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Proposal 2 of 2012: An Assessment

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Executive Summary*

Michigan's statewide ballot in November will include Proposal 2, described officially as "a proposal to amend the state constitution regarding collective bargaining" — that is, exclusive workplace bargaining by certified unions. If approved by voters, the measure would have two general effects.

First, the proposal would enshrine collective bargaining powers in the Michigan Constitution. Collective bargaining is already permitted by longstanding state and federal law, but under Proposal 2, these powers would have a broader sweep and could generally be changed only by a state constitutional amendment, not an act of the Legislature. Second, Proposal 2 would establish a radical new constitutional proposition: the power of most union contracts to override, with only limited exceptions, all state and local laws concerning "wages, hours, and other terms and conditions of employment" or the "financial support" of unions. These phrases are remarkably broad, giving union contracts the power to nullify a wide range of laws, including numerous laws meant to control government spending.

State labor law has permitted unionized collective bargaining for state employees since 1979; for local government employees since 1965; and for a much smaller group of private-sector workers since 1939. Federal labor law has permitted the same for most private-sector workers since 1935. In one sense, Proposal 2 would provide unions and their members with an insurance policy against the unlikely repeal of these laws.

But by placing collective bargaining power in the constitution, Proposal 2 would do more than that. If Proposal 2 were adopted, even small modifications to the scope of collective bargaining for state and local government employees in Michigan would require a state constitutional amendment.

Note that in most cases, Proposal 2 would not affect private-sector workers. Most private-sector employees are governed by federal law, not state law and the state constitution. Proposal 2 primarily concerns state and local government employee unions, since states, not the federal government, have the sole power to determine whether state and local government employees should be allowed to bargain collectively.

Proposal 2's radical power lies in a subsection that allows state and local laws to be overridden by provisions of collective bargaining agreements that deal with "wages, hours, and other terms and conditions of employment." This phrase is a legal term of art that is incredibly broad. It covers obvious compensation issues like health insurance benefits to social health questions like smoking on the premises to obscure matters like the price of candy in factory vending machines.

Proposal 2 similarly allows state and local laws to be overridden by elements of collective bargaining agreements "respecting financial support by employees of their collective bargaining representative." Contract provisions could thus nullify laws that separate government and politics by preventing government collection of union political money or union dues, which almost always have a significant political component.

Many state laws would be immediately vulnerable to nullification by the terms of government-employee collective bargaining agreements. Included are:

* Citations provided in the main text.

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- Public school management provisions:
  - protecting good teachers from being laid off due to a lack of seniority;
  - creating greater flexibility in assigning teachers to areas of need;
  - allowing notification of parents about ineffective teachers;
  - freeing school boards to allow interdistrict and intradistrict choice;
  - enabling districts to contract freely with private providers of noninstructional services
- Educations reforms meant to modernize the tenure system and make it easier to remove poorly performing teachers.
- A law that puts caps on government contributions towards government-employee health insurance (the so-called "80-20" law)
- The Freedom of Information Act.
- A law that prohibits government employers from collecting money for unions "PACs" (called "separate segregated funds")

Proposal 2 would also preclude the Legislature's enacting a "right-to-work" law — that is, a law that prevents unionized employees from losing their jobs if they object to union membership and choose not to financially support the union.

Proposal 2 would affect many laws meant to control government spending. As a result, the proposal could lead to at least $1.6 billion in projected savings being lost each year, primarily due to changes to the 80-20 health insurance provisions, employee pension contribution and school district contracting for noninstructional services. Contractual changes to public school employee retiree health care benefits could put at risk a total of $7.1 billion in anticipated taxpayer savings, while changes to either the state employee pension system or the public school employee pension system could add billions of dollars more.

Hence, as the study concludes, Proposal 2 "seems less likely to protect jobs than to create larger demands on workers' income to supply better wages, hours, and other terms and conditions of employment for government employees."

Introduction

Proposal 2, if approved by Michigan voters in November, would add collective bargaining for government employees and private employees to the enumeration of rights in the state constitution. The proposal would also bestow significant legal power on collective bargaining agreements by allowing them to override state law in certain circumstances. This Policy Brief reviews the proposal, discusses its effect and reviews a number of laws that would or could be changed or abrogated under the proposal.

Proposal 2 is relatively brief. First, the measure would add a new section to Article I of the Michigan Constitution. This proposed Section 28 consists of six subsections.*

The proposed Article I, Section 28(1) creates a constitutional power permitting government employees and private employees to bargain collectively with their respective employers through exclusive labor representatives:

> (1) The people shall have the rights to organize together to form, join or assist labor organizations, and to bargain collectively with a public or private employer through an exclusive representative of the employees' choosing, to the fullest extent not preempted by the laws of the United States.

The proposed Article I, Section 28(2) defines collective bargaining as the mutual obligation of the employer and the exclusive labor representatives to negotiate over employees' wages, hours and other terms and conditions of employment:

> (2) As used in subsection (1), to bargain collectively is to perform the mutual obligation of the employer and the exclusive representative of the employees to negotiate in good faith regarding wages, hours, and other terms and conditions of employment and to execute and comply with any agreement reached; but this obligation does not compel either party to agree to a proposal or make a concession.

The proposed Article I, Section 28(3) states that with a couple exceptions, no existing or future state or local laws may "abridge, impair or limit" the collective bargaining rights articulated in subsection 1:

* The complete language of Proposal 2 is posted online at www.MIballot2012.org; see "Initiative Petition Amendment to the Constitution (Protect Our Jobs)," (Mackinac Center for Public Policy, 2012), http://goo.gl/h5fsD (accessed Sept. 29, 2012). The new language that would be inserted into the Michigan Constitution by Proposal 2 also appears in this Policy Brief in "Appendix A: Proposal 2's Ballot Description and Language."

(3) No existing or future law of the State or its political subdivisions shall abridge, impair or limit the foregoing rights; provided that the State may prohibit or restrict strikes by employees of the State and its political subdivisions. The legislature's exercise of its power to enact laws relative to the hours and conditions of employment shall not abridge, impair or limit the right to collectively bargain for wages, hours and other terms and conditions of employment that exceed minimum levels established by the legislature.

The proposed Article I, Section 28(4) similarly circumscribes the power of state and local law over collective bargaining agreements, but this time with respect to any contractual obligation of employees to financially support their labor representative.

(4) No existing or future law of the State or its political subdivisions shall impair, restrict or limit the negotiation and enforcement of any collectively bargained agreement with a public or private employer respecting financial support by employees of their collective bargaining representative according to the terms of that agreement.

The proposed Article I, Section 28(5) defines the terms "employee" and "employer."

(5) For purposes of this Section, "employee" means a person who works for any employer for compensation, and "employer" means a person or entity employing one or more employees.

The proposed Article I, Section 28(6) provides that if any portion of Proposal 2 is found in conflict with the U.S. Constitution or federal law, the remainder of Proposal 2 shall be effective.

(6) This section and each part thereof shall be self executing. If any part of this section is found to be in conflict with or preempted by the United States Constitution or federal law, such part shall be severable from the remainder of this section, and such part and the remainder of this section shall be effective to the fullest extent that the United States Constitution and federal law permit.

Proposal 2 would also amend Article XI, Section 5 of the State Constitution by adding a new paragraph. This paragraph would confer broad collective bargaining powers on state civil service employees, but requires merit-based promotions:

Classified state civil service employees shall, through their exclusive representative, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions, which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness.

Proposal 2 Under Federal and Michigan Labor Law

Proposal 2 is best understood by first examining which workers would be affected by the measure. Labor law in the United States can be divided into two separate categories. The first is private-sector employment. Workers in the private sector are governed by myriad federal statutes concerning their legal protections on the job. The primary statutes for most private-sector workers are the National Labor Relations Act[1] and the Railway Labor Act.[2]

States have limited power to regulate labor relations for workers in the private sector. Their primary power is the ability to pass a "right-to-work" law, which is discussed later.* Michigan also regulates, under an act known as the Labor Relations and Mediation Act, small-scale private-sector unionization that does not meet threshold requirements in the NLRA.[3] On the whole, given the presence of the NLRA (passed in 1935) and Michigan law governing small-scale unionization (passed in 1939), Proposal 2 would have little effect on the private-sector employees in Michigan.

The second major category of labor law is employment in state and local government.† In Michigan, local government employees have been permitted to engage in collective bargaining since the passage in 1965 of the state's Public Employment Relations Act, which is based on the federal NLRA. State employees, on the other hand, are mostly governed by the Michigan Civil Service Commission, which is empowered by the

* A "right-to-work" law is based on section 14(b) of the 1947 Taft-Hartley Act, which allows states to bar union or agency shop collective bargaining agreements where union membership is a condition of employment. 29 U.S.C.A. § 164(b). In practical terms, state "right-to-work" laws stipulate that providing financial support to a union cannot be made a condition of employment. To date, 23 states have adopted right-to-work laws, mostly in the South and West. Indiana was the first Midwest state to enact a right-to-work law.

† Federal government workers are covered by federal laws.

state constitution[4] and whose rules since 1979 have permitted state employees to collectively bargain.*

State and local government employees are much more numerous than the limited contingent of private-sector employees covered by the Labor Relations and Mediation Act. Moreover, state and local government employees are entirely governed by state law, unlike private-sector employees. Hence, Proposal 2's practical effects would involve almost exclusively state and local government employees.

The U.S. Constitution and Public-Sector Unionization†

The U.S. Supreme Court has observed that collective bargaining with government is not a fundamental right under the U.S. Constitution, but rather a matter subject to state law. In the 1979 case Smith v. Arkansas State Highway Employees, Local 1315, the U.S. Supreme Court discussed workers' First Amendment right to join a union:

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members.[5]

In that same decision, however, the court clarified that the states are not obligated to engage in collective bargaining with public-sector unions — in other words, that public-sector unions have no First Amendment right to engage in collective bargaining:

> The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective. The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[6]

Thus, the decision whether to allow public-sector bargaining belongs to each state, and states can choose to permit no public-sector bargaining at all. A 2002 Government Accountability Office report indicates that at that time, 12 states did not permit public-sector bargaining; 12 allowed some public-sector bargaining; and 26, including Michigan, permitted most public-sector employees to engage in collective bargaining.[7]

As the U.S. Supreme Court has observed, there are reasons that state governments might wish to limit the power of public-sector unions. In the 1977 case Abood v. Detroit Board of Education, the U.S. Supreme Court discussed "the important and often-noted differences in the nature of collective bargaining in the public and private sectors."[8] The court wrote:

> A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market. Municipal services are typically not priced, and where they are[,] they tend to be regarded as in some sense "essential" and therefore are often price-inelastic. Although a public employer, like a private one, will wish to keep costs down, he lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases. A public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment.[9]

In addition to escaping market discipline, public-sector unions face a government that is typically divided. The court observed:

> The government officials making decisions as the public "employer" are less likely to act as a cohesive unit than are managers in private industry, in part because different levels of public authority [—] department managers, budgetary officials, and legislative bodies [—] are involved, and in part because each official may respond to a distinctive political constituency. And the ease of negotiating a final agreement with the union may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others.[10]

And ultimately, the court noted, there is a third critical difference between public- and private-sector bargaining:

* Michigan Civil Service Commission Rules, Revised May 23, 2012, 6-1, 6-2, 6-3. In November 1978, state troopers and sergeants were given the power to collectively bargain through an amendment to the Michigan Constitution. Const. 1963, art. 11, sec. 5.

† Most of this section has already been published by the Mackinac Center for Public Policy (Patrick J. Wright, "Public-Sector Bargaining Privileges Are Not Inalienable Rights," (Mackinac Center for Public Policy, 2011), http://www.mackinac.org/14734 (accessed Sept. 25, 2012). The text appearing here is a lightly edited version of the earlier publication.

> [D]ecisionmaking by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters [—] taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table.[11]

These disparities between bargaining in the private and public sectors led the court to conclude, "It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector."[12] In other words, the court characterized public-sector collective bargaining as a legal privilege that gives government-employee unions systemic leverage that private-sector unions do not have.

Public-Sector Employment Relations in Michigan

As noted earlier, Michigan has permitted public-sector collective bargaining through the state's Public Employment Relations Act and through rules approved by the Michigan Civil Service Commission. At present, the Michigan Civil Service Commission can change these rules, and the Michigan Legislature can pass statutory amendments to the Public Employment Relations Act, meaning that public-sector bargaining power remains subject to legislative control.

In fact, the appearance of Proposal 2 on the November ballot follows a period of legislative revisions to PERA that have generated controversy. One Associated Press article in 2011 described Michigan's government employees as feeling "under attack."[13] The current state of public-sector employment relations in Michigan, both legal and financial, is discussed below.

Michigan Labor Law

Since the 1930s, Michigan has been among the most heavily unionized states in the union. While some states do not engage in collective bargaining in the public sector,[14] Michigan government has freely accepted the presence of organized labor, with many state laws reflecting the priorities of labor unions. Michigan's prevailing wage law, for instance, explicitly requires the adoption of union wages and benefits.* This language stands in contrast to the federal Davis-Bacon act and comparable wage laws in many other states.

In spite of recent amendments,† PERA retains its basic character, both in the process of union recognition and collective representation. Unions continue to represent all workers within a bargaining unit, including those who openly oppose unionization. Local governments and school districts are still obligated to bargain in good faith with recognized unions, and if they (or the unions) fail to do so, they are subject to unfair labor practice charges that will be adjudicated by the Michigan Employment Relations Commission.[15] Certain limits have been placed on the scope of bargaining,[16] but the vast majority of the traditional topics of bargaining — wages, benefits, hours, and working conditions — remain open to negotiation, and there is little in the law to prevent unions from pursuing creative approaches to protecting or rewarding workers.[17] And workers can still be required by union contracts to pay agency fees or dues to a union that they may oppose.[18]

Most employees of state government itself can also be organized and represented by unions under rules established by the Michigan Civil Service Commission.[19] Much like PERA, the CSC's rules give unions broad powers to represent all workers in a bargaining unit,[20] to bargain in good faith with a state government required to do likewise,[21] and to collect dues and fees from all workers without regard to whether individual workers support the union.[22] There has been no indication that the CSC is likely to rescind these rules.[23]

Michigan's Public-Sector Employment Costs

By several measures, Michigan labor law has not shortchanged government employees. Between 2000 and 2010, total private-sector wages in the state dropped by more than 20 percent when corrected for inflation, while total state and local government employee wages kept pace with inflation.[24] The real cost of state and local government employees' benefits shot up by more than 25 percent during the same period.[25]

* Michigan's "prevailing wage law" requires construction contractors working on state-financed projects to pay "prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers." MCL § 408.554.

† Several of these amendments would be affected by Proposal 2. They are discussed below, under "Public School Management Provisions."

Government employee benefits are now a significant concern for Michigan taxpayers. Unfunded pension liabilities for most state and public school employees alone officially stood at $27.8 billion at the end of fiscal 2011, but even this number assumes a fairly high rate of return on the investment of pension assets — in nearly every case, 8.0 percent.[26] Lower, more prudent investment assumptions would necessarily show that Michigan's underfunding of the two pension plans is higher.*

And in many cases, state and local government employees receive generous retiree health care benefits (in addition to Medicare). A 2010 survey of 24 major Michigan employers, in contrast, showed that just three offered subsidies of any kind for retiree health care.[27] More broadly, if all state and local government employee benefits — pension, insurance coverage, paid leave and others — were set at the state's private-sector levels, taxpayers would save an estimated $5.7 billion per year.[28]

For decades, the Michigan Education Association, the state's largest public school employee union, has pressured school districts into buying health insurance for school employees through the Michigan Education Special Services Association, the union's affiliated health insurance administration program.[29] In 2011, about 80 percent of school districts purchased health insurance from MESSA. The average MESSA premiums for single, two-person and family plans were $7,210, $16,173 and $17,692 — 52 percent, 64 percent and 36 percent above private-sector averages for Michigan, respectively.[30] School employee health insurance costs in Michigan's public schools have risen to about $1,300 per pupil — 31 percent higher than the per-pupil cost in 2004.[31]

Some costs of unionizing personnel are harder to translate into dollar amounts, but they are nevertheless very real. For instance, unionized workplaces often have fairly strict job definitions. Depending on the size of the jurisdiction and the makeup of the bargaining unit, there can be dozens of these.† Job assignments are often done by seniority and layoffs are also made by a strict last-in-first-out basis, meaning that good workers are as likely to be laid off as poor ones.[32] Recent legislation has made these "last-in-first-out" layoffs less of a problem in public schools,‡ but work rules remain a serious issue.

The current governor and Legislature have taken a number of steps to address the government-personnel cost and service quality issues described above. For example, Public Act 152 of 2011 places limits on government-employer contributions to government-employee health care, with government employees generally expected to pick up 20 percent of the cost of their own insurance.[33] The measure encourages employers and employees to economize, but does not prohibit generous health insurance, and some local governing bodies can vote to set the limits aside.§ The bulk of the legislation that has affected collective bargaining over the past few years — limits on the use of seniority in contracts, blocking automatic pay increases in the absence of a current contract, bargaining over evaluations and merit pay for teachers — has been in this vein: designed to address recurring cost and quality problems, while leaving unions broad authority to bargain.¶

Consider even Public Act 4 of 2011, a controversial law now subject to a referendum on the November ballot.[34] The act addresses local governments "in a condition of financial stress or financial emergency."[35]

The problem of insolvent local governments can be severe. As a co-author of this Policy Brief recently wrote:

> California's unsustainable labor obligations [have] caused cities like Vallejo and most recently Stockton to declare bankruptcy. Before entering Chapter 9 (the part of the federal bankruptcy code which applies to municipal bankruptcies), Stockton's fiscal problems forced the city to cut 25 percent of its

* A recent report from the nonprofit organization State Budget Solutions suggests that Michigan's reported unfunded liability of $11.5 billion for all state government pension systems in 2008 (when unfunded liabilities were much lower) ranged from $63.6 billion to $72.2 billion under alternative valuation methods and assumptions. James M. Hohman, "Commentary: Pension Liabilities Larger Than Reported," (Mackinac Center for Public Policy, Aug. 2, 2012), http://www.mackinac.org/17326 (accessed Sept. 28, 2012).

† For instance, a consultant found that the Detroit Water and Sewerage Department had 257 separate work classifications. John Wisely, "Detroit water department to cut 81% of workers under new proposal," Detroit Free Press, Aug. 9, 2012, http://goo.gl/mvqwK (accessed Sept. 25, 2012).

‡ Following the passage of Public Act 102 of 2011, state law now requires that teacher performance evaluations be considered before seniority in teacher layoff decisions. MCL §§ 380.1248-49.

§ MCL § 15.568. Note that there is no reason MESSA cannot compete under the new rules.

¶ For more information on the reforms that have been made to collective bargaining, and in other areas, see "25 Reforms in 2011," (Mackinac Center for Public Policy, April 10, 2012), http://www.mackinac.org/16753 (accessed Sept. 29, 2012). There were two union-related pieces of legislation that had less to do with cost: a prohibition on school districts' collection of union dues and a general prohibition on government employers' collection of union members' financial contributions to union political action committees. Nevertheless, these revisions are not necessarily hostile to unionization per se; rather, they can involve legitimate questions about government's proper role in facilitating the collection of political money for nongovernment parties.

police force and 30 percent of its fire department. The city also had to reduce pay for all of its workers by 20 percent. In the end, the city could not even pay its vendors [and risked missing] payroll.[36] [Stockton] cut services by so much that officials said, "[P]ublic safety is at a crisis level."[37]

Public Act 4 includes a provision allowing state-appointed emergency managers of municipalities in a state of financial emergency[38] to set aside (with approval of the state treasurer) local government-employee union contracts.[39] This power is a clear exception to the procedures established in PERA.

Yet whatever the merits of Public Act 4, the contract provision has a practical basis. Personnel costs typically represent a majority of a local government's operating budget. Given this, and given the stated intent of the act to prevent "the insolvency of local governments" and "protect the credit of this state,"[40] the power to restructure personnel contracts furnishes emergency managers with direct control over an area of spending that may have the largest impact on their mission.

Notably, emergency managers have exercised the right to modify collective bargaining in only three local governments: Flint, Pontiac and the Detroit Public Schools. In fact, the state financial reviews in Public Act 4 have been utilized in only a small number of communities and school districts. Some elements of Public Act 4 have been invoked in the city of Detroit, but even Detroit, with its persistent and highly publicized financial problems, has yet to be placed under an emergency manager.[41]

Public Act 4, then, affects public-sector collective bargaining only in exceptional cases. In the vast majority of instances, Michigan's legislature has yet to advance any legislation that would change the basic premises of PERA and government-sector collective bargaining.

Analyzing the Provisions of Proposal 2

A review of Proposal 2 shows it would modify or nullify the legislative measures described above. Indeed, a section-by-section analysis of Proposal 2 will show that its effect is extremely broad, as unions would be given the power to negotiate contracts with greater legal power than acts of the Legislature. Any laws on the books — and any laws adopted in the future — that impair or limit collective bargaining would be void.

Proposed Article I, Section 28(1)

Proposed Article I, Section 28(1), states that the people shall have the right to "organize together to form, join, or assist labor organizations" and second the power "to bargain collectively with a public or private employer." The right of forming labor organizations is redundant, since the First Amendment protects the people's right to form associations, including labor unions. The power to collectively bargain is somewhat redundant: It is included in the NLRA, the Labor Relations and Mediation Act and PERA. Placing this provision in the state constitution would effectively be an insurance plan to preserve the power of collectively bargaining if Congress or the Michigan Legislature were to repeal the above acts, all of which are at least 47 years old.

Nevertheless, placing a broad guarantee of collective bargaining powers into the state constitution would be significant. As discussed earlier under "The U.S. Constitution and Public-Sector Unionization," there is no federal constitutional requirement that state and local governments negotiate with labor organizations. If Proposal 2 were approved, any modifications to collective bargaining powers would be subject to constitutional challenge and would likely require a new constitutional amendment.*

Proposed Article I, Section 28(2)

Proposed Article I, Section 28(2), defines the duty to "bargain collectively." The employer and the union representing the employees must "negotiate in good faith regarding wages, hours, and other terms and conditions of employment," and must "execute and comply with any agreement reached" by the parties. Courts have said that negotiating in "good faith" depends on whether a party "actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement."[42]

The text of this proposed subsection also indicates, however, that the duty to bargain in good faith "does not compel either party to agree to a proposal or make a concession." Such language appears elsewhere in state and federal labor law, and it may have a significant impact on labor dispute resolution methods currently practiced

* Public-sector collective bargaining in most states is enabled by statute. At least two states — Florida and Missouri — guarantee a broad collective bargaining power in their constitutions. Florida Constitution, Art. I, Sec. 6 and Missouri Constitution, Art. I, Sec. 29. Note that both Florida and Missouri provide the same powers that appear in subsection (1) of Proposal 2. The remainder of Proposal 2 would be unique to Michigan.

under state law. This point will be explored below under "Binding Arbitration in Public Act 312."

Proposed Article I, Section 28(3)

Proposed Article I, Section 28(3), states, "No existing or future law of the State or its political subdivisions shall abridge, impair or limit" the rights discussed in Proposal 2's previous two subsections. This provision has essentially two components. The first prohibits state and local lawmakers from attempting through law to limit PERA or the Labor Relations and Mediation Act. This makes explicit what it is already implicit: that state law cannot trump the state constitution.

The second component, however, can be described, without hyperbole, as a radical proposition — that a collective bargaining agreement has the power to override state and local law. There are just two exceptions: Collective bargaining agreements cannot override a state law to prohibit government employees from striking,* and they cannot abrogate the Legislative's power to set "minimum levels" for "wages, hours, and other terms and conditions of employment."

The radical power that remains, however, is that any past, present or future state or local law that would "abridge, impair, or limit the right to collectively bargain for wages, hours and other terms and conditions of employment" is susceptible to nullification by a collective bargaining agreement.† And since collective bargaining agreements by definition involve negotiations over "wages, hours and other terms and conditions of employment," the key to understanding the scope of this radical power is to explore the definition of that phrase.

The Meaning of "Wages, Hours and Other Terms and Conditions of Employment"

The range of laws that would be invalidated by Proposal 2 is indicated by a legal term of art. Both Section (2) and (3) of the proposal uses the term "wages, hours, and other terms and conditions of employment." The proposed amendment's language is borrowed from similar language in the NLRA[43] and PERA.[44]

The Michigan Supreme Court has explained the significance of this phrase:

> In both the PERA and the NLRA, the collective bargaining obligation is defined as the mutual duty of labor and management to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." The subjects included within the phrase "wages, hours, and other terms and conditions of employment" are referred to as "mandatory subjects" of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject, and neither party may take unilateral action on the subject absent an impasse in negotiations.[45]

The Michigan Supreme Court held that courts should take a "liberal approach to what constitutes a mandatory subject of collective bargaining."[46] The Michigan Court of Appeals has suggested that mandatory subjects should be even more liberally construed under PERA than under the NLRA because government employees, in contrast to their private-sector counterparts, are forbidden to strike.[47]

In 1998, the Michigan Supreme Court set forth some (but not all) mandatory subjects under PERA:

> Mandatory subjects of collective bargaining are comprised of issues that "settle an aspect of the relationship between the employer and employees," and include, but are not limited to, terms and conditions of employment concerning hourly, overtime, and holiday pay, work shifts, pension and profit sharing, grievance procedures, sick leave, seniority, and compulsory retirement age. Health insurance benefits are mandatory subjects of bargaining.[48]

The breadth of the concept of mandatory subjects of bargaining can best be demonstrated by a discussion of a collective bargaining dispute at Ford Motor Company that was eventually decided by the U.S. Supreme Court.[49] In that case, the court reviewed whether Ford Motor Company needed to bargain over "prices for in-plant cafeteria and vending machine food and beverages."[50]

The court held that the courts should defer to the NLRB's "special expertise" in determining what should be a mandatory subject.[51] This deference was necessary since, "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."[52] The court noted that the price of in-factory food was likely of "deep concern to workers" and is "plainly germane to the 'working environment.'"[53]

* Proposal 2 includes no requirement that the Legislature continue the government-employee strike prohibition that has existed since 1947.

† A number of laws that could be invalidated through this provision will be discussed below, under "Major Laws Susceptible to Challenge."

The United States Supreme Court held that the food prices were a mandatory subject of collective bargaining. Thus, because private employees may legally strike, the workers had the legal ability to strike over the price of a candy bar or can of soda.

Almost as important as the breadth of mandatory subjects of bargaining is the government board that will decide what qualifies. The proposed amendment does not allow the breadth of this term to be decided by the people's representatives in the Legislature. Rather, the scope of this amendment will be decided by the Michigan Employment Relations Commission, a three-member unelected state labor board.

It should also be noted that unlike the NLRB, MERC would not receive a high degree of deference from the courts. The Michigan Supreme Court has ruled that executive agency decisions are due "respectful consideration," but that ultimately the duty of interpreting state law remains with the courts.[54] As a result, MERC decisions are even more likely to be appealed to the court system than NLRB decisions are. Given the power granted to collective bargaining agreements under Proposal 2, the net effect of this proposal would almost certainly be substantial and protracted litigation over the legal scope of collective bargaining.

Proposed Article I, Section 28(4)

The Proposed Article I, Section 28(4), states that "no existing or future law" of the state or local government may "impair, restrict or limit the negotiation and enforcement of any collectively bargained agreement" as it relates to the financial support of a union by employees. In other words, no state law could relieve unionized employees of a contractual duty to pay money to a union.

This provision has two major consequences. The first involves the process of handling money that employees owe or have pledged to a union.

In many cases, an employer will withhold that money from a unionized employee's paycheck and then forward the amount directly to the union. In this case, the money never actually reaches the employee.

Michigan lawmakers currently regulate this transaction, in both government-employee unionization and in the small-scale private-employee unionizations covered by the Labor Relations and Mediation Act. State law can prevent employers from withholding dues or other monies owed to the union, thereby leaving the union to collect the money directly from the employees themselves. In the context of government employers, such a prohibition on withholding union monies from employee paychecks has been justified on grounds of preventing the government from becoming entangled in the gathering of money for political purposes.[55]

The proposed Article I, Section 28(4), however, would prevent such state regulations, allowing collective bargaining agreements to determine how such monies would be collected. Government employers could be required to collect money intended, for example, for union political action committees.

The second major consequence of the proposed Article I, Section 28(4), involves what monies a union can claim to begin with. When a union is certified as a collective bargaining representative in the workplace, it gains a monopoly right to become the "exclusive representative" of all of the employees during collective bargaining. Employees who support the union's presence may choose to formally join the union, in which case, they would owe membership dues to the union. But in many states, including Michigan, a union also gains the legal power to demand payment from *all* employees for its negotiations during collective bargaining and "grievances" (i.e., resolving disputes with management). This payment is generally known as an "agency fee" and would be collected from all employees not already paying union dues.*

Under the NLRA, states are permitted to decide whether unions can levy a compulsory agency fee. States that do not grant the unions this power are known as "right-to-work" states.

Michigan is not currently a right-to-work state — unions in Michigan can demand agency fees from all employees, regardless of whether those employees support the presence of the union in the workplace. Employees who do not pay agency fees to the union can legally be fired if the collective bargaining agreement includes a "union security" clause, as almost all contracts do.

* Note that "agency fees" are not "union dues." Generally, agency fees are meant to cover exclusively the costs of collective bargaining negotiations and grievance administration. Nevertheless, agency fees are often set at the same level as union dues and are decreased only if a fee payer invokes his or her rights to cover no more than the union's negotiating costs (these rights are generally known as "Beck" or "Hudson" rights, based on the Supreme Court cases that articulated them). Agency fees are not supposed to be spent on political purposes, a significant difference from union dues, which can be. Note also that union dues, because they are incurred "voluntarily," are owed to a union in either a right-to-work state or a non-right-to-work state. (The degree to which the union members join "voluntarily" when they may face considerable social and legal barriers to leaving the union and becoming fee payers, is beyond the scope of this Policy Brief.)

(Union-security clauses in a right-to-work state are unenforceable.)

Under the proposed Article I, Section 28(4), the Michigan Legislature would no longer be able to decide whether Michigan would become a right-to-work state for either government employees or private-sector workers. Only a further constitutional amendment would allow a right-to-work provision that affects a collective bargaining agent's "financial support by employees."

Proposed Article I, Section 28(5)

This proposed subsection defines an employee as someone who works for an employer "for compensation." An employer is a "person or entity employing one or more employees."

This provision allows unionization of a single employee.

As a practical matter, defining "employer," "employee" and "compensation" has proved extremely complicated in existing state labor law. The brief and arguably circular and vague definition of these terms in Proposal 2 will almost certainly lead to lengthy and complex litigation.

The potential for disagreement over the meaning of employment-related terms has been underscored by recent litigation over whether home-based day care providers and home help providers who indirectly receive child care and Medicaid subsidies are state government employees.[56] A similar controversy arose over an attempted unionization of graduate student research assistants at the University of Michigan.[57] Each of these debates necessarily involved intense investigation of existing labor and constitutional law regarding what constitutes employment.

Proposed Article I, Section 28(6)

This proposed subsection covers two points of law. The first involves actions (or nonactions) by the Legislature. Often, when the state constitution is amended, the Legislature passes "enabling" legislation to accompany the amendment and specify its exact effects. This subsection's declaration that the various subsections of the proposed Article I, Section 28, are "self-executing" stipulates that they will have the full force of law even if no enabling legislation is passed.

The second declares that the various subsections of the proposed Article I, Section 28, are "severable" if "found to be in conflict with or preempted by the United States Constitution or Federal law." This clause means that if any portion of the proposed subsections is nullified by a court ruling, the remaining subsections will remain enforceable as part of the Michigan Constitution. An adverse court ruling is therefore not "all or nothing."

Proposed Amendment to Article XI, Section 5

The proposed amendment would add a paragraph to Article XI, Section 5, of the Michigan Constitution regarding the Civil Service Commission. Under this article of the state constitution, much of the state's workforce is overseen by an independent Civil Service Commission. The CSC has authority to set wages, benefits and working conditions, and also oversee hiring and disciplinary decisions.

Since 1978, Article XI, Section 5, has permitted state police troopers and sergeants to "bargain collectively with their employer" about most aspects of employment, though not promotions, which are based on merit. The section has also given state troopers access to binding arbitration in order to settle protracted collective bargaining disputes.

Currently, the state constitution does not bestow the same collective bargaining power on other state employees under the CSC's jurisdiction. The CSC's own rules, however, allow most other state employees to unionize and engage in collective bargaining over a wide range of topics. These CSC rules are very similar to PERA. Through them, the CSC has effectively delegated much of its authority to the collective bargaining process. The CSC has, however, the ability to resolve impasses (when the state and a union cannot agree to terms), and the commission can intervene in negotiations or even amend its rules to ensure that the process works smoothly.[58]

If Proposal 2 were adopted, state employees under the CSC's jurisdiction and not in the state police force would receive the same constitutional basis for their ability to collectively bargain as state police, although unlike the police, these employees would not have recourse to binding arbitration. The main practical effect of the adoption of Proposal 2, then, would be to ensure through the state constitution that the CSC could not rescind its rules permitting state employee unionization and the exercise of collective bargaining power.

Major Laws Susceptible to Challenge

As noted above, the most radical portion of Proposal 2 — the proposed Article I, Section 28(3) — would give unions the ability to negotiate terms in their labor contracts that supersede state law. Also as discussed above, this ability to nullify or suspend laws would be limited only by the scope of collective bargaining itself, and this scope would be defined as "wages, hours, and other terms and conditions of employment." In addition, under the proposed Article I, Section 28(4), there is a prohibition on state or local laws that would "impair, restrict or limit" any provisions in collective bargaining agreements concerning employees' financial support of a union.

This phrase is defined in federal law, but since 1994, the scope of bargaining that the phrase represents has been narrowed by the Michigan Legislature in an exercise of its constitutional discretion over public-sector collective bargaining. In that year, because of a perceived imbalance of power favoring public school employee unions at the collective bargaining table (an imbalance reminiscent of the discussion in Abood), the Legislature passed Public Act 112, which added "prohibited subjects of bargaining" to PERA.[59] Additional prohibited subjects have since been added to PERA.[60]

Proposal 2 would effectively restore the status quo pre-1994, rendering many of these prohibited subjects of bargaining vulnerable to nullification in new public school collective bargaining agreements. We now turn to these provisions. Note the large number of contracts under which such challenges could be mounted. A review of the Mackinac Center's database of Michigan School District Collective Bargaining Agreements indicates that there are a minimum of 1,698 collective bargaining agreements in Michigan's public school system alone.[61] The content of each of these contracts — and the content of an unknown number of other union contracts in state, county, municipal and other government subdivisions — would provide opportunities to challenge some or all of the laws discussed in the remainder of this Policy Brief.

Public School Management Provisions

The list of PERA's prohibited subjects of public school collective bargaining is found in MCL § 423.215(3)(a)-(p). These limitations on the scope of bargaining were meant to ensure that negotiations did not stray into core school management areas and broader policy issues. Examples of prohibited subjects of bargaining include:

- Decisions regarding "who is or will be the policyholder of an employee group insurance benefit" (meant to address the issue of the costs associated with the Michigan Education Special Services Association, as described earlier)[62]
- "Establishment of the starting day for the school year and the amount of pupil contact time required to receive full state school aid"[63]
- Whether "to provide or allow interdistrict or intradistrict open enrollment opportunity in a school district"[64]
- Whether "to contract with a third party for [one] or more noninstructional support services"[65]
- "The use of volunteers in providing services at its schools"[66]
- The "use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services"[67]
- Decisions "regarding teacher placement" (i.e., teaching assignments)[68]
- "[P]olicies regarding personnel decisions when conducting a staffing or program reduction" (meant to end the "last-in-first-out" policies discussed above)[69]
- "[D]ecisions about how an employee performance evaluation is used to determine performance-based compensation" (meant to permit merit pay)[70]
- Decisions about "the notification to parents and legal guardians" when a student is placed with an ineffective teacher.[71]

There is clear evidence that the items above are plausible targets of nullification under Proposal 2. Earlier this year, the Michigan Education Association distributed to its collective bargaining negotiators a three-page list of laws vulnerable under Proposal 2, so that the negotiators could target these laws during contract negotiations after November. The MEA's list includes some of the PERA provisions set out above (see Appendix B for a copy of the memo). That list also includes several of the laws discussed below.

Others have concluded a broad range of laws would be open to challenge under Proposal 2. In a July 20, 2012, memo to Gov. Rick Snyder, Michigan Attorney General Bill Schuette wrote that Proposal 2 "represents breathtaking changes to governmental branches' and units' prerogative to perform their constitutional function, establish their goals and objectives, determine budgets, compensation, retirement, medical or other benefits, and control terms

and conditions of public employment."[72] The attorney general estimated that Proposal 2 could abrogate in whole or in part more than 170 existing Michigan laws."[73]

Regardless of what the exact number of vulnerable laws is, the laws below are clearly among those susceptible to challenge.

Government-Employee Health Benefit Reform

Government union contracts under Proposal 2 could override the so-called "80/20" law, which protects taxpayers by putting a ceiling on government employer payments toward government-employee health insurance. Government employers can choose between a cost cap expressed in dollar terms or as a percentage of employee health insurance premiums (the latter cap has a maximum employer contribution of no more than 80 percent of government-employee health insurance premiums).[74] The lost taxpayer savings that might arise from undercutting this law will be discussed below.[75]

Education Reforms

In 2011 Michigan enacted a package of laws to amend the Teacher Tenure Act, Revised School Code and PERA. Public Act 101 revised the standards for allowing public school teachers to be granted tenure. The act also made the process of revoking tenure more efficient for ineffective teachers.[76] Public Act 102 enacted "Last-In/First-Out" reforms to protect talented new teachers from being laid off simply because they lacked seniority.[77] Both of these laws would be susceptible to a union-led court challenge as violations of Proposal 2 if it were to pass.

Freedom of Information Act

In 1976, following the Watergate scandal, Michigan passed the Freedom of Information Act, which gives citizens the right to access to public records.[78] Courts have said that FOIA's goal was "to establish a philosophy of full disclosure by public agencies and to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information."[79]

Regardless of this intent to provide broad disclosure of public records, Proposal 2 would empower government employers and government employees to reach a collective bargaining agreement that would shield records like employee misconduct files from FOIA discovery.

One union has already shown hostility to FOIA. In 2007, the Howell Education Association successfully blocked FOIA requests for emails sent on the Howell school district's computer system by teachers serving as union officials.[80] The Howell Board of Education and the Howell Education Association also approved a "memorandum of understanding" that called for a "go-slow" approach to FOIA requests in order to facilitate legal challenges:

> [I]t is likely that an employee or representative union may seek to restrain or limit release of information through the legal system. For this reason, the school district will not disclose personnel documents requested under FOIA until the full five business-day period provided under current law has elapsed.[81]

If Proposal 2 were to pass, further contractual challenges to FOIA seem likely. Inevitably, they would override a state law meant to promote citizen oversight of government.

Binding Arbitration in Public Act 312

Proposal 2 may also lead to the repeal of the binding arbitration provision appearing in Public Act 312 of 1969.[82] The act resolves protracted disputes over new or extended collective bargaining agreements between public safety officers, such as police or fire fighters, and government employers. The act's purpose is provide an expeditious resolution of the dispute and thereby ensure that a strike does not interrupt vital public safety services designed to prevent death, personal injury and other immediate and irreparable public harm.

Under this process, if an impasse occurs during contract negotiations between a municipality and a labor organization representing public safety workers, either side can unilaterally request a panel of arbitrators to determine a final contract.[83] Specifically, either the government employer or the employee union may request "binding arbitration proceedings" if a new contract has not been reached and mediation has failed after 30 days or after some mutually agreed additional time.[84]

Section 28(2) of Proposal 2 requires the government employer and the government-employee union to "negotiate in good faith," but the proposal adds that this provision "does not compel either party to agree to a proposal or make a concession." This language about compulsion is similar to wording in the NLRA and identical to statutory wording in PERA.*

* See 29 USC § 158(d); MCL § 423.215(1). The NLRA language is also repeated

Article 11, Section 5, of the Michigan Constitution currently allows state police to unionize. It also provides access to "binding arbitration" to resolve prolonged bargaining disputes. In pertinent part, that constitutional provision states:

> State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer . . . and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.[85]

Proposal 2 would add language to Article XI, Section 5, that would permit collective bargaining for all state employees, not just state police, rather than leaving that question in the hands of the Michigan Civil Service Commission. No change would be made, however, to the language allowing state troopers recourse to "binding arbitration."

The pertinent question is whether Proposal 2's provision preventing compulsion would be at odds with statutory and constitutional provisions permitting binding arbitration. At the time that Public Act 312 was passed, the no-concession language existed in PERA, the (state) Labor Relations and Mediation Act and the NLRA. There were subsequent challenges made to Public Act 312 that were rejected by the courts.[86] Yet it does not appear that there has been a challenge to Public Act 312 based directly on the no-concession language that existed in PERA when Act 312 was passed.

Because state troopers are explicitly allowed mandatory arbitration by the text of the state constitution, it is clear that they would continue to have that option if Proposal 2 were approved by the voters. For public safety personnel who currently have access to mandatory arbitration through Public Act 312, the outcome is less clear. Even though this potential conflict in legal provisions has existed for more than 40 years, it has not been addressed by a court.

But the elevation of the "does not compel" language from a statute, on the same legal plane with Public Act 312, to the constitution, where it could supersede Public Act 312, would make a legal challenge more likely. It may be that the courts would hold that mandatory arbitration does not force a party to agree to a proposal or make a concession. In that case, binding arbitration could continue under Proposal 2. But if the courts accepted a straightforward textual argument, there would be a strong case that binding arbitration compels either the public employer or the government-employee union (or both) to accept something it (they) did not want every time an arbitrator made a decision. If the court were to accept the textual argument, binding arbitration for most public safety officers would be ruled unconstitutional under the language of Proposal 2.

School District Dues Collection

In 2012, the Legislature passed Public Act 53, which stopped automatic payroll deductions of union dues from public school employees' paychecks.[87] As noted earlier under "Proposed Article I, Section 28(4)," such a prohibition can be justified on grounds of preventing the apparatus of government — in this case school districts — from becoming entangled in the collection of money for political purposes, since a significant portion of union dues are used for political activity.

Under this law, school employee unions must collect their members' union dues themselves, something that requires time and money. Unions have challenged the law in court partly on equal protection grounds (only public school employee unions were included in the bill), but the dispute is still under litigation.* Unions could challenge Public Act 53 on grounds that it violated Proposal 2's protection of union financial support provisions in collective bargaining agreements (Article I, Section 28(4)).

'Paycheck Protection'

In 1994, the Legislature amended the state's campaign finance act and adopted "paycheck protection." This provision safeguarded unionized workers' right to refrain from making contributions to a union's political activities by requiring the union to obtain the employees' affirmative consent before collecting money from an employee's paycheck for the union's "separate segregated fund," which is known colloquially as its "political action committee," or "PAC."[88] Before that, employees often had to request an end to political withdrawals from their

in MCL § 423.30, which is part of Public Act 176 of 1939, the "Labor Relations and Mediation Act." This act governs small-scale private-sector unionization not governed by the NLRA.

* In Bailey v Callaghan, __FSupp2d__ , 2012 WL 2115300 (EDMich 2012), a federal judge issued a preliminary injunction. The case is on appeal to the 6th U.S. Circuit Court of Appeals.

paychecks. If Proposal 2 passes, unions could bargain away the 1994 paycheck protection law.

Pension Reform

It is unclear what effect Proposal 2 would have on a long-established reform of Michigan's government-employee pension and benefit systems. In 1996, the Legislature "closed" a costly defined-benefit pension plan in the Michigan State Employees' Retirement System, thereby preventing state employees hired on or after March 31, 1997, from participating in the plan.[89] One estimate suggests Michigan taxpayers have avoided as much as $4.3 billion in government pension underfunding as a result.[90]

Pension benefits would clearly be a legitimate subject of collective bargaining under Proposal 2. On the other hand, the Civil Service Commission would have to approve any such collective bargaining agreement, and the CSC did not prevent the Legislature from closing the plan in the first place.

Public Act 4 of 2011: The 'Emergency Manager' Law

Public Act 4 of 2011, known as the Local Government and School District Fiscal Accountability Act, strengthened the powers of emergency managers who are appointed by the state to deal with local governments or school districts in "financial stress or financial emergency."* The act empowered an emergency manager to, among other things, amend the local government's or school district's collective bargaining agreements with government-employee unions if the state treasurer approved.[91]

But if Proposal 2 were approved, provisions of Public Act 4 related to wages, hours and other terms and conditions of employment for government employees would be subject to challenge. For instance, under the law, emergency managers would lose their ability to modify or terminate municipal and school board contracts or take remedial action to oversee local pensions funded below 80 percent.[92]

* MCL §§ 141.1501-31 (suspended pending referendum vote). Technically, "emergency managers" were created by Public Act 4. The act's predecessor, Public Act 72 of 1990, termed these state-appointed receivers "emergency financial managers." "Public Act 72 of 1990, 'Local Government Fiscal Responsibility Act'," (Michigan Legislature, 1990), http://goo.gl/fg7g3 (accessed Sept. 25, 2012).

Other Possible Laws

As observed earlier, the phrase "wages, hours and other terms and conditions of employment" covers a wide range of potential bargaining issues, including some that are not obvious at first blush. For instance, a government-employee union (and government employer) could include in a contract the ability to smoke indoors on the job in a public building, even if this violates the statutory ban on indoor smoking in public places.[93] This example may seem absurd, but the National Labor Relations Board has already determined that smoking on the work premises is a mandatory subject of collective bargaining.[94] As one of the "terms and conditions of employment," smoking provisions in a collective bargaining agreement with a government-employee union would have the power of the Michigan Constitution and supersede Michigan's existing "public space" indoor smoking ban.†

Proposal 2 does not enumerate the specific laws that it would invalidate. Recall, however, that the legal clauses in literally thousands of state and local government contracts — a minimum of 1,698 contracts in Michigan's public school districts alone — would provide myriad opportunities to challenge state law. In turn, determining the full scope and impact of Proposal 2 will be left primarily to the Michigan Employment Relations Commission, the Civil Service Commission and Michigan's court system, all of which will be asked to invalidate any law deemed to abridge, impair or limit collective bargaining.

Estimating the Potential Cost of Lost Reforms‡

While all the potential effects of Proposal 2 cannot be anticipated, there are, as discussed above, several laws that would no doubt be superseded under the proposal. These laws are scheduled to save Michigan taxpayers at least $1.6 billion per year.

† Theoretically, private-sector collective bargaining agreements might trump state law as well. For instance, imagine that a unionized wait staff at a large restaurant chain demanded the ability to smoke on the job despite the Michigan state law prohibiting smoking in restaurants. Would the NLRB hold that Proposal 2's language applied to workers under the NLRB's jurisdiction? And how would Michigan's courts treat private-sector union contracts that conflicted with state law? The answers to these questions are unknown.

‡ Most of this section has already been published. See James M. Hohman and F. Vincent Vernuccio, "$1.6 Billion in Savings Lost Under Prop 2," (Mackinac Center for Public Policy, 2012), http://www.mackinac.org/17534 (accessed Sept. 25, 2012). The text appearing here is a lightly edited version of the earlier publication.

Because of Proposal 2's considerable scope, this estimate is by no means an exhaustive accounting of Proposal 2's possible financial burdens. The following is a cost breakdown of current and predictable taxpayer savings revoked if Proposal 2 passes.

Health Insurance Premium Sharing

Recent legislation protects taxpayers from bearing the full burden of expensive government-employee health insurance premiums. The law includes cost caps, or a maximum taxpayer liability of 80 percent.

Under Proposal 2, collective bargaining agreements would likely supersede the so-called "80-20" law described earlier under Government-Employee Health Benefit Reform." Overriding this law would cost taxpayers an estimated $1 billion annually in potential savings. This figure is based on the difference between public- and private-sector employment benefits,[95] isolating just the health insurance portion and adjusting the gap downward to reflect the limited application of private-sector benchmarking. The 80-20 reform should save $1 billion annually when fully implemented and applicable to all local governments and authorities.*

Public School Employee Pension Adjustments

Recently passed legislation includes a cost shift from employers to employees in the state's school pension fund. These shifts will save taxpayers $312 million in the first year, according to a state fiscal analysis.[96] Under Proposal 2, any changes in retirement benefits would likely be negotiated away in collective bargaining. The American Federation of Teachers-Michigan and the Michigan Education Association, in fact, have already filed legal challenges to the legislation.[97]

School Support Services Privatization

School districts around the state have saved millions by contracting out with private vendors for food, custodial or transportation services.[98] Under Proposal 2, privatization of noninstructional services would no longer be a prohibited subject of bargaining. Hence, unions could add "no-bid" clauses to their collective bargaining agreements to prevent districts from contracting with private service providers for such services. Based on the application of savings figures from Mackinac Center privatization surveys to districts that have yet to contract out, Proposal 2 could prevent school districts from saving an additional $300 million annually.[99]

The three items above account for $1.6 billion in annualized savings.

Other Reforms With Potential Taxpayer Savings

Other laws that would save state tax dollars would also be in jeopardy if Proposal 2 passes. The magnitude of the future savings associated with these laws is uncertain; many long-term savings cannot be predicted on a per-year basis. Laws of this nature include the following.

Emergency Manager Law

As discussed above under "Public Act 4 of 2011: The 'Emergency Manager' Law," an emergency manager of a financially stressed municipality or school district can request approval from the Department of Treasury to amend union collective bargaining agreements under specified criteria.[100] If Proposal 2 passes, emergency managers would be denied this option.

Reports from the Treasury show that the emergency managers' amendments to collective bargaining agreements with government-employee unions in Flint, Pontiac and Detroit Public Schools have already saved taxpayers $100 million. While the emergency manager law will certainly save taxpayer money over the long term, an exact estimate of future savings is unknown.

MSERS Reforms

As discussed above under "Government-Employee Health Benefit Reform," former Gov. John Engler's 1996 initiative to close the state's major defined-benefit plan for state government retirees might be amenable to legal challenge if Proposal 2 passes. The 1996 pension reform has saved taxpayers from incurring $2.3 billion to $4.3 billion in additional unfunded liabilities since 1997, according to a 2011 Mackinac Center report.[101] The future cost of reopening the pension plan to new entrants or otherwise overriding the 1996 reform is unknown.

* For the total difference between government- and private-employee benefits in Michigan, see Hohman, "Benchmarking Benefits Methodology Sheet," (Mackinac Center for Public Policy, Dec. 17, 2010), http://goo.gl/QvJb1 (accessed Sept. 25, 2012).

Public School Retiree Health Care Cost Sharing

In addition to the savings mentioned above under "Public School Employee Pension Reforms," there are savings from recently passed school pension fund reforms that lowered the calculated financial burden of the retiree health care benefits currently offered to school employees and retirees. This represents a $7.1 billion decrease in taxpayer payments to the system, according to a state fiscal analysis.[102] If these reforms were overridden by union contracts under Proposal 2, state taxpayers would lose these savings.

Other State Employee Pension System Reforms

Last year, the state required its employees to contribute more money to cover the cost of their own pension and retiree health care coverage — benefits largely unavailable in the private sector. According to a state analysis,[103] this increased responsibility is expected to save taxpayers $82 million and $56 million annually for retiree health care and pension benefits, respectively. While these reforms are currently subject to litigation, these taxpayer savings would be automatically be subject to nullification through collective bargaining under Proposal 2.

Hence, Proposal 2 would cost Michigan taxpayers conservatively $1.6 billion annually in current and scheduled taxpayer savings — but that number likely underestimates the full financial impact. What is certain is that government-employee union authority will be fortified against the claims of taxpayers' elected representatives.

Conclusion

If adopted, Proposal 2 would amend the constitution in a manner not found in any other state constitution. The amendment would realign collective bargaining relations in state and local government by clearly giving union contracts the ability to override, veto or nullify any law deemed to impair or limit the contract's enforcement. The amendment would require the government to honor collective bargaining agreements even if the terms of the union contracts were inconsistent with state or municipal law. Further, the measure would give labor organizations the ability to force unionized employees to pay for union services regardless of an individual worker's desire for representation.

Proponents of Proposal 2 describe the measure as protecting working families, but it primarily involves state and local government employees, less than 3 percent of the people of Michigan. The proposal essentially seeks to enshrine the continued viability of a special interest group — organized labor — in the Michigan Constitution.

Unions' share of the private-sector workforce has fallen for decades, and their share of the public-sector workforce has fallen since 1992, despite the modest growth of government unions. Rather than adapting to market forces and providing services tailored to today's workforce, organized labor promotes a constitutional guarantee of its monopoly bargaining power as employees' "exclusive representative" — a phrase used twice in Proposal 2' first two sentences. The future role of organized labor is a worthwhile public policy debate, but the propriety of amending the constitution to revitalize a special interest group is questionable.

The scope of public-sector bargaining has been subject to various adjustments in Michigan over the past two years. These adjustments have in many ways countered the advantages recognized by the Supreme Court in the Abood case, and they have largely been intended to ensure the protection of taxpayer interests. Michigan's legislature has yet to advance any legislation that would change the basic premises of PERA.

Michigan's electorate and political leaders have given collective bargaining a fair chance to work in government, and the state's current leadership still appears to be motivated to find ways to make that process work. Indeed, the state has retained PERA's basic tenets through a stubborn economic downturn in which real private-sector wages have declined in ways government-employee wages have not; in which the unfunded liabilities in major government-employee pension funds have soared past $25 billion; and in which neighboring states have implemented dramatic labor law revisions, such as Indiana's right-to-work law or Wisconsin's budget-reform legislation.

In light of the state's recent history, the provisions of Proposal 2 are not just questionable, but disproportionate. They would drastically alter the relationships between government employers and government employees and shift the bargaining power across the table to labor organizations and away from taxpayers' elected representatives. The result for working families — indeed, for all the people of Michigan — seems less likely to protect jobs than to create larger demands on workers' income to supply better wages, hours and other terms and conditions of employment for government employees.

Appendix A: Proposal 2's Ballot Description and Language

The 100-Word Ballot Description

The following description of Proposal 2 will appear on the November 2012 ballot:

☐

A PROPOSAL TO AMEND THE STATE CONSTITUTION REGARDING COLLECTIVE BARGAINING

This proposal would:

- Grant public and private employees the constitutional right to organize and bargain collectively through labor unions.
- Invalidate existing or future state or local laws that limit the ability to join unions and bargain collectively, and to negotiate and enforce collective bargaining agreements, including employees' financial support of their labor unions. Laws may be enacted to prohibit public employees from striking.
- Override state laws that regulate hours and conditions of employment to the extent that those laws conflict with collective bargaining agreements.
- Define "employer" as a person or entity employing one or more employees.

Should this proposal be approved?

☐

The Complete Language of Proposal 2

The language that Proposal 2 would insert in the Michigan Constitution appears below.

☐

The proposal would add a new Section 28 to Article I of the State Constitution, as follows:

ARTICLE I, Section 28: COLLECTIVE BARGAINING RIGHTS

(1) The people shall have the rights to organize together to form, join or assist labor organizations, and to bargain collectively with a public or private employer through an exclusive representative of the employees' choosing, to the fullest extent not preempted by the laws of the United States.

(2) As used in subsection (1), to bargain collectively is to perform the mutual obligation of the employer and the exclusive representative of the employees to negotiate in good faith regarding wages, hours, and other terms and conditions of employment, and to execute and comply with any agreement reached; but this obligation does not compel either party to agree to a proposal or make a concession.

(3) No existing or future law of the State or its political subdivisions shall abridge, impair or limit the foregoing rights; provided that the State may prohibit or restrict strikes by employees of the State and its political subdivisions. The legislature's exercise of its power to enact laws relative to the hours and conditions of employment shall not abridge, impair or limit the right to collectively bargain for wages, hours, and other terms and conditions of employment that exceed minimum levels established by the legislature.

(4) No existing or future law of the State or its political subdivisions shall impair, restrict or limit the negotiation and enforcement of any collectively bargained agreement with a public or private employer respecting financial support by employees of their collective bargaining representative according to the terms of that agreement.

(5) For purposes of this Section, "employee" means a person who works for any employer for compensation, and "employer" means a person or entity employing one or more employees.

(6) This section and each part thereof shall be self-executing. If any part of this section is found to be in conflict with or preempted by the United States Constitution or federal law, such part shall be severable from the

remainder of this section, and such part and the remainder of this section shall be effective to the fullest extent that the United States Constitution and federal law permit.

The proposal would add the following to Article XI, Section 5 of the State Constitution:

Classified state civil service employees shall, through their exclusive representative, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions, which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness.

Z

Appendix B:
Michigan Education Association Memorandum Re. Passage of Ballot Initiative and Bargaining Implications for Expired Contracts (April 17, 2012)

MEMORANDUM

TO: **MEA UniServ Directors**

FROM: **MEA Legal Department & Craig Culver**

DATE: **April 17, 2012**

RE: **Passage of Ballot Initiative and Bargaining Implications for Expired Contracts**

With voter approval of the Protect Our Jobs Ballot Initiative, the Amendments contained in the Ballot Proposal would become effective immediately upon certification of the election results. ***This would most likely be sometime in late November, 2012.***

Upon certification of the Ballot victory, the following would immediately occur:

1. Any hourly or annual rates of pay lost from the prohibition on step increases after contract expiration caused by 2011 PA 54 (MCL 423.215b) would be reinstated beginning on the certification date.

    a. Pay lost from step freezes occurring between a labor agreement's expiration date and the certification of the Ballot initiative victory would NOT be restored; however, income lost during this period could be bargained back retroactively.

2. The status quo of an expired labor agreement's provisions regarding health insurance plans and employee contributions would be restored to pre-PA 54 and pre-PA 152 levels.

    a. The "Cap Rules" created by 2011 PA 152 (The Publicly Funded Health Insurance Contribution Act) would NO longer be a necessary part of future bargaining proposals.

    b. Any increases in health plan costs occurring after the expiration of the contract that were entirely passed on to employees (due to PA 54) would cease unless the expired labor agreement contained a provision requiring employees to assume some or all rate increases.

    NOTE: Health insurance increases that were passed on to the members could also be bargained back retroactively.

3. The new prohibited bargaining topics created by 2011 PA 103 and included in Section 15(3) of PERA would NO LONGER exist. This law currently prohibits bargaining over the decision or impact concerning the following subjects:

a. The placement of teachers;

b. Personnel decisions for teachers during a reduction in force, recall or hiring after a reduction in force, as set forth in MCL 380.1248;

c. Teacher evaluation systems, including the format, timing or number of classroom observations, as set forth in MCL 380.1249 and in the Teachers' Tenure Act.

d. Teacher discipline policies, which may NOT include a standard different than the arbitrary and capricious standard; and

e. Performance-based compensation systems for teachers, as set forth in MCL 380.1250

f. Notification to parents and legal guardians that children are being taught by ineffective teachers, as required by MCL 380.1249a.

NOTE: For bargaining units that negotiated the removal of language regarding these prohibited topics, passage of this ballot initiative would once again allow for collective bargaining in these areas; for bargaining units that negotiated LOAs addressing these prohibited topics, passage of this ballot initiative may, depending on the language of the LOA, cause those topics to immediately become effective provisions of the contract.

4. The prohibited bargaining topics created by 1994 PA 112 and included in Section 15(3) of PERA would NO LONGER exist. The provisions of this law prohibit bargaining over the following topics:

   a. Who is or will be the policyholder of an employee group insurance plan;

   b. The starting day for the school year and the amount of pupil contact time required to receive full state school aid under MCL 380.1284 and MCL 388.1701;

   c. The composition of school improvement committees established under MCL 380.1277;

   d. The decision whether to provide/allow interdistrict or intradistrict open enrollment opportunity in a school district or of which grade levels or schools in which to allow such an open enrollment opportunity;

   e. The decision whether to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies under MCL 380.1852.

f. The decision whether to contract with a third party for 1 or more noninstructional support services;

g. The use of volunteers in providing services at its schools;

h. Decisions concerning use of experimental or pilot programs and staffing, and decisions concerning use of technology to deliver educational programs and services; and

i. Any compensation or additional work assignment intended to reimburse an employee for or to allow an employee to recover any monetary penalty imposed under PERA.

NOTE: Some of these topics may be considered permissive bargaining topics, such as the decision whether to provide/allow interdistrict or intradistrict open enrollment opportunity in a school district, and the decision whether to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies

5. The prohibition created by 2011 PA 297 (Public Employee Domestic Partner Benefit Restriction Act) on public employers providing medical and other fringe benefits to members with domestic partners would NO LONGER restrict bargaining.

   a. All public sector labor organizations could once again bargain over domestic partner benefits for their members.

6. The prohibition created by 2012 PA 53 on the ability of MEA bargaining units to collect dues or service fees from wages through payroll deduction would NO LONGER exist.

   a. MEA and its local affiliates could once again bargain with the employer over the use of payroll deduction to collect dues and service fees.

Endnotes

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