

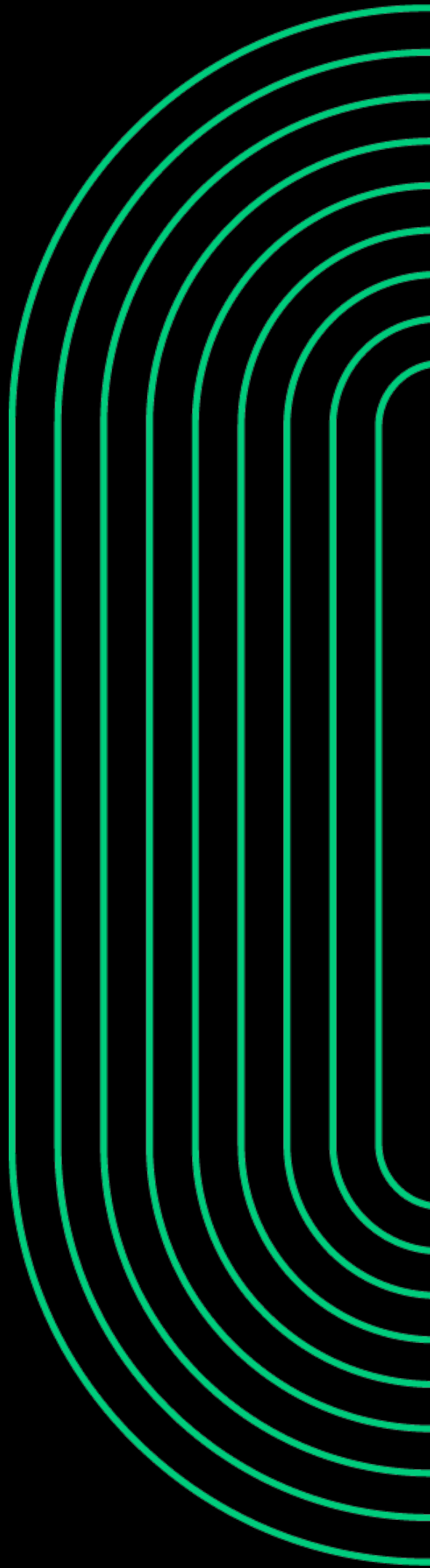
# B23: Legal Considerations in Hiring Contract Employees and Retirees

Michigan School Business Officials

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# Hiring Contract Employees



# Third Party Contractors

- Private Company
- Provides Educational Staffing Services
  - Non-instructional support staff
  - Administrators
  - Substitute teachers
- Written Agreement that Identifies the Relationship
  - Third Party and District
  - Third Party and Staff
  - District and Staff



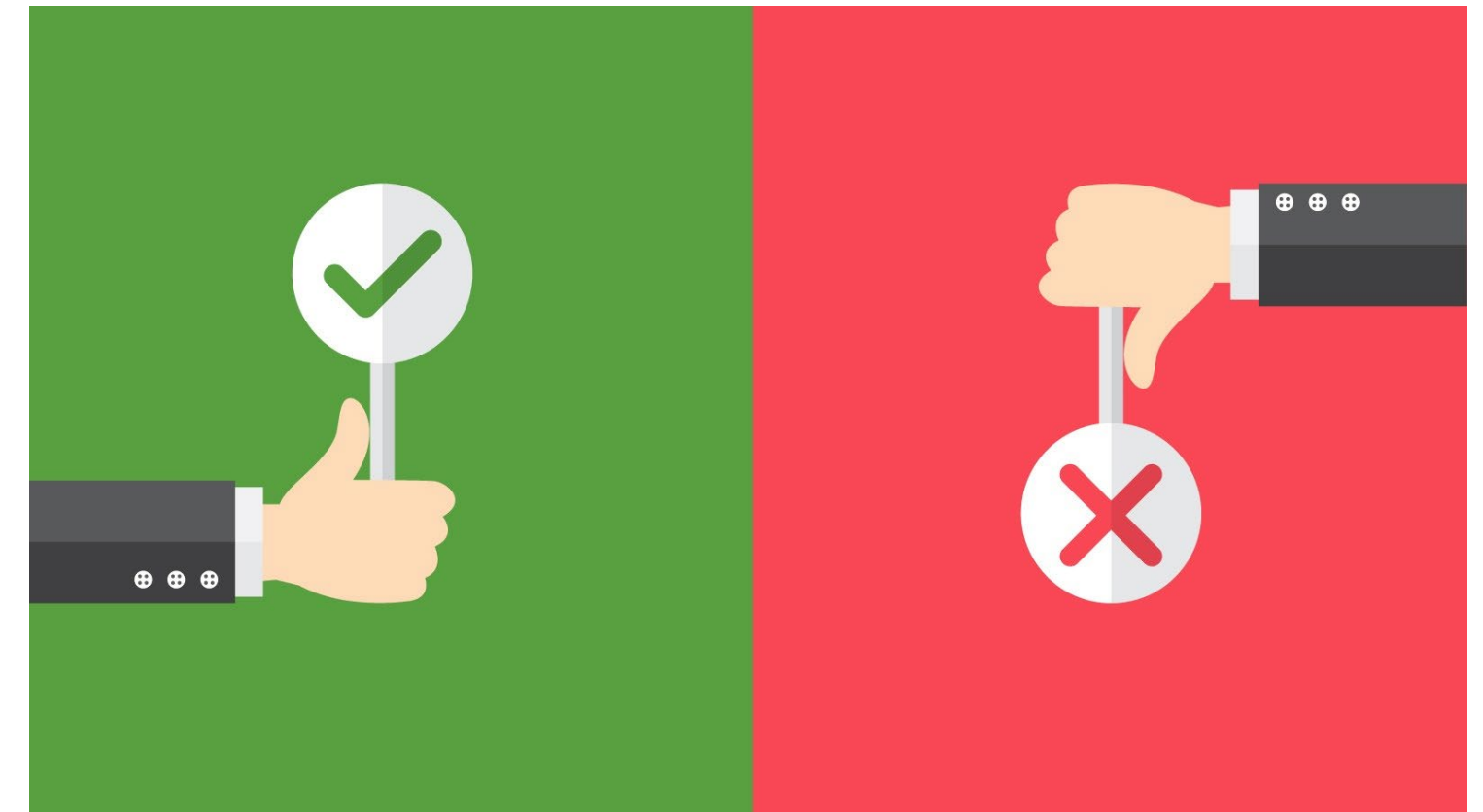
# Direct Employer: Pros and Cons

## Pro:

- Complete control over all operations, management, supervision, curriculum and employees
- Ability to screen and hire employees
- Governmental immunity

## Con:

- Cost of MPSERS payments
- Administrative and supervision costs
- Potential direct and primary legal liability
- Potential unionization of direct academy employees
- Workplace politics and appeals





# Direct Employer Costs

1. MPERS: A school that hires staff directly is a reporting unit and makes payments to Michigan Public Employees Retirement System
2. Employer Contribution Rates (Percentage of employee compensation)
3. Workers' Disability Compensation Insurance
4. State and Federal Unemployment Tax
5. Employer share of Social Security and Medicare
6. Employee Benefits
7. Litigation Costs



# Direct Employer Costs

## 8. Cost for Management and Personnel Responsibilities

- Hire and fire employees
- Discipline and Evaluate Employees
- Maintain employment records
- Develop and update employment policies and procedures
- Create and update employee handbook
- Ensure compliance with federal, state and local laws
- Potential unionization



# Direct Employer Costs

## 9. Costs for Direct Day-to-day Operations

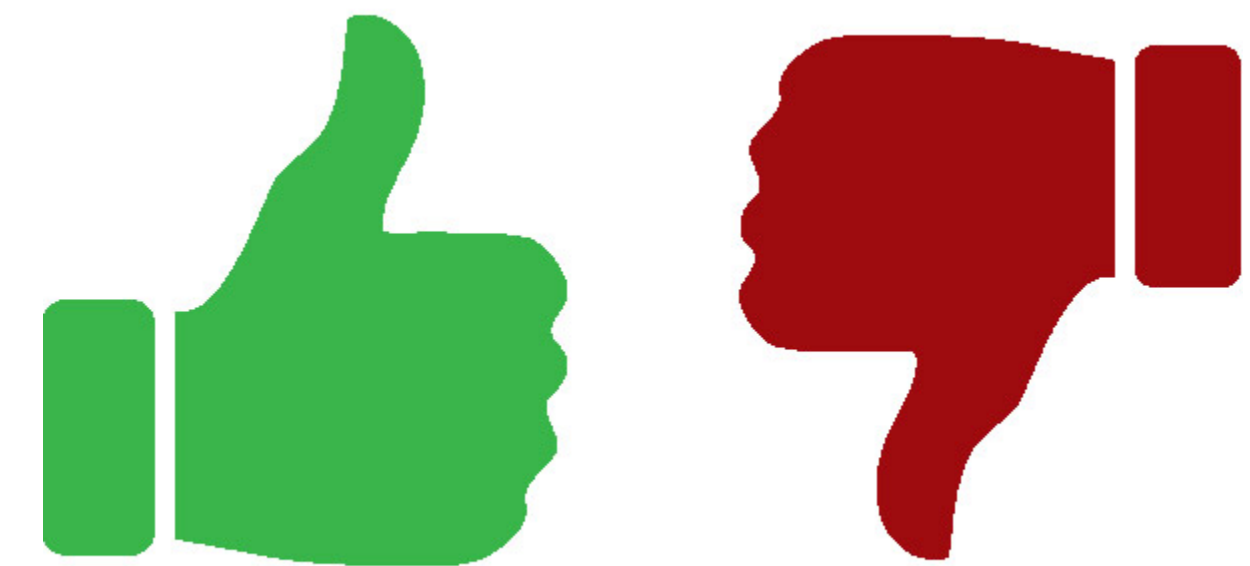
- Management
- Budget
- Curriculum
- Custodial and Maintenance
- Transportation
- Payroll



# Third Party Contractor: Pros and Cons

## **Pro:** Not a reporting unit

- Administrative and Supervisory responsibilities
- Hires, fires, evaluates and disciplines employees
- Assumes potential legal liability of staff
- If staff unionizes, third party management company has responsibility – strikes are legal!



## **Con:** No control beyond policy-making and charter obligations passed on to management company over large aspects of operations, management, supervision, curriculum and staff

- Staff loyalty to third party management company
- Governmental immunity may be questioned



# Define the Employer/Contractor Relationship

- The Third Party Company may be considered not to be the employer, depending upon the amount of control it exercises (or does not exercise) over the worker during the term of the assignment.
- If the contractor is a third party, the employer needs to make sure the terms of the relationship to the worker is clearly spelled out in an agreement.



# Liability Concerns if found to be the Employer

- May be liable for discrimination and harassment claims
- FMLA issues
- Work related injuries
- Minimum wage and overtime payments
- If misclassified – are they part of a district union?



# The “Right to Control Test”

- A determination is made by looking at the entire relationship
  - The nature and degree of control over the worker – does the district instruct the individual as to when, where, and how work is performed?
  - The degree of supervision exercised over the work and by whom
  - The furnishing of workspace and/or equipment and supplies
  - The amount and kind of training provided by the district
  - The power each has to determine the pay rates or method of payment
  - The right each has to hire, fire or modify working conditions

# Employee Classification Best Practices

- Before hiring independent contractors, Employers should:
  - Make clear which department within the organization is responsible to understand the law;
  - Know which contractors have been engaged;
  - Understand the terms of the engagement;
  - Monitor compliance; and
  - Know your workforce.





# Employee Classification Best Practices

- When entering into agreements with other service providers, Employers should:
  - Define each party's relationship to the other parties
  - Describe the specific services and conditions that apply to the work to be performed
  - Address criminal background checks
  - Obtain appropriate indemnification provisions to protect the company from the wage and hour claims of the service provider's workers
  - Avoid giving contractors rights or access that cut against the independent contractor determination

# Subcontracting Non-Instructional Support Services



# Public Employment Relations Act

- Public Act 112 of 1994 amended the Public Employment Relations Act (PERA) and removed a number of subjects from collective bargaining involving public school districts, including the subcontracting of “non-instructional support services.”



# Public Employment Relations Act

- Section 15(3)(f) of PERA:

*(3) Collective bargaining between a public school employer and bargaining representatives of its employees shall not include any of the following subjects:*

*\* \* \**

*(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.*



# Public Employment Relations Act

- Section 15(4) of PERA:

*(4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.*



# Section 15(3)(f) – Repealed

Public Act 143 (2023) repealed this prohibited subject of bargaining effective February 23, 2024



# Subcontracting of ALL Support Services is Now a Mandatory Subject of Bargaining

- Must obtain union's agreement, or
- Bargain to impasse
- Possible if Board of Education supports to include a subcontracting right in the collective bargaining agreement



# What About Existing Subcontracted Positions?

- Can still keep subcontracted positions based on the February 13, 2024, status quo.
- But if the district brings these functions in-house with its own employees – will risk a union's effort to organize into a represented collective bargaining unit, requiring collective bargaining over the terms and conditions of employment.





# Subcontracting Administrative Services



# Subcontracting Administrative Services

- Often former district administrators will work through third party contractors.
- **Benefits:**
  - Avoid insurance costs
  - Avoid MPSERS contribution, and
  - Avoid FICA/FUTA taxes



# *Mantei v MPERS, 256 Mich App 64 (2003)*

- The Michigan Supreme Court held that a retired public school principal providing services as an elementary school principal through a private-sector contractor was not a public school “employee” under MPERS, and therefore, no district contribution to MPERS was required, nor a setoff of the retiree’s earnings.
- The court rejected application of the IRS “20-point” control test in determining whether the retiree was a public school employee or a private-sector contractor for purposes of MPERS, and instead, looking at the “totality of circumstances”, applied the “economic reality” test:
  1. Who controls the retiree’s duties,
  2. Who pays the wages and benefits of the retiree,
  3. Who has the right to hire, fire and discipline the retiree, and
  4. To what degree is the performance of the retiree’s duties an “integral part of the employer’s business toward the accomplishment of a common goal”?

# *Mantei v MPSEERS*, 256 Mich App 64 (2003)

- The key facts in *Mantei* included:
  - Contract: Retiree had a written at-will employment contract with a personnel services company that expressly recited that the retiree “shall not be considered an employee of the district for any purpose.”
  - Wages/Benefits: The company paid all wages to the retiree, which were never more than 42% of what the retiree’s former salary as an employee of the district. The company also was responsible for all benefits, insurances (workers’ compensation and unemployment), and payroll taxes for the retiree. The district provided no wages or benefits of any kind. The company was not “merely a conduit” to maintain “a financial status quo”.



# *Mantei v MPSEERS, 256 Mich App 64 (2003)*

- Discipline/Performance of Duties: The district did not supervise, evaluate, or discipline the retiree; did not maintain any personnel records on the retiree, nor was the retiree required to report to administration when he left his building (reflecting the retiree's control over his working hours, to some extent). Although required to follow district policies, he retained autonomy regarding the method and manner he fulfilled his duties ("he essentially exercised his independent judgment on a daily basis without supervision").
- Other: The retiree resigned any and all employment with the district and abandoned all tenure rights. The retiree announced his resignation long before he was offered an agreement to return as a contractor.

# *Mantei v MPSEERS*, 256 Mich App 64 (2003)

- To avoid potential liability under MPSEERS, districts must structure their relationships with contractors for administrative services to satisfy the four-part “economic reality” test and should not significantly deviate from the facts/relationship structure of the parties in *Mantei*.
- By structuring their relationships with contractors for administrative services as described above, districts will also be positioning themselves to avoid the potential liability for social security and income taxes imposed upon employers (although subject to the IRS “20-point” control test).



# Subcontracting Administrative Services

- As districts get more aggressive in subcontracting administrative services, there may be more challenges to such arrangements. To protect themselves, districts should:
  - Obtain indemnification agreements with the contractors, so that if there is any liability under MPERS or the IRS, it will be assumed by the contractor (which, in turn, should have indemnification agreements with the individual administrators, who are benefiting from the arrangement); and
  - Contract with competent contractors who can effectively defend against a potential claim, and, ideally, would also be a financial “deep pocket” to make good on the indemnification agreement.

# Subcontracting Substitute Teachers



# The 60/150 Day Rule

- MCLA §380.1236 (1) and (2)
  - Directly-employed substitute teachers assigned to one specific substitute teaching position for more than 60 days must receive the privileges granted to regular teachers for the duration of the assignment, including pay not less than the minimum salary on the current salary schedule.
  - Directly-employed substitute teachers who are employed 150 days or more as a substitute teacher may be entitled to an offer employment in the following school year.
- 60 day and 150 day rules not applicable when substitute teacher is employed by a person or entity that contracts with school district or ISD pursuant to section 1236a.



# The 60/150 Day Rule

- Section 1236a allows school districts to avoid the impact of Section 1236 (1) and (2), provided that the contract between district and “entity” includes:
  - Assurance to furnish qualified teachers.
  - Assurance to not furnish someone who would be ineligible if hired directly by the district.
  - Description of level of compensation and fringe benefits and insurance coverage.
  - Assurance of criminal background checks done and provided to the school district.
  - Allows the district to purchase liability insurance for such individuals assigned to their district under such a contract.

# MPERS and Hiring Retirees



# Retirees

## Public Act 147 of 2023, effective October 10, 2023

- The Michigan legislature changed the Michigan Public School Employees Retirement System (MPERS) yet again altering the requirements affecting retirees employed by a “reporting” unit, which includes a public school district, intermediate school district, or public school academy.
- Public Act 147 replaces the previous Public Act 184 that went into effect on July 25, 2022. The new statute went into effect on October 10, 2023.
- The definition of employed at a reporting unit is the same. It means: *“Employed directly by a reporting unit as an employee, indirectly by a reporting unit through a contractual arrangement with other parties, or by engagement of a retirant by a reporting unit as an independent contractor.”*
- Bona fide termination of employment means, as determined by the retirement system, a retirant has completely severed the employer-employee relationship. Completely severing the employer-employee relationship includes, but is not limited to, a retirant not working for his or her reporting unit employer during the month of the retirant’s retirement allowance effective date and before severing the employer-employee relationship, the retirant does not intend or expect to have an offer or contingency to become employed at any reporting unit.



# Retirees

- The general rule is if a retirant becomes re-employed by a reporting unit, then the retirant forfeits his or her retirement allowance and the retirement system substantive for health care benefits from the retirement system for the entire month of each month in which the retirant is employed at a reporting unit.
- Public Act 147 (MCL 38.1361) contains several exceptions that apply to public school districts, intermediate school districts, and public school academies.
  - *Exception 1:* The general rule of forfeiting retirement benefits does not apply to a retirant who is employed at a reporting unit (a) a retirant retired after a bona fide termination of employment, and (b) the retirant has been retired for at least 9 consecutive months before becoming employed.
  - *Exception 2:* The second exception is in effect for a term of 5 years after the effective date of Public Act 147 – October 10, 2023. The retirement benefits forfeiture does not apply to a retirant who becomes employed in a position other than a superintendent and is employed at a reporting unit (a) the retirant retired after a bona fide termination of employment, and (b) either of the following circumstances apply: (i) the retirant has been retired for at least 6 consecutive months, or (ii) the earnings of the retirant do not exceed \$15,100 in a calendar year.

# Retirees

- *Exception 3:* The retirement benefit forfeiture does not apply for the next 5 years after the effective date of the mandatory act to a retirant who at the time of retirement was employed as a superintendent who becomes employed at a reporting unit if (a) the retirant retired after a bona fide termination of employment, and (b) either of the following circumstances applies: (i) the retirant has been retired for at least 6 consecutive months, or (ii) if the retirant is employed in a position other than a superintendent, the earnings of the retirant do not exceed \$15,100 in a calendar year.
- *Exception 4:* A retirant is not eligible to use any service or compensation attributable to the re-employment as a retiree for a re-computation of his or her retirement allowance.



# Retirees – PA 147

- The retiree is responsible for ensuring that he or she has satisfied PA 147's requirements. Retirees should be told to consult with their MPSERS representative about retirement benefits.
- If a retired teacher is returning to the District from which the teacher had attained tenure, the teacher is not required to serve a probationary period.
- If a retired teacher had earned tenure at one District, but is hired at another District, the teacher may earn tenure after the probationary period of two years. School officials should carefully consider the tenure impact before hiring a returning retiree.
- Neither the Teachers' Tenure Act (TTA) nor PA 147 allows a school to terminate a tenured teacher without TTA protection. Employment contracts for returning retired teachers should *not* include a requirement that the teachers will resign their employment on June 30 of the following year.

# Hiring Retirees – Other Considerations

- Rate of Pay?
  - Review your collective bargaining agreements/past practice – some collective bargaining agreements or past practices provide that the Board will honor previous years of experience when determining salary schedule placement.
- Annual Evaluation?
  - Yes. The statutory requirement to evaluate teachers broadly applies to all individuals providing direct instruction.
- Health Insurance?
  - As of July 25, 2022, those retirees who return to work in compliance with PA 147 do not lose their insurance premium subsidy and can therefore remain on MPERS insurance. They also may be entitled to applicable bargaining unit benefits, including health insurance. Beware of age discrimination claims relating to insurance benefits.

# Questions?



# Thank You!



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