

Thrun Law Firm, P.C.
 2024 MASA Midwinter Conference
 Recent Developments in Labor Law

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 Michigan Association of
Superintendents & Administrators

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Legislators look to restore collective bargaining rights for school employees




State Rep. Matt Koleszar, an MEA member who taught in Airport Community Schools, testifies before the House Labor Committee on legislation he's introduced to repeal anti-educator laws passed 12 years ago.

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Wage and Benefits Freeze



- PA 113 of 2023
- Repeals PERA § 15b which freezes wages and benefits after CBA expiration if no new contract and prohibits retroactive application
- Effective *sine die* (without date) 91 days after Legislature's final adjournment

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Union Perspective

*"With the removal of Section 15b, practitioners might **expect longer and more aggressive negotiations**. With the passage and enactment of [PA 113 of 2023], Union members and their families can **expect better contracts** without the risk of financial hardship from stagnant wages and increased healthcare costs."*

Attorney Benjamin King
 Labor and Employment Law Notes (Fall 2023)

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Bargaining Implications

- Less employer leverage for CBA settlement
- Consider CBA language to clarify *no automatic* step, lane, or 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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PA 9 of 2023 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, plus another 90 days

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Don’t Forget Janus



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Janus v AFSCME, Council 31 138 S Ct 2448 (2018)

Public employee mandate to pay union dues violates First Amendment as subsidized “union speech”




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“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.**”

Janus v AFSCME, Council 31
138 S Ct 2448 (2018)

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But, PERA Section 10 has immediate effect if *either*

- A US Supreme Court decision reverses or limits *Janus v AFSCME, Council 31* (2018), **or**
- An amendment to the US Constitution is ratified that restores the ability to require a public employee to pay agency fees to the bargaining representative

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Collecting Union Dues



- PA 114 of 2023
- Removes PERA § 10 prohibition against public schools collecting union dues or service fees
- Effective Feb. 13, 2024

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Relatedly, State School Aid Act § 164h Repealed

PA 144 of 2023 (eff. Feb. 13, 2024)

Previously imposed 5% SSAA penalty if CBA:

- Deducts union dues
- Includes 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 *must* be bargained back into CBA
- Unions have been collecting dues since 2012 through ACH, credit card, and other methods (including garnishment)
- If you agree to deduct, insist on hold harmless/indemnification

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Union Perspective

“By removing PERA’s prohibition against dues deduction in public schools, teachers[?] unions will no longer need to expend resources keeping track of delinquent members and dues payments. Resources used to collect dues can now be used to advance members rights and bargain stronger contracts.”

Attorney Benjamin King
Labor and Employment Law Notes (Fall 2023)

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MEA Proposed Language

Effective the 2024-2025 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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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

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

The Association agrees that in any action so defended, it will indemnify and hold harmless the Board 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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Repeal of PERA § 15(3) Prohibited from July 19, 2011

- PA 115 of 2023
- Repeals § 15(3) prohibited subjects for:
 - Evaluation/Observation
 - Merit Pay
 - Teacher Placement
 - Layoff/Recall
 - Discipline
 - Ineffective Teacher Notice
- Effective Feb.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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Repeal of PERA § 15(3)(f) Prohibited




- PA 143 of 2023
- Repeals PERA §15(3)(f) PBS for 3rd-party contracts for noninstructional support services
- Effective Feb. 13, 2024

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Repeal of PERA § 15(9) Prohibited



- PA 115 of 2023
- Repeals PERA § 15(9) PBS for intergovernment agreement to consolidate, jointly perform, or collaborate about 1 or more functions or services
- Effective Feb. 13, 2024

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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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Addition of PERA § 11a



- PA 236 of 2023
- Adds Section 11a
- Effective Feb.13, 2024

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Requirements

- Within 30 days after hiring an Ee, Er must provide the Ee's employment and contact information to the employee's union representative.
- Every 90 days, Er must provide to Union the employment and contact information of the EEs represented by that Union

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Employment and Contact Info

- Name
- Department of Agency
- Classification
- Primary work location address
- Home address
- Personal phone number
- Personal email address
- Work email address
- Date of hire
- EE ID number
- Full-time / Part-time status
- Wage

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Layoff/Recall

Teacher Placement



- PA 116 of 2023
- 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 a Vacancy
- Placing a Teacher in a Classroom
- Conducting a Staffing or Program Reduction
- Any Other Personnel Determination Resulting in the 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 or 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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SB 395

Evaluation

- Amends RSC § 1249, 1249a, & 1249b
- 11/1: Passed by House with H-2 Substitute; sent back to Senate
- 11/22: Signed; PA 224
- Effective July 1, 2024

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Evaluation and Collective Bargaining

<p>Old Language:</p> <p>With the involvement of teachers and school administrators, the board shall adopt and implement a performance evaluation system</p>	<p>New Language:</p> <p>This section does not prohibit or limit the right or duty of a school and a collective bargaining representative to engage in collective bargaining over the topic of performance evaluations, subject to the requirements in this section and section 1249b</p> <p>With the involvement of teachers and school administrators, and after collective bargaining, if applicable, the board shall adopt and implement a performance evaluation system</p>
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Evaluation Ratings

<p>Old Language:</p> <p>Highly effective, effective, minimally effective, ineffective</p>	<p>New Language:</p> <p>Beginning July 1, 2024 – effective, developing, or needing support; Evaluation must be in writing – if not, T is deemed effective</p>
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Unevaluated

<p>Old Language:</p> <p>N/A</p>	<p>New Language:</p> <p>T is not assigned an evaluation rating and is “unevaluated” if:</p> <ul style="list-style-type: none"> T worked less than 60 days in that school year T’s eval vacated through grievance procedure District and T agree to designate T as unevaluated because of extenuating circumstances <p>T receives an unevaluated designation, rating from preceding school year is used “for consecutive purposes under this section”</p>
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Evaluation ratings (review)

<p>Old Language:</p> <p>A tenured T rated as ineffective may request in writing a review of the evaluation and the rating within 20 days</p> <ul style="list-style-type: none"> Sup must review and may make modifications No more than 2 reviews per 3 years 	<p>New Language:</p> <p>Tenured T rated needing support (first time):</p> <ul style="list-style-type: none"> May request in writing a review of eval and rating by sup or int sup within 30 calendar days Written response within 30 calendar days T or union may request mediation within 30 calendar days if not satisfied; Within 15 days, sup or int sup must respond scheduling mediation.
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New Language (cont.)

If T receives 2 consecutive ratings of needing support, T may use the grievance procedure or employment contract re second eval rating and the eval process. If the grievance procedure does not end in binding arbitration, T may request binding arbitration within 30 calendar days after T receives the written response.

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Frequency of Evaluation

Old Language:

T rated as HE on 3 consecutive evaluations = may do biennial evals

New Language:

Tenured T rated as HE **or** E on 3 most recent consecutive year-end evaluations = may do biennial **or triennial evals**

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Use of Data

Old Language:

Student growth and assessment data

40%

New Language:

Based on *locally agreed upon* student growth and assessment data **or student learning objectives**

Must be measured using metrics agreed through collective bargaining, if applicable

Student learning objectives - measurable, long-term, academic goals, informed by available data, that T sets at beginning of year for all students

20%

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State Assessments

Old Language:

For core content areas in grades and subject in which state assessments are administered, 50% of student growth must be measured using the state assessments

New Language:

Language deleted

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IDPs/MYPR

Old language:

Required for T in the first year of the probationary period or who received a rating of minimally effective or ineffective

New language:

Required for T in the first year of the probationary period or who received a rating of ME, I, needing support, or developing

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MYPR

Old language:

Based at least in part on student achievement
Aligned with T's IDP
Include specific performance goals

New language:

Be aligned with T's IDP
Include specific performance goals

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Evaluation Tool Objective Criteria

Old Language:

Portion of T's eval not measured using student growth and assessment data must be based on [several factors]

New Language:

Portion of T's eval not measured using student growth and assessment data **or student learning objectives** metrics must be based on **objective criteria**

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Classroom Observations

Old Language:

Review T's lesson plan / state curriculum standard used
Review pupil engagement in lesson

New Language:

Review T's lesson plan/statute curriculum standard used
Review pupil engagement in lesson
Must be discussed during post-observation meeting

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Duration of Observation

Old Language:

Does not have to be for an entire class period

New Language:

Must be not less than 15 minutes but does not have to be for an entire class period

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Teachers' Tenure Act Sec. 3

The controlling board shall determine the format and number of the classroom observations in consultation with teachers and school administrators.

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Observation Feedback

Old Language:

Within 30 days after each observation, T is provided with feedback

New Language:

Within 30 **calendar** days after each observation, T is provided with **written** feedback

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Mentors

Old Language:

Encouraged to assign a mentor to teacher rated minimally effective or ineffective

New Language:

Shall assign a mentor to a teacher rated **developing or needing support**

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Training Content

New Language:

By 9/1/2024, (every 3 yrs) evaluator training, including:

- Eval criteria
- Expectations (key behaviors/ practices of effective teaching)
- Eval process (conducting classroom observations, collect data, and analyze results)
- "Calibration" exercises
- Ongoing support (feedback and coaching)

Old Language:

Evaluators must be trained on eval tool

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Dismissing Teacher

If T is rated as ineffective on 3 consecutive annual year-end evals, the school district shall dismiss the teacher

If T is rated ineffective **or needing support** on 3 consecutive year-end evaluations, the school district shall dismiss the teacher

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Ineffective Teachers

Old language:

Notice to parents when assigning student to teacher who received ineffective rating for 2 consecutive years

New language:

Same, but for needing support rating and if T requested a review of the T's eval rating, the board must not issue the notification until the review process is complete

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Teachers v Ancillary

- Be careful here!
- Ancillary are not subject to amended 1248 (placement and layoff/recall)
 - Teacher and ancillary placement are not the same thing
- (Most) Ancillary are not subject to the Teachers' Tenure Act (arb and cap)
- Do not just agree to treat teachers like ancillary under the contract

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Arbitrability



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Beyond Bargaining



CBA language is subject to grievance arbitration *unless* expressly excepted


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Grievance Procedure Considerations

Definition: Procedure for addressing Union Allegations that the District violated a term of the CBA.

- Limit the definition of "grievance" to express violations of the CBA.
- Consider removing any process appeal to the Board [add MERC mediation in its place]
- Limit the Arbitrator's jurisdiction.
 - No Jurisdiction over "Evaluations," especially ratings except what is provided in 1249
 - No Jurisdiction over "Assignments"
 - No Jurisdiction over "Discipline"
 - No Jurisdiction over Layoff/Recall



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Bargaining Strategies



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Consider Trade-offs and Package Bargaining

- *"Individual, unconditional board concessions seldom impel the union to concede or compromise a position; unconditional concessions, predictably, do not carry bargaining leverage. Trades, however, enhance your chances of achieving your desired changes; they help you narrow the issues on the table and help you move closer to agreement. Trades do carry bargaining leverage."*
- NJSBA, *Trade-Offs and Packaging as Bargaining Tactics*
- https://www.njsba.org/wp-content/uploads/2016/04/negotiations_advisor_tradeoffs.pdf

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Key Takeaways

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

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