationary teacher nonrenewal, discipline, or discharge Claims in multiple forums at the same time (TTA, EEOC, MDCR, USDOE, DOL, state or fed court, etc) Limits on evidence (no video; investigator notes must be given to Ass'n; face accusers) Unnecessary timelines and procedures 	<p>Green Flags</p> <ul style="list-style-type: none"> Weingarten rights Limited process in contract recognizing that Title IX investigation will now comply with process in contract Written recommendation for discharge from the Sup or designee to the Brd Progressive discipline (?)
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TEACHER PLACEMENT

<p>Red Flags</p> <ul style="list-style-type: none"> Seniority-based decisions Bid bump procedure based on effectiveness Limitations on mid-year hiring decisions Timelines and processes Recognizing teacher preferences <ul style="list-style-type: none"> - building, subject, class, etc. - internal v external - voluntary transfer trumps involuntary transfer - requirements to interview internal candidates 	<p>Green Flags</p> <ul style="list-style-type: none"> Decisions driven to put most effective teacher in classroom Department recommendation for vacancy but discretion rests with Board District has complete discretion to fill new educational program (pilot program) with internal or external candidates Do not restrict District's authority to determine assignment, reassignment, or transfer consistent with Board Policy. Limit arbitrability of placement decisions Comply with cert, licensure, approval, permit laws and rules Update management rights clause
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TEACHER LAYOFF/RECALL

<p>Red Flags</p> <ul style="list-style-type: none"> Tenure status/seniority as a factor Timelines/procedures "Qualified" undefined Bumping process based on effectiveness Length of time on the recall list more than policy Limitations on when a layoff may be conducted (financial crisis) Layoff avoidance (voluntary leaves) Recall avoidance (waive recall) 	<p>Green Flags</p> <ul style="list-style-type: none"> Follow Policy for layoff and recall procedures Give administration discretion to make voluntary and involuntary transfers to avoid layoff Superintendent determines what constitutes a "vacancy" Automatic termination and removal from the recall list if employee fails to accept recall position or fails to report to recalled position. Share seniority lists
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EVALUATION/OBSERVATION

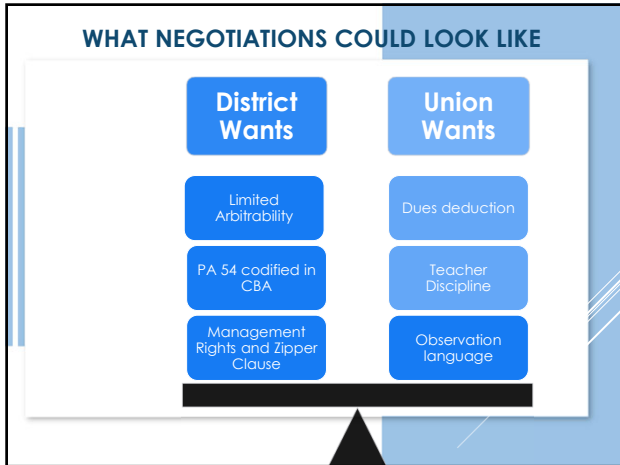
<p>Red Flags</p> <ul style="list-style-type: none"> Unnecessary and "scripted" meetings "Mutual consent" and "signed" documents Limitations on observations <ul style="list-style-type: none"> - number or caps - format and time limit - unscheduled - walkthroughs Limitations on 2nd evaluator Requests for 2nd evaluator Arbitrating process - negative observation, IDP, MYPR, etc Evaluation standards - "clear and convincing evidence" 	<p>Green Flags</p> <ul style="list-style-type: none"> Evaluation process follows Board Policy Limit arbitration to only what is provided under 1249 Skeleton forms for IDP and MYPR Probationary teachers cannot challenge their observations, IDP, MYPR, the evaluation process, or their final evaluation rating Biennial or triennial evaluations Data used as 20% of eval Discretion to deviate from triennial or biennial evals if needed
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GRIEVANCE ARBITRATION EXCLUSIONS

- Probationary teacher discipline, discharge, evaluation, observation, placement
- Decisions to place bargaining unit members in Schedule B/extra-duty assignments
- Matters raised in other forums
 - EEOC/MDCR
 - TTC
 - MERC/DOL
 - USDOE

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