STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30212
Lansing, Michigan 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 24, 2012

Honorable Paul E. Opsommer
State Representative
The Capitol
Lansing, MI 48909

Dear Representative Opsommer:

Attorney General Schuette has asked me to respond to your letter asking whether union dues may continue to be deducted from subsidies paid to home help care providers in light of a recent amendment to the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*

2012 PA 76 was signed by the Governor on April 10 and became effective immediately. See Const, art 4, § 27. (See attached). The Act amended PERA's definition of "public employee" to expressly exclude a person employed by an organization or entity who receives a direct or indirect government subsidy:

> (e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> (*i*) *A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee.* This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these. [MCL 423.201(1)(e)(i) (emphasis added).]

The genesis for this amendment is fairly restated in the legislative analysis for the Act. See Senate Legislative Analysis, SB 1018, March 28, 2012. (See attached). But briefly, the Department of Human Services and the Department of Community Health (DCH) administer a program that supports services to individuals who are eligible for Medicaid and need assistance with personal care activities. The services are provided by workers who are selected by the recipients but paid through a subsidy administered by DCH. *Id.*

In 2004, DCH entered into an interlocal agreement with the Tri-County Aging Consortium, which created the Michigan Quality Community Care Council (MQCCC) to coordinate personal assistance services, as well as maintain a registry of home help providers in designated communities. In 2005, and on the premise that the home help providers were "public employees" of the MQCCC, an election was held under PERA allowing the providers to unionize and be represented by the Service Employees International Union (SEIU) Healthcare Michigan. The MQCCC also entered into a collective bargaining agreement with the home help providers that covers wages, benefits, and conditions of employment. *Id.* Pursuant to the interlocal agreement and the collective bargaining agreement, union dues have been routinely deducted from the providers' subsidy payments. State funding for the MQCCC was later eliminated in fiscal year 2011-2012. *Id.*[1]

Subsequently, a dispute arose regarding whether the home help providers were "public employees" entitled to organize under PERA. Ultimately, the Legislature enacted 2012 PA 76, which amended PERA to specifically address this issue by providing that persons employed by private individuals but paid through government subsidies are not public employees. MCL 423.201(1)(e)(i). The Act further provides that an election shall not be directed for a bargaining unit of "a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void." MCL 423.214(2). Finally, the Act expressly provides that it "is curative, reflects the original intent of the legislature, and is retroactive." 2012 PA 76 (enacting section 1).

It is understood that DCH is continuing to deduct or withhold union dues from the payments it processes for the home help providers under an agreement with the MQCCC. You ask whether the dues withholding must cease under the terms of 2012 PA 76 or for "other legal considerations irrespective of the statutory change."

"In determining whether a statute should be applied retroactively or prospectively only, '[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.'" *Frank W Lynch v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation omitted). Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested. *Id.* And an amendment that affects substantive or vested rights will not be construed to apply retroactively unless the Legislature clearly expressed such an intent. *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1985); *Franks v White Pine Copper Division*, 422 Mich 636, 671-674; 375 NW2d 715 (1985); *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 37; 539 NW2d 526 (1995).

Here, the Legislature's intent that the Act be applied retroactively is "clear, direct, and unequivocal." *Davis v State Employees Retirement Board*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006). Again, the Act expressly provides that it is "retroactive." 2012 PA 76 (enacting section 1). And under a retroactive application of the Act, the prior election and creation of the bargaining unit for home help providers is invalid and void because the providers are not public employees, regardless of the terms of the existing interlocal agreement, the collective bargaining agreement, or any other agreement. MCL 423.201(1)(e)(i) and 423.214(2). As a result, there is no legitimate or legal basis upon which DCH may continue to withhold union dues from providers' payments.

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[1] DCH has taken steps to terminate the interlocal agreement, which will occur under its terms on or about April 12, 2013. The collective bargaining agreement is set to expire November 15, 2012.

Furthermore, the 2005 election resulting in the organization of home help providers and their representation by the SEIU was likely unlawful. That is because even under the pre-amendment version of PERA, home help providers could not be considered "public employees" eligible to organize since they are employed by the private individuals they serve, not a public entity. See MCL 423.201("'Public employee' means a person holding a position by . . . employment in the government of this state, in the government of 1 or more of the political subdivisions of this state . . . in the service of an authority, commission, or board, or in any other branch of the public service."); Mich Admin Code, R 400.1104.

As a result, the election and events that flowed from it, including the negotiation of the collective bargaining agreement, were void *ab initio*. See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (Contracts must be enforced as written, "unless a contractual provision would violate law or public policy.") (internal italics, ellipses, quotation marks, citations and brackets omitted; emphasis added); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54-58; 672 NW2d 884 (2003) (Holding contract for referral fee void *ab initio* because it violated public policy.)

Notably, this result does not present an impairment of contract issue, at least with respect to terminating the dues witholding. See Const 1963, art 1, § 10.[2] This is because halting the dues withholding does not substantially burden the contractual relationship between the home help providers and their purported employer, MQCCC. *Health Care Ass'n Workers Comp Fund v Dir of Bureau of Workers Comp*, 265 Mich App 236, 243; 694 NW2d 761 (2005) ("[I]f the impairment of a contract is only minimal, there is no unconstitutional impairment of contract.") Moreover, even a statute that substantially impairs a contractual provision does not violate the Constitution if there is a significant and legitimate public purpose for the regulation and the means adopted to implement the legislation are reasonably related to the public purpose. *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 163-164; 658 NW2d 804 (2002), citing *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 23; 367 NW2d 1 (1985).

Thank you for forwarding this matter to our attention. If you have any questions, please do not hesitate to contact this office.

Sincerely yours,

Richard A. Bandstra
Chief Legal Counsel

Att.

[2] Since your request only inquired as to the dues withholding requirement, this letter does not address other provisions of the collective bargaining agreement.