

# Recent Developments in Labor and Employment Law



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**THRUN**  
LAW FIRM, P.C.

THESE SLIDES REFLECT GENERAL  
LEGAL STANDARDS FOR THE  
RELATED PRESENTATION AND ARE  
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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

# 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.”*





PERA §10  
IMMEDIATE  
EFFECT

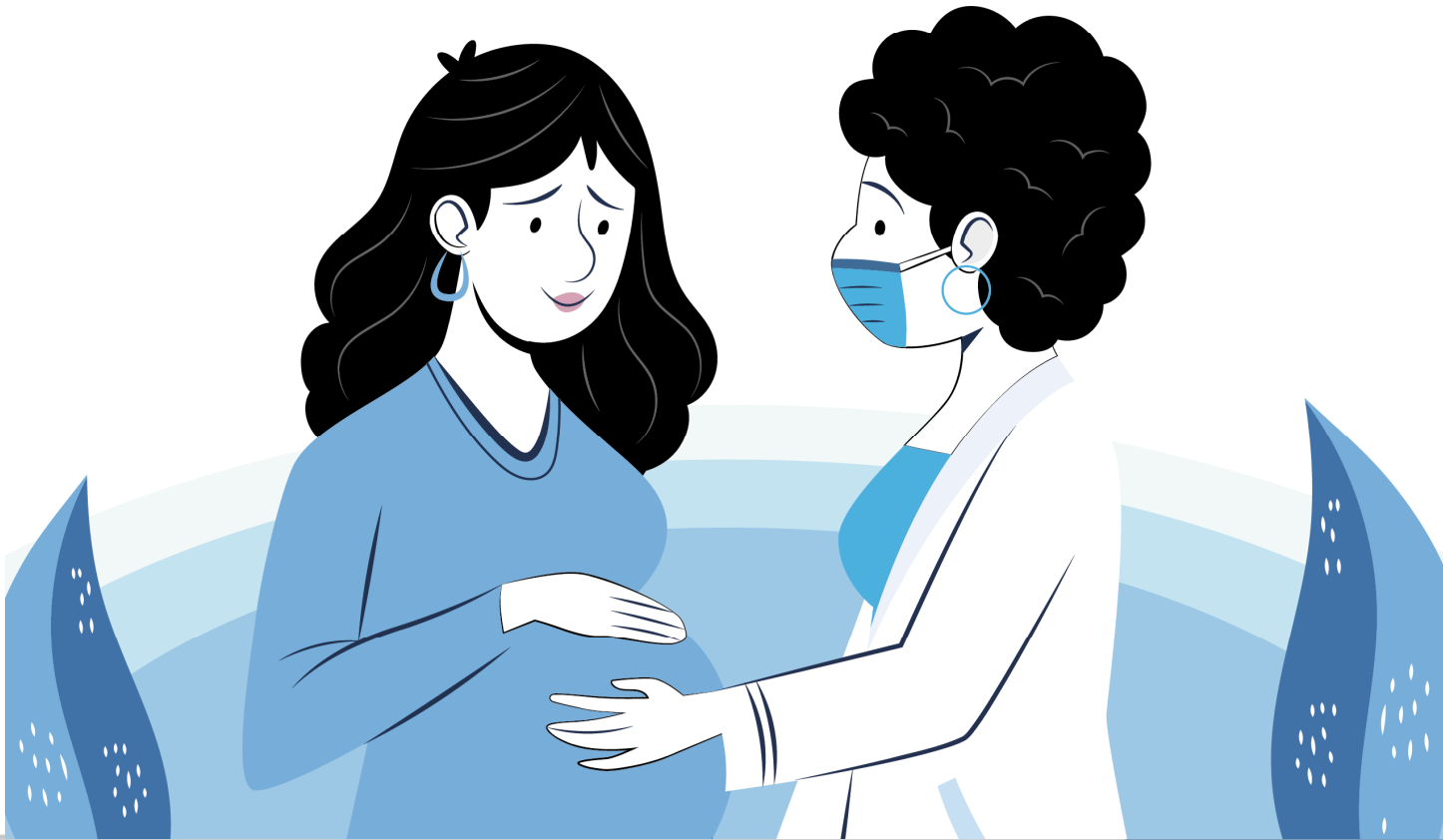
*IF  
EITHER*

SCOTUS 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

**THE 2023  
PREGNANT WORKERS  
FAIRNESS ACT  
(PWFA) UPDATE**



**Effective June 27, 2023**

# PREGNANT WORKERS FAIRNESS ACT

Requires “covered employers” to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

Covered Employer = at least 15 employees

# PREGNANT WORKERS FAIRNESS ACT

- Temporary job reassignment
- Seating or modified seating
- Closer parking access
- Additional break time to rest, eat or use restroom
- Modified, flexible hours
- Leave to recover from childbirth
- Appropriately sized uniforms/equipment



# PREGNANT WORKERS FAIRNESS ACT

Covered employers cannot:

- Require employee to accept accommodation without discussion;
- Deny employment opportunities to qualified employee or applicant based on need for reasonable accommodation;
- Require employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate for reporting or opposing unlawful discrimination; or
- Interfere with any individual's rights under the PWFA.

# PREGNANT WORKERS FAIRNESS ACT

Possible penalties for non-compliance include:

- Payment of lost wages and benefits
- Compensatory damages
- Punitive damages
- Injunctive relief
- Other remedies (including attorneys' fees and costs)

# 2023 PA 45 AMENDMENT OF THE ELLIOT- LARSEN CIVIL RIGHTS ACT

Added “sexual orientation, gender identity or expression” to the list of protected classifications

Effective June 15, 2023

ELLIOT-  
LARSEN  
CIVIL RIGHTS  
ACT  
-  
PROTECTED  
CLASSES

- Religion
- Race
- Color
- National Origin
- Age
- Sex
- Sexual Orientation
- Gender Identity or Expression
- Height
- Weight
- Marital Status

# 2023 PA 45 CROWN ACT

Amended definition of “race” in the Elliot-Larsen Civil Rights Act to clarify race includes “traits historically associated with race” including hair texture and hairstyles

- Braids
- Locks
- Twists

Effective June 15, 2023



EEOC Updates Guidance

# WORKPLACE HARASSMENT POLICY

How It Affects Employers



# EEOC PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

- ❑ Resource for EEOC staff
- ❑ Legal analysis of standards for
  - ❑ determining when conduct = harassment based on protected class
  - ❑ determining employer liability for claims of harassment
- ❑ Reflects SCOTUS decision in *Bostock v Clayton County*, 590 US \_\_\_\_ (2020)
- ❑ Addresses virtual and on-line harassment

# EEOC PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

- ❑ Allegedly harassing conduct must be evaluated in the context in which it arises.
- ❑ Can include intentional and repeated use of name or pronoun inconsistent with gender identity or denial of use of facilities such as bathroom and locker rooms
- ❑ Not required to accommodate religious expression that creates or reasonably threatens to create a hostile work environment.



EEOC  
PROPOSED  
ENFORCEMENT  
GUIDANCE ON  
HARASSMENT  
IN THE  
WORKPLACE

- ❑ Individual may establish harassment by showing that the conduct would make it more difficult for a reasonable person in the individual's situation to do their job.
- ❑ Unwelcome harassment – conduct that is subjectively and objectively hostile is necessarily unwelcome.
- ❑ Can file a claim if harmed by the unlawful harassment of third party, even if not harassed yourself.

# EEOC PROPOSED GUIDANCE

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# INTERNAL INVESTIGATIONS

Employer's investigation will generally be considered adequate if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."

- ❑ Not a "trial-type" investigation
- ❑ Conducted by an impartial party
  - ❑ Free from influence of harasser
  - ❑ Seek information from all parties
- ❑ Inform complainant and harasser of findings, outcome, and corrective actions
- ❑ Not required to impose discipline if conclude harassment did not occur or investigation inconclusive

# EEOC PROPOSED GUIDANCE

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# INTERNAL INVESTIGATIONS

To combat systemic harassment, EEOC recommends employers

- Keep records of all harassment complaints and investigations
- Use the records to identify patterns of harassment
- Conduct training



# INDEPENDENT CONTRACTOR



DEPT OF LABOR'S FINAL RULE

**DOL FINAL  
RULE ON  
INDEPENDENT  
CONTRACTORS**

## DOL 2021– Economic Realities Test

### Two “Core” Factors Dominate

1. Nature and degree of worker’s control over the work;
2. Worker’s opportunity for profit and loss based on initiative and/or investment

# DOL FINAL RULE ON INDEPENDENT CONTRACTORS

## **Totality of the Circumstances**

1. worker's opportunity for profit or loss;
2. investments by the parties;
3. work relationship's permanency;
4. nature and degree of control over the work;
5. whether the work is an integral part of the employer's business; and
6. the worker's skill and initiative.

Final Rule Effective March 11, 2024

# ECONOMIC DEPENDENCE

Contractors who perform substantially all of their work for one business are likely to be economically dependent on that business

- likely to be misclassified employees

# DOL FINAL RULE APPLIES TO FLSA

Minimum Wage and Overtime

NOT IRS Rules

IRS looks at common law rules - only three factors:

- (1) behavioral control;
- (2) financial control; and
- (3) type of relationship



# DOL FAQ

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs>

# 2023 PA 10 REENACTMENT OF THE PREVAILING WAGE ACT

For projects funded with any amount of state funds – including school projects

- Commission will establish prevailing wages and benefits
- Schedule of the rates will be part of the specifications for work to be performed

Effective February 13, 2024

# Prevailing Wage Act

Includes following school projects

- New construction
- Alteration
- Repair
- Installation
- Painting
- Decorating
- Completion
- Demolition
- Conditioning
- Recondition
- Improvement

# Prevailing Wage Act

Complaints heard by Michigan  
Department of Labor and Economic  
Opportunity (DLEO)

Penalties include

- \$5,000 fine
- Additional 10% as determined by DLEO
- Termination from projects

# 2023 PA 236 INFO SHARING UNDER PERA

30 days after hire/every 90 days must provide each representative the employment and contact information.

Effective February 13, 2024

# 2023 PA 236

## INFO SHARING UNDER PERA

- a) Name
- b) Department or agency
- c) Classification
- d) Address of primary work location
- e) Home address, unless confidential
- f) Personal telephone number
- g) Personal email address
- h) Work email address
- i) Date of hire
- j) Employee identification number, if applicable
- k) Full-time or part-time employment status
- l) Wage

# Improved Workforce Opportunity Wage Act

As of January 1, 2024

Minimum Wage increased

☐ from \$10.10 to \$10.33/hour

For 16-17 year olds increased

☐ from \$8.59 to \$8.78/hour

Training wages for 16-19 year olds

☐ \$4.25/hour for first 90 days

# 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



# 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

# 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

# LINDKE V FREED

## 601 US \_\_\_\_ (2024)

Freed = Port Huron City Manager had private Facebook page

- mostly posted on personal life
- occasionally post on city issues

Lindke = City Resident

- upset with City's COVID-19 response
- commented on Freed's Facebook posts

Freed got fed up and blocked Lindke

SOCIAL  
MEDIA  
AND  
FREE  
SPEECH

Government official's social media conduct can be attributed to government

*only if the official*

1) possessed actual authority to speak on government's behalf, *and*

2) purported to exercise that authority when speaking on social media

# SOCIAL MEDIA AND FREE SPEECH

## Suggest Using Disclaimers

- Personal Page of \_\_\_\_\_
- Views expressed are strictly my own

## Suggest Having Two Pages

- Personal Life Page
- Official Public Life Page

# 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 (\$\$\$)

# “UNPROHIBITED” BARGAINING SUBJECTS 2023

1994:

Policyholder status

Starting day for school year

Composition of school  
improvement committee

Open enrollment decisions

Authorizing body for PSAs

~~Third party contract for  
noninstructional services~~

Volunteers

Experimental/pilot programs

2011:

~~Teacher Observation~~

~~Teacher Evaluation~~

~~Ineffective Teacher Notice~~

~~Teacher Layoff/Recall~~

~~Teacher Placement~~

~~Merit Pay~~

~~Teacher Discipline~~

~~Intergovernmental  
Agreements~~

**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 February 13, 2024



# 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

Mandatory Subject Of Bargaining	Legal Guardrails
Teacher Discipline	Teachers' Tenure Act <ul style="list-style-type: none"> <li>• Probationary teacher discharge and nonrenewal</li> <li>• Tenured teacher discharge</li> <li>• Demotion</li> <li>• Leave of Absence</li> </ul> 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

# 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

# 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.

# 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.

# Repeal of PERA §15b

2023 PA 113

- Repeals the wages and benefits freeze after CBA expires without new contract and prohibited retroactive application

Effective February 13, 2024

# BARGAINING IMPLICATIONS

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



## 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.



# 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



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



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)

# 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)

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)

# 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

## May Bargain

- Dues, PAC
- Teacher Discipline
- Teacher Merit Pay
- Teacher Evaluation
- Teacher Placement
- Teacher Layoff/Recall
- Retro Pay

## CBA Must Address

- RSC 1248: TOR Placement System (“effectiveness”)
- RSC 1248: TOR Layoff/Recall System (“effectiveness”)
- RSC 1249: TOR Evaluation Tool (+) Student Growth Measurements

# “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)



# 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.

# QUESTIONS



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