

Collective Bargaining Agreements and Contracts Certification

MSBO Certification Class

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Caution

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- Future legal developments may affect these topics
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What is your role in the organization?



4

What is your role in negotiations?



5

How much experience have you
had in negotiations?

Bargaining Basics Overview



Topics of Presentation

- I. Preparing for negotiations
- II. Best practices: Negotiating Contract Terms
- III. Managing ADA/CBA/FMLA/COMP
- IV. FLSA issues
- V. Quiz

I. Preparing for Negotiations

A. “Pro-Labor” at MERC

- Tinamarie Pappas (8/20):
 - NLRB trial attorney
 - Uptick of NLRB citation in MERC decisions
- Bill Young (March 2021)
 - Former MEA Attorney
- ~~• Bob LaBrant (expired 6/30/21)~~
 - ~~• Michigan Chamber of Commerce~~

(RD)

I. Preparing for Negotiations

- Example of Pro-Labor Agenda
- City of Detroit Fire Department, 34 MPER 17 (Oct, 2020)
 - H: CBA must be explicit about a working condition to absolve the duty to bargain. Must be specific evidence that the parties bargained out that issue. Otherwise, there remains a duty to bargain.
 - Worked around *Port Huron* Case.
- Reversed on Appeal

I. Preparing for Negotiations

B. Format of negotiations

1. In person?

2. Zoom negotiations

a. Zoom negotiation best practices

- Control the room - no recording
- Set up separate caucus room
- Assure everyone has “Left” Table room

Practical Considerations: Politics

- Support unit vs. teachers
- MEA elect your Board?
- Many may not be dues paying; who will be voting for ratification?



Practical Considerations: Teachers

- Potential repeal of right to work, PA 54, PA 152 and prohibited subjects
- Long term contract? [MEA may be unwilling to enter a multi-year contract because of pending changes in labor law]
- Top of scale wage proposals/granting steps?
- Controlling compensation of new hires with wage limits?
- Falling Enrollment next year

(RD/JG)

Negotiation Preparation

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- Track language concerns
- Copy of Agreement
- Legal review
- Input from supervisors, administration

(JG)

Negotiation Preparation

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- Prepare to update with new legal changes
- Deal with entitlements
- Align with Board Policies
- Review past grievances for language improvements

(RD/JG)

Assemble Team

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- Composition of Negotiation Team
- Align negotiation team decision makers/board
- Board members part of team?
- Define team member roles



(JG)

Establish Goals/Parameters

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- Prioritize
 - “Gotta Gets”
 - “Wish List”
- Financials (not just wages)
 - Insurance
 - Others
- Language
 - CBAs are NOT policies
- Align law of bargaining unit

(JG)



Table Impact

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- 1. Less = More Management Rights
- 2. CBA Can Expand Law
- 3. Contract Inclusion = Grievance Procedure
- 4. Why cite laws?
- 5. No Prohibiteds or Illegals [Get Out Now!]
- 6. Importance of Express Language or Zipper [Trumps Past Practice]

(RD)

Expect the Unexpected

18

- Goal: Fair agreement for District financial stability, with legally compliant contract language
- Since “fairness” views differ, the road to agreement may include
 - Crisis activities
 - Mediation
 - Fact Finding
 - Impasse/Imposition

(JG/RD)

Table Trends

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- Significant reassignment of UniServs
- Use of “snap” negotiators
- Unwillingness to agree to multi-year contract
- Association requests for Fact Finding to avoid impasse
- Crisis Management Plans
- Reemergence of the concept of seniority

(RD)



Financial Analysis

20

- What assumptions will be under attack?
- Fund balance policy?
- Prepare a simple schedule of compensation basics: cost of steps, cost of a 1% increase, etc.
- Remember “Ups”
- Federal & State COVID Relief Funds
 - Auditor approval/input
 - Avoid using for “legacy” costs

(JG)



Financial Analysis

21



- MEA will perform its own analysis
- Amended Budget Analysis
- Do not misrepresent at the table
- The value of factfinding

(RD)

Financial Analysis: Matrix

22

- Total costs of all bargaining unit members
- Wages, extra comp, FICA, retirement, health insurance, comp., other benefits



(JG/RD)

Negotiation Status Summary

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Attachment 1

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Attachment 1 Negotiation Status Summary

NEGOTIATIONS PORTAGE TEACHERS ISSUE SUMMARY	PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION		
	Previous Meetings: Next Meeting: (:OOp.m.)		
ARTICLE	BOARD	ASSOCIATION	NOTES
ARTICLE 1 (Recognition)			
Article 2 (Association and Teacher Rights)			
Article 6 (Working Hours)			
Article 7 (Teaching Loads)			
Article 10 (Teaching Assignment)			

(RD)

Managing Tentative Agreements

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- Best Practice: Tentatively Agree (TA) each article
- Best Practice: Sign-off on agreed-upon current contract language (CCL)
- Incorporate into updated Master Agreement
- Keep Board updated on TAs

(JG)

Bargaining Unit Composition

25

- Who is on the bargaining team and what is their wage schedule position?
- Who are you negotiating against?

(JG)

- Only fee-paying members can vote to ratify CBA?
[Repeal of right to work will not impact dues paying status because of US Supreme Court decision in *Janus* (2018)]
- Disaffiliation?

(RD)



Open Meeting Act Considerations

26

- Section 8(c) of Open Meetings Act (OMA)
- Purpose of strategy and negotiation sessions connected with a CBA
- Not required to enter closed session to update the Board about negotiation progress
- Cannot be used as a means to discuss individual employment contracts

(RD/JG)

Identify Variables

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- Student count
- Retirement contribution
- Expiration of ESSER funds
- Virtual Programming
- Other variables

(JG)

Loss of Leverage [PA 54]: PERA § 15b(1): Benefits

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“Employees who receive health, dental, vision, prescription, or other insurance benefits under a [CBA] shall bear any increased costs of maintaining those benefits that occur after the expiration date. The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits.”

- *On the Chopping Block*

(RD)

Loss of Leverage [PA 54]: PERA § 15b(1): No Retro

29

- “[T]he parties to a [CBA] shall not agree to, and an arbitration panel shall not order, any retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the [CBA].”
- MCL 423.215b(1), PA 54 of 2011

(RD)

Section 164h of the State School Aid Act

30

- Districts/ISDs cannot enter into collective bargaining agreements after October 1, 2017 that:
 - establish racial or religious preferences for employees;
 - automatically deduct union dues;
 - conflict with federal or state transparency laws
 - include a method of compensation that does not comply with RSC Section 1250.

Violation is a 5% state aid penalty

(RD)

RSC Section 1250: Merit Pay **[May be on Chopping Block]**

- Became effective in 2010
- Requires a “method of compensation” (for teachers and administrators) that:
 - includes “job performance and job accomplishments”
 - as a “significant factor” in determining
 - “compensation” *and*
 - “additional compensation”

(RD)



Health Insurance

32

- PA 152 Hard Caps or 80/20 formula on chopping block. Best Practice: write district contribution amount in contract
- Bidding, at least every three years by law
- Medical Benefit Plan Coverage Year?
- What is the ACA lookback year?

(JG)



II. Best Practices: Negotiating Contract Terms

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- Contract should reflect current/improved working conditions.
- Prepare for union political messaging and initiatives.
- Keep good notes of negotiations to memorialize topics covered during negotiations.
- Other than merit pay and emergency manager language, CBA should not include prohibited subjects of bargaining. [Prohibited Subjects may be on chopping block, so get them out NOW!]

(RD)

Contract Duration

34

- MEA may only want one year
- Value of wage reopeners
- Economic certainty permits longer contract duration
- Consider June 30 expiration date to match District fiscal year
- MEA effort to reconfigure medical benefit coverage year



(RD)

Prohibited Subjects: **May be on chopping block**

35

- Establishment of the starting day, Sec. 15(3)(b)
- Whether to allow open enrollment, Sec. 15(3)(d)
- Use of Third Party Contractors for Non-Instructional Services, Sec. 15(3)(f)

(RD)

Prohibited Subjects: **May be on chopping block**

36

- Use of volunteers, Sec. 15(3)(g)
- Pilot Programs, Technology to deliver programming and staffing and Impact, Sec. 15(3)(h)



(RD)

Prohibited Subjects, Teachers:

May be on chopping block

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- Teacher Placement, Sec. 15(3)(j)
- Teacher Layoff and Recall, Sec. 15(3)(k)
- Teacher Evaluation, Sec. 15(3)(l)
- Teacher Discipline, Sec. 15(3)(m)



(JG)

Prohibited Subjects: **May be on chopping block**

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- Merit Pay under RSC 1250, Sec. 15(3)(o)
- Inclusion of Emergency Financial Manager language in all Master Agreements, Sec. 15(7)

* Sec. 15(4): District has “sole authority” to decide



(RD)



TRUE OR FALSE?

Teacher bumping practices should be included in the collective bargaining agreement.



40

TRUE OR FALSE?

Merit pay should NOT be included in the CBA because it is a prohibited subject.

Schedule B: Compensation for Coaches

41

- January 5, 2018, US DOL WHD issued an opinion letter that considered coaches “exempt” as “teachers” under FLSA
- Salary level and Basis Test do not apply to “teachers” under FLSA
- Apply to coaches “not otherwise employed,” but also references that it is applicable to coaches whose “primary duty” is coaching

(RD)

Schedule B: Compensation for Coaches

42

- Non-exempt warning: watch OT and minimum wage
- Joint employment
- EduStaff - Contractor vs employment practices.
Michigan payment of wages issue [Thrun SLN
October, 2022]

(RD)



TRUE OR FALSE?

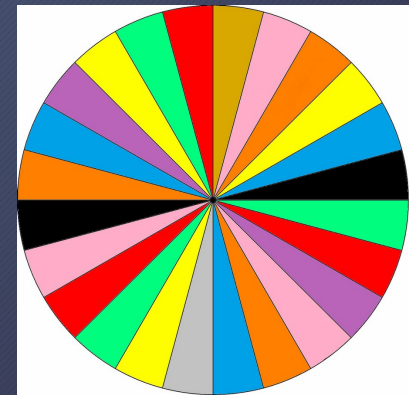
A custodian, who is also a coach, must be paid minimum wage and overtime for coaching duties.

15-minute break...

44



When we
return, we'll
spin the
wheel for a
gift card
prize!



Preparation for Financial Negotiations: Research Employee Costs

45



- Scattergram of teachers at step/lane/longevity levels
- Salary step increases
- Cumulative salary increase
 - District percentage
 - Compared to CPI
- Compared to other
 - District bargaining units
 - School districts

(JG)

Steps

46

- Trend of reconfiguring step schedule continues
- Proposals to recoup steps not issued in past contract years
- To increase pay at “bottom” of scale, consider eliminating Step 1 and moving others
- Add steps to top
- Longevity?
- Best Practice: Percentage Increase vs. Block Dollar Amount?

(RD)

Grievance Process Best Practices

47

- Definition of “grievance”
- Clear contract language vs. practice
- Zipper clause
- Sixth Circuit: Grievance Suspension if file EEOC claim retaliatory
- Adding a mediation step in the process and eliminating a Board Hearing step

(RD)



TRUE OR FALSE?

Past Practice can overrule clear contract language on the same issue.

Calendar Issues

49

- Start day is a prohibited subject
- Calendar is not; but common calendar must be followed
- PD as instructional time



(JG/RD)

MEA: Message Development

50

“In terms of a bargaining message, the public responds most positively when we talk about children, quality in the classroom and the future. There may come a time when it’s appropriate to talk about money and benefits, but lay the groundwork first.”

MEA, *Crisis Planning*, p 20 (July, 2009)

(RD)



MEA: Message Development

52

- Talk about money in terms of “attracting and retaining the highest quality teachers and education support professionals **for the sake of the children** in the district.” Keep your message as positive as possible.

MEA, *Crisis Planning*, p 18 (July, 2009)

(RD)

MEA Project Analysis

53

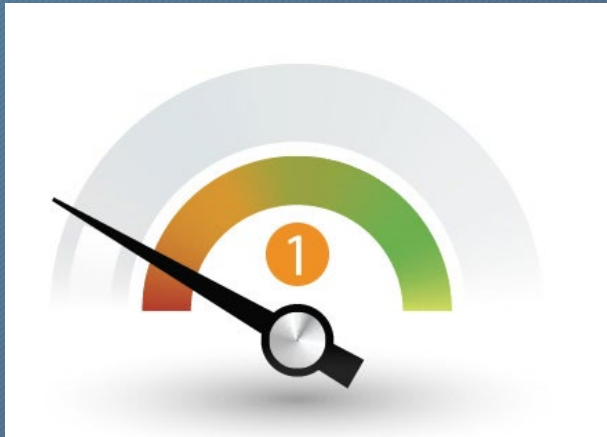
- Full Transparency of your members
- Involvement in school board elections
- Select a crisis theme
- Select a crisis color (not school colors)
- Wear same color
- Wear buttons
- Bumper stickers/car window signs
- Communication system with members

MEA, *Crisis Planning*, p 18 (July 2009)

(RD)

MEA “Stage 1” Activities

54



- Internal newsletter (after bargaining)
- Member phone fan-out/email list
- Wear hats, t-shirts, etc.
- Develop precinct maps
- Complete a power study
- Develop a community newsletter
- Encourage community members to call board members
- Attend board meetings

(JG)

MEA, *Crisis Planning*, p 18 (July, 2009)

MEA “Stage 2” Activities

55



- Picket board meetings
- Enlist speakers at board meetings
- Attend community events
- Set up a website
- Distribute information flyers
- Connect with local police, fire dept.
- File grievances, FOIA requests
- File ULPs - with follow-up press releases

(JG)

MEA, *Crisis Planning*, p 19 (July, 2009)

MEA “Stage 3” Activities

56



- Crisis Assessment Team (CAT)
- Work to rule
- Community coffee klatches
- Hold a rally
- Investigate banks, etc., for low interest loans
- Radio and public access TV ads
- Search for and set-up crisis headquarters

(JG)

MEA, *Crisis Planning*, p 19 (July, 2009)

District Response

57

- One spokesperson
- Communication plan
- Negotiation Updates to Board in open session
- District website
 - Proposals
 - Financial data/graphs
- Statements to media
- Caution
 - Ground rules
 - Interference/direct dealing

(RD)



58

TRUE OR FALSE?

Labor negotiations are confidential, and the Board cannot communicate with the public about proposals between the parties under PERA.

Contract No No's

59

- Pull discipline from file [Bullard-Plawecki vs. MCL 380.1230b(6)]
- Recite law in CBA
- Bootstrap board policies into grievance procedure
- Seniority with the entire bargaining unit, as opposed to seniority by classification
- Mandatory rollover timeframes for renegotiation

(RD/JG)



60

TRUE OR FALSE?

The district must remove discipline from employee personnel files after four years, under Bullard-Plawecki.

Contract Interpretation

61

- Clear meaning
- If no clear meaning, look to:
 - History
 - Negotiation Notes
 - Practice of Parties
- Proposals with commentary: write intent of proposal in comments on the side

Payroll DEDUCTIONS: *Janus*

62

- Union dues/PAC deductions
 - Section 164h, State Aid Act
- **Right to Work [Likely going away]**
PERA Section 10(c) prohibits a public school employer from assisting a labor organization in collecting dues or service fees from public school employees (MCL 423.210, Sec.10(c))
 - Garnishments
 - *Janus*
- Other payroll deductions

(RD/JG)

Grievances

63



- Limited definition of a “Grievance”
- Exclude prohibited subjects, evaluation ratings, etc.
- Picking Arbitrators
- Limits on Arbitrators

Grievances

64

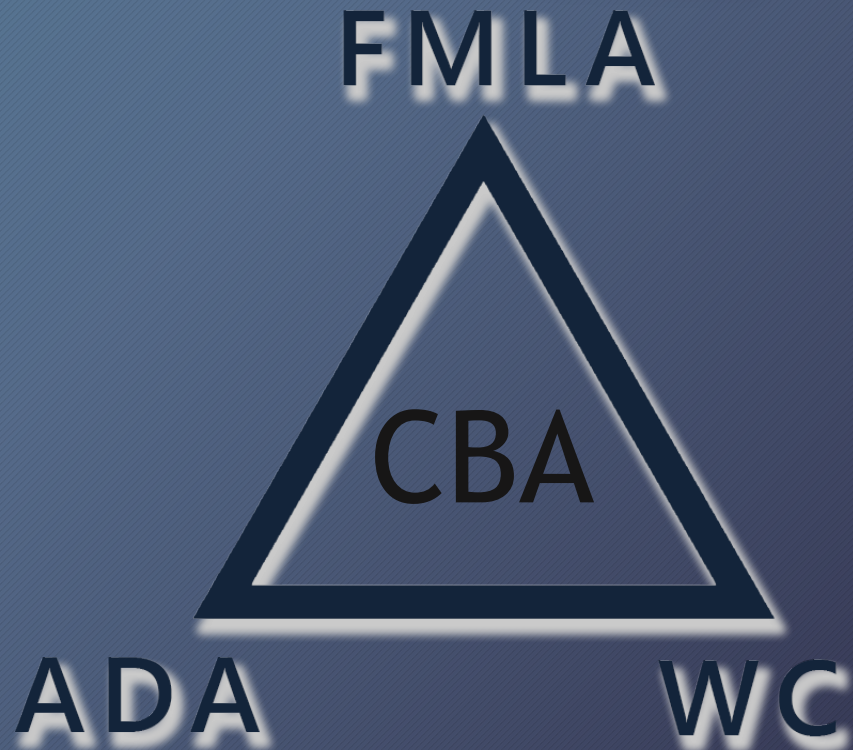
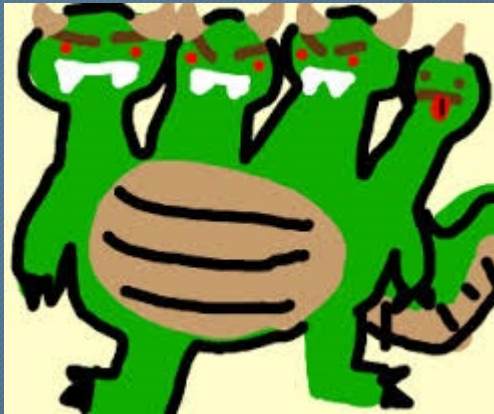
- Best Practices & Lessons
 - Exchanging exhibits, witnesses, and issues 1+ week before arbitrations
 - Bifurcate arbitrability issues from substantive issues before beginning the hearing

(RD)

III. Managing ADA/CBA/FMLA/COMP

65

- Align laws
- 4 Headed Monster



(RD)

ADA: Basic Components

66

- Qualified individual with a disability
- Reasonably accommodate essential job functions
- If no undue hardship or direct threat to health or safety
- Impact of COVID-19
- **Implement four step interactive process**

(RD)

ADA: Definition of Disability

67

- Physical/Mental impairment
- Substantially limits
- major life activity
- Record or “Regarded as” Disabled

(RD)



68

TRUE OR FALSE?

A broken arm cannot be a disability under the ADA.

- 12 week leave - “serious health condition”/new baby/military matters
- Eligibility?
- Leave year?
- Concurrent, unpaid
- Intermittent
- FMLA? Court of Appeals affirmed current composition of FMLA in January, 2023.

Paid Medical Leave Act (PMLA): Non-Exempt Staff

70

- Average 25 hours/week eligibility
- 1 hour paid leave for 35 hours worked
- Non-exempt employees only
- Accrue up to 40 hours/year
- Must be in CBA
- Covers districts with 50 or more employees

(RD)



71

TRUE OR FALSE?

COVID-19 can be considered a serious health condition under the FMLA.



72

TRUE OR FALSE?

The full FMLA should be outlined in a collective bargaining agreement.



TRUE OR FALSE?

FMLA leave should be calculated using a “rolling forward” basis.

WORKER'S COMP

74

- Injury on the job
- Occupational disease
- Concurrent with FMLA?

(RD)

FLSA Exemptions (from minimum wage and OT)

75



- Professional
- Administrative
- Executive
- Computer EEs

Determining “Exemptions”

76

- Salary Level
- Salary Basis Test: \$684/week or \$35,568/year.
- Duties Test
- FLSA Review

(RD)

FLSA - General Definitions

77

- “Volunteer”
 - The term “employee” does not include any individual who volunteers to perform services for a public agency which is a political subdivision of a state if:
 - the individual volunteers for civic, charitable, or humanitarian reasons.
 - such services are not the same type which the individual completes for the public agency; and
 - the individual receives no compensation (except for expenses, reasonable benefits, nominal fees, or a combination of these).
 - No coercion

(JG)

Treatment of Non-Exempt Employees

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- FLSA Covers:
 - Minimum Wage
 - Overtime

(RD)

Treatment of Non-Exempt Employee

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- FLSA Does Not Cover:
 - Break Time
 - Holiday Time
 - OT Per Day
 - Lunch Periods
- Look at Master Agreements



(RD)

Non-Exempt Employees: Hours Worked

80

- All working time is considered compensable, whether or not it was expressly authorized by the ER.
- “Work not requested but suffered or permitted is work time...The reason [for the work] is immaterial. The ER knows or has reason to believe the EE is continuing to work and the time is working time.”
- Includes working at the end of a shift to complete an assigned task or correct errors.

(JG)

Best Practice: Contracts and Pay Rate

81

- Best practice is to include an EEs pay rate in the individual contract or offer letter to indicate either the hourly pay rate or weekly pay rate.
- Non-exempt “salaried” EEs: \$___/hour
- Exempt EEs: \$____/week

(RD)

Don't Miss These Hours

- Preliminary and Concluding Activities
 - e.g., cleaning the bus, or filing a report.
- Break Periods
 - Short rest or break periods must be counted as hours worked.
- Meal Periods
 - Meal period of 30 minutes or more need not be counted as hours worked provided EEs are completely relieved of duty.
- On-Call/Standby Time
 - An EE is off-duty if he or she is completely relieved of duty for a period of time which is long enough to be effectively used for the EE's own purposes.
- Travel Time/Email Answering Time/Required Training Time
- De Minimis Rule

FLSA - General Definition

83

- “Independent Contractors”
 - Excluded from the definition of “employee” to the extent the individual’s work meets the following factors:
 - Is the work an integral part of the ER’s business?
 - Does the worker’s managerial skill affect opportunity for profit or loss?
 - How does the worker’s investment compare to the ER’s investment?
 - Does the work require special skill and initiative?
 - Is the relationship between worker and ER permanent or indefinite?
 - What is the nature and degree of the ER’s control?

(RD)

FLSA - General Definitions

84

- “Joint Employment”
 - DOL Administrator’s Interpretation No. 2016-1
 - Involves situations in which an individual is the “employee” of several entities
 - Factors:
 - Directing, controlling, or supervising the work;
 - Controlling employment conditions;
 - Permanency and duration of relationship;
 - Repetitive and rote nature of work;
 - Integral to business;
 - Location of performance;
 - Performing administrative functions commonly performed by EEs.

(RD/JG)

Questions?

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New Process: The MSBO Evaluation is your record for attendance.

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Please complete by **February 10**

- ✓ Receive an email from survey monkey for the MSBO evaluation. Your evaluation will be your record for attendance.
- ✓ Receive e-mail from MOECS-noreply@michigan.gov to fill out an evaluation for SCECHs.