STATE OF MICHIGAN
COURT OF CLAIMS

TAMERA MARTIN, an individual, and RICHARD SULLIVAN, an individual,

Plaintiffs,

v.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION (MERC), a state government agency, TINAMARIE PAPPAS, MERC Chairperson (in her official capacity), WILLIAM F. YOUNG, MERC Commissioner (in his official capacity), ROBERT L. CHIARAVALLI, MERC Commissioner (in his official capacity), MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY (LEO), a state government agency, and SUSAN CORBIN, LEO Director (in her official capacity),

Defendants.

No. 25-_____-MM

Hon. _____

Brief in support of Plaintiffs' 7/30/25 motion for preliminary injunction and mandamus

Oral argument requested.

MACKINAC CENTER LEGAL FOUNDATION
Derk A. Wilcox (P66177)
Patrick J. Wright (P54052)
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org
wright@mackinac.org
Attorneys for Plaintiffs

BRIEF IN SUPPORT OF PLAINTIFFS' 7/30/25 MOTION FOR PRELIMINARY INJUNCTION AND MANDAMUS

INTRODUCTION

In 2024, the Governor signed into law two related Acts, 2024 PA 144 and 2024 PA 145 (Acts). The purpose of the Acts is to take home help caregivers, who are mostly friends and family members providing care of loved ones, and convert them into limited-purpose public employees of the state so that they can be unionized. The state, subsidized by the federal Medicare program, pays the providers for providing care, and under the Acts designates the providers as employees of a state agency solely for purposes of allowing collective bargaining.

This general concept was effectuated in various states and made its way to the United States Supreme Court in *Harris v Quinn*, 573 US 616 (2014), where it was held to violate the caregivers' constitutional rights. There, the Supreme Court noted the providers were "state employees for one purpose only, collective bargaining" and "the scope of bargaining that may be conducted on their behalf is sharply limited." *Id*. at 642. Due in large part to "unusual status of personal assistants" and the "union's limited authority in this area," the Supreme Court held that providers could not be compelled to provide financial support to the union. *Id*. at 644-46.

In 2005, under the auspices of Michigan's Public Employment Relations Act (PERA) [1], Michigan providers had been unionized as purported public employees of a council.[2] This unionization was highly controversial and was eventually stopped by the Legislature explicitly exempting these providers from the definition of public employees under PERA. 2012 PA 76. In the 2012 general election, a union-backed amendment to the state Constitution to make the

[1] Const 1963, art 4, § 48 states: "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."

[2] This council was called the Michigan Quality Community Care Council (MQC3) and was created by an interlocal agreement.

unionization, dues, and agency fees permanent was rejected by the voters.[3] 2024 PA 144 and 145 are meant to allow the unionization of the providers again.

2024 Public Act 144 does most of the work in converting providers into public employees that purportedly can be unionized. It creates a new statutory scheme called the "home help caregiver act," which creates the home help caregiver council, an orientation program for providers including a mandatory membership pitch from a union, and most importantly purports to allow unionization of home help providers under PERA despite the providers being considered "public employees of the director of the department of health and human services," MCL 400.804(1), and that "the only appropriate unit for individual home help caregivers is a statewide unit of all individual home help caregivers." MCL 400.804(7). 2024 Public Act 145 removed the ban on home-help bargaining and allows the Legislature to designate individuals as public employees who can be unionized under PERA.

A union, Service Employees International Union Health Michigan (SEIUHM), has petitioned Defendant Michigan Employment Relations Commission (MERC), which administers PERA, seeking to be named as the collective bargaining agent these providers. MERC is preparing an election for providers to determine if they want SEIUHM to be their collective bargaining representative.

But such an election would violate the Michigan Constitution by usurping the Michigan Civil Service Commission and taking away its jurisdiction and control—powers that are given to it by the Michigan Constitution. Const 1963, art 11, § 5. These powers are incapable of being superseded by legislation. Furthermore, the unionization of home help workers would be a form

[3] https://www.legislature.mi.gov/documents/2023-2024/michiganmanual/2023-MM-P0098-p0104.pdf The results show the unionization amendment was defeated 56% to 44%.

of political spoils, which is exactly what the creation of the constitutional Civil Service was supposed to end. Per art 11, §5 of the Michigan Constitution, the proper remedy for this is injunction and mandamus. Further, the unconstitutional portions of 2024 PA 144 are not severable from the remainder of that public act.

Additionally, forcing these caregivers to associate with a union violates their federal First Amendment rights. Under a logical extension of *Harris*, home help providers cannot be placed in a mandatory bargaining unit (even if no financial support for the union is demanded). The remedies for this claim are for nominal damages and declaratory and/or injunctive relief.

THE CONSTITUTIONAL CIVIL SERVICE

The state first instituted a constitutionally required and defined civil service by amending the Constitution in 1940. Const 1908, art 6, § 22. Prior to that, there had been civil service statutes, but the Legislature exempted state employees from the requirements of that civil service and ignored qualifying tests and requirements leading to the voters constitutionalizing the concept. "We must conclude that the civil service amendment was written into the fundamental law in part at least because of popular dissatisfaction with then existing conditions. It is a proper inference that the citizens of Michigan may have desired and intended to bring about a betterment in administration of State employment civil service." *Reed v Civ Serv Comm'n*, 301 Mich 137, 154 (1942). *Reed* would further describe the impetus for codifying the civil service in the Constitution rather than leaving it to the machinations of the Legislature:

> Under [1937 PA 346], 'heads of divisions' were exempt from its provisions. A controversy arose over giving employees a preferred exemption by creating many heads of divisions.
> …
> In 1939, the legislature, by [1939 PA 97], discarded the results of such qualifying tests, but increased the number of exempt positions. Filling of vacancies continued to be provided for from eligible register lists prepared under the same indefinite yardstick set up by the former act.

Id. at 155.

Of major importance to the adoption of the constitutional civil service was ending the politicization and the spoils system inherent in that legislative tinkering. "It is undisputed that the civil service system was established to put an end to the evils of the 'spoils system' which had politicized all levels of state government." *Council 11 v Michigan Civ Serv Comm'n*, 87 Mich App 420, 424 (1978).[4]

The civil service constitutional provision continued largely unchanged by the adoption of the current Constitution, now Const 1963, art 11, § 5, which begins by describing the breadth of its coverage—all employees of the state government with a handful of specified exemptions:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

Const 1963, art 11, § 5. The entire section is included in pages 2-3 of the Appendix as Exhibit 1.

THE HISTORIC ORIGINS AND ONGOING SCHEME TO MAKE HOME HEALTH CAREGIVERS UNIONIZED STATE EMPLOYEES

The scheme enacted by these subject Acts is neither new nor unique to Michigan. In fact, an unsuccessful attempt was made to amend the Constitution in 2012 to do much of what the

[4] *Black's Law Dictionary* at page 1203 (9th ed, 2009), defines the "spoils system" as "The practice of awarding government jobs to supporters and friends of the victorious political party."

Legislature has tried to do here. The following is a brief overview of past attempts to unionize people on the basis of their receipt of some sort of payment from the government.[5]

Under the contested Acts, the Plaintiff caregivers are state employees solely for the purpose of being represented by a union in a bargaining unit. Their only connection to public employment is that they receive a payment from the state government via a federal program called the Home Help Program (HHP) that was created in 1981.

The United States Supreme Court held that any federal policy that favored institutionalization of the disabled amounted to discrimination. *Olmstead v L.C.*, 527 US 581 (1999). So, it has long been a policy that the disabled are best cared for in their own homes and the HHP has been a part of that. Care is frequently given by friends and family members. A 2005 survey from the Anderson Economic Group found that "Over 80% of Home Help workers have one client…75% of providers stated that they had become a home care worker because a family member or close friend was in need of care."[6] They provide care for basic daily living requirements such as dressing, bathing, eating, toileting, etc.

The push to unionize home caregivers began in California in the 1980s and is closely tied to the Service Employees International Union (SEIU).[7] In 2003, the scheme was enacted in Illinois

[5] The author has written on this in more depth. Wilcox, *An Analysis of Proposal 4 of 2012: The Unionization of In-Home Caregivers*, Mackinac Center for Public Policy, Oct 8, 2012, attached as Exhibit 4, pages 22-42 in the Appendix. Also available online here: https://www.mackinac.org/archives/2012/s2012-09.pdf (last accessed July 20, 2025).

[6] https://www.andersoneconomicgroup.com/Portals/0/upload/AEG_MQC3_PUBLIC_Dec15.pdf

[7] The SEIU was the union involved in Michigan's previous unionization of home help caregivers, and the union currently petitioning to represent Plaintiffs and other home caregivers is SEIUHM. Their website states that SEIUHM is a local of the SEIU and their constitution and bylaws were ratified January 24, 2019. https://www.seiuhealthcaremi.org/about/

via an executive order signed by then-governor Rod Blagojevich. A later challenge to this Illinois scheme made it to the United States Supreme Court where it was held that forcing those Illinois caregivers to financially support the SEIU violated the First Amendment. *Harris*, supra.

In Michigan, during the previous unionization, an entity called the Michigan Quality Community Care Council (MQC3) had been created via an interlocal agreement.[8] The MQC3 became the employer, and it entered into a collective bargaining agreement with the SEIU. The collective bargaining agreement required all members of the bargaining unit to pay either union dues or agency fees—which were almost the equivalent of full dues—to the SEIU. Legislative hearings were held investigating this and the Legislature subsequently stopped funding the MQC3 in 2012.[9] Despite this defunding, the MCQ3 continued to operate in a reduced capacity. Notably, the SEIU provided the majority of the funding for the MCQ3 thereafter. Discovery in a lawsuit showed that in January 2012 the MCQ3 had approximately $22,000 in the bank, $12,000 of which had come from the SEIU. The ostensible employer was funded by the union it was supposed to bargain against.[10] Besides defunding the MQC3, in 2012 Public Acts 45 and 76 were signed into law and they made it clear that home-based caregivers were not public employees under PERA. MCL 423.201(1)(e)(i) (which has since been amended by 2024 PA 145 at issue here).

MERC has received Certification of Representation petitions from SEIUHM for an election authorized by these Acts. These are MERC case Nos. 25-D-0699-RC and 25-F-1170RC, Case Search IDs C-136298 and C-14099. See Exhibits 5 and 6 at pages 44 and 47 in the Appendix.

[8] Interlocal agreements are provided for in Const 1963, art 7, § 28 and the agreement process is codified as part of the Urban Cooperation Act of 1967.

[9] Wilcox, at page 28 in the Appendix.

[10] Wilcox, at page 30 in the Appendix.

In response to removing the home caregivers from PERA, a proposal to amend the Constitution was put on the ballot. This became Proposal 4 of 2012. The language of Prop 4 tried to amend the Constitution to do much of what the Acts at issue here have attempted. Prop 4 would have added to Const 1963, art 5, § 11 the following highlighted language: "classified state civil service shall consist of all position in the state service except those filled by popular election, heads of principal departments, … ***in-home personal care providers subject to the authority of the Michigan Quality Home Care Council.*** …"[11] Prop 4 was rejected by the voters 56 % to 44%.[12]

What was rejected by the voters as an attempt to amend the Constitution has now been attempted by legislation—except that whereas it would have been a legitimate constitutional amendment had it passed, subverting art 11, § 5 legislatively by 2024 PA 144 is illegitimate.

It is often noted that "courts must not be concerned with the alleged motives of a legislative body in enacting a law, but only with the end result—the actual language of the legislation." *Michigan United Conservation Clubs v Sec of State*, 464 Mich 359 (2001). Here, as discussed in the next section, the actual language of the Acts violates the Constitution. But because art 11, § 5 was enacted with an intent to eradicate the spoils system, the motivation here should be examined and taken into account if the subject Acts produce a result contrary to that intention.

The SEIU is a highly political entity. According to OpenSecrets, a nonpartisan 501(c)(3) entity that tracks data on money in politics, SEIU is one of the most significant sources of campaign contributions.[13] For instance, in the 2024 election cycle the SEIU nationwide contributed

---

[11] Wilcox, supra at 9.

[12] https://www.mackinac.org/17934

[13] https://www.opensecrets.org/orgs/service-employees-international-union/summary?id=D000000077 (accessed July 20, 2025)

$35,428,401 to campaigns.[14] This placed them 28th out of 40,455 organization contributors—easily within the top 1% of such contributors.[15] They gave 100% of their political donations to one side of the political aisle.[16] Unionizing home caregivers has been a key source of the SEIU's money and power. After Illinois Governor Blagojevich's 2003 executive order unionizing home caregivers, the *New York Times* reported that the union became the top overall donor to Blagojevich's 2006 re-election campaign with donations in excess of $900,000, or about 5 percent of his total campaign funds.[17] The *Wall Street Journal* reported that:

> The Service Employees International Union has grown quickly over the past few years by organizing home-health-care workers, often with the help of state governors and lawmakers who received generous campaign donations and other union support.
>
> The Illinois situation fuels a perception that the SEIU has an "inside track" with elected officials, says Gary Chaison, a professor of industrial relations at Clark University, in Worcester, Mass. "Every union will use political influence to make organizing easier," he said. "They may have gone beyond the usual influence."[18]

Since the last attempt in Michigan to unionize home caregivers, the United States Supreme Court has held that no public employee is required to pay a union that represents them dues or agency fees. *Janus v AFSCME Council 31*, 585 US 878 (2018). Plaintiffs and other caregivers may

---

[14] *Id*.

[15] *Id.* On that page, hovering over the term "Ranks 28" will provide more detail on the methodology used.

[16] *Id*.

[17] Greenhouse, *Union Is Caught Up in Illinois Bribe Case*, New York Times, December 12, 2008. https://www.nytimes.com/2008/12/12/us/politics/12union.html (accessed July 20, 2025) a print copy is attached as Exhibit 7 at page 50 in the Appendix.

[18] Maher, *Illinois Scandal Spotlights SEIU's Use of Political Tactics*, Wall Street Journal, December 20, 2008, https://www.wsj.com/articles/SB122973200003022963 (accessed July 20, 2025) link requires subscription. A print copy is attached as Exhibit 8 at page 54 in the Appendix.

opt out and refuse to join or pay the union. However, they will now be required to attend mandatory sessions that they were not previously required to attend and at which a union representative "must be allowed to attend."[19] There will undoubtably be pressure to join. And as will be discussed below, they are still required to forcibly accept the union as their bargaining representative despite any disagreement with the union's message or policies—a violation of their First Amendment rights.

COUNT I: 2024 PA 144 AND 145 AND HOW THEY VIOLATE THE MICHIGAN CONSTITUTION

Constitutional provisions and analysis of the acts show a clear violation of Michigan's Constitution.

Const 1963, art 11, § 5 states:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

Const 1963, art 4, § 48, allows the Legislature to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." The means by which the Legislature has done this, through unionization of "public employees" under PERA cannot include those in the "state classified civil service."[20]

---

[19] MCL 400.803(10).

[20] Thus, all state employees are in a general sense "public employees," but not necessarily "public employees" as defined by PERA. There are some state employees covered by PERA, because those state employees are not considered part of the "classified state civil service" under Const 1963, art 11, § 5. An example of state employees that are public employees under PERA and not members of the classified state civil service are employees at state universities. But in this case the

In Public Act 144, the Legislature sought to work around the classified state civil service provision by stating it did not apply:

> Solely for the purposes of collective bargaining, and as expressly limited under this section, individual home help caregivers are considered, by virtue of this section, public employees of the director of the department of health and human services or the director's representative. This act does not require or provide for the treatment or classification of individual home help caregivers as public employees for any other purpose, and the department's role as employer solely for the purposes of collective bargaining does not serve as a basis to establish an employer-employee relationship. Individual home help caregivers are not employees of the state or political subdivisions of this state for any other purpose and ***are not subject to the provisions of section 5 of article XI of the state constitution of 1963***. 1947 PA 336, MCL 423.201 to 423.217, applies to the governance of the collective bargaining relationship between the department and the bargaining representative of a bargaining unit composed of individual home help caregivers as provided in this section.

MCL 400.804(1) (emphasis added).

Thus, despite indicating that providers are employees of the Department of Health and Human Services (DHHS), and that "the only appropriate unit for individual home help caregivers is a statewide unit of all individual home help caregivers," MCL 400.804(7), the Legislature was contending that these providers are not classified state civil service employees.

2024 PA 144 and 145 work together to create a new form of state public employee who is only a state employee for the purpose of collective bargaining. The shorter of the two acts, 2024 PA 145, amends MCL 423.201 by removing the explicit ban on home help unionization. It also added a new definition to PERA Sec 1(e), "Public employee":

> (ii) An individual designated by the legislature as a public employee. The legislature may designate an individual as a public employee only for the purpose of collective bargaining. The designation does not render the individual an employee of this state or political subdivision of this state for any purpose other than the limited purpose authorized by the legislature.

---

inverse is occurring—the Legislature is attempting to expand the statutory term "public employee" to include what should be members of the classified state civil service.

MCL 423.201(e)(ii). The entirety of this (ii) subsection was added by 2024 PA 145.

This purports to allow the Legislature to transfer jurisdiction of state employees from the civil service to PERA by legislative action. Such re-classifications exempting state employees from the state civil service was one of the reasons for adding the civil service to the Constitution. *Reed*, *supra*.

The other act, 2024 PA 144, describes in detail the new classification of employees, and how these caregivers are employees of DHHS, but only for the purpose of collective bargaining. MCL 400.804(1). The next subsection states that for all purposes other than collective bargaining, the person receiving the homecare remains the employer—not the state:

> (2) Except for the limited purposes described in subsection (1), participants or participants' representatives are the sole employer of individual home help caregivers and retain the rights to select, hire, direct, schedule, supervise, or terminate the services of any individual home help caregiver who provides individual home help services for the participant in accordance with the laws and regulations governing the Home Help Program.

MCL 400.804(2).

The home help caregivers are likewise not considered government actors and the government and its offices are not liable for their actions:

> Notwithstanding an individual home help caregiver's status as a public employee under subsection (1), the individual home help caregiver is not a government actor and the state, the department, the council, and the board bear no liability for any actions undertaken by the individual home help caregiver in the performance of the individual home help caregiver's duties. The state, the department, or contractors of the state or department are not vicariously or jointly liable for the action or inaction of any individual home help caregiver…

MCL 400.804(5). 2024 PA 144 provides for methods of dispute resolution regarding caregivers' disputes with the bargaining representative. MCL 400.804(12) and MCL 400.805.

2024 PA 144 also created a home help caregiver council (Council) within the DHHS. MCL 400.802(e) and (f), and MCL 400.803(1).[21] The Council is directed and governed by a seven-member board.[22]

Despite being a bargaining unit, they cannot bargain for wages. The amounts paid to the caregivers are determined by the state via the budgeting and legislative appropriations process. "[T]he department shall engage in collective bargaining with the exclusive bargaining representative concerning the terms and conditions of employment that are under the state's control." MCL 400.804(3). Since the state department is only the employer for the purpose of collective bargaining and collecting dues for the union, any effort to increase wages is a request to the Legislature and more akin to lobbying than collective bargaining.

The attempt to end-run around the constitutional civil service is clear. The Constitution grants the state Civil Service Commission authority over "all positions in the state service except those filled by popular election" and other department heads. Supra. "All" means all state employees. The Civil Service Commission has the constitutional duty to classify all positions according to duties and responsibilities. Const 1963, art 11, § 5. The Civil Service Commission: (1) fixes the rates of compensation for all classes of employees; (2) approves or disapproves disbursements for all personal services; (3) sets standards for employment based exclusively on merit; (4) classifies all positions according to duties and responsibilities; (5) makes rules and

[21] DHHS is one of the 20 principal departments in the executive branch pursuant to Const 1963, art 5, § 2 and is not a party to this action.

[22] The seven-members consist of the directors—or their designees—from DHHS, the Department of Labor and Economic Opportunity, and the Department of Treasury. The remaining members of the board are appointed by the director of DHHS and two must represent participants or participant's representatives and the remaining two must represent nonprofit organizations that advocate on behalf of other adults or people with disabilities. 2024 PA 144, MCL 400.803(2).

regulations covering all personnel transactions; and (6) regulates all conditions of employment in the classified service. *Id*. Despite the fact that the subject caregivers are employees of DHHS and its director, a principal state department, their position is taken out of the control of the Civil Service Commission and all of the forgoing duties in the paragraphs above, despite being mandated to the Civil Service Commission by the Constitution, are allocated elsewhere by the subject Acts.

Furthermore, the purpose behind this unconstitutional abrogation of the Civil Service's powers is to accomplish exactly what the Civil Service was created to prevent in the first place—classification of certain state employees as falling outside of the state classified civil service as part of a spoils system. Here that would be by funding a union that in turn financially supports certain politicians. For these reasons the Acts are invalid and void *ab initio*.

Lastly, it may be countered that the Constitution also contains a conflicting provision stating: "[t]he legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49. And, therefore, that the Legislature may do what it has done with these Acts. However, there is a more germane constitutional provision stating "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." Const 1963, art 4, § 48. But art 4, § 49 does not help the Defendants. "Where as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other." *Straus v Governor*, 459 Mich 526, 531 (1999). To read these provisions together it is of the utmost importance to recall, "Our courts have also acknowledged that the [Civil Service Commission]'s power and authority are derived from the Constitution and that 'its valid exercise of that power cannot be taken away by the Legislature.'" *UAW v Green*, 302 Mich App 246, 269 (2013), aff'd on other grounds, 498 Mich

282 (2015), citing *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717 (2002). Read together, the courts have determined that the Legislature may encroach or supersede the Civil Service Commission, but only where it passes laws that are of general applicability—covering both private and public employment, or involve constitutional protections such as discrimination. *UAW v Green*, supra, at 278-279. The Acts here are not general—they are as narrowly tailored as could be, and do not comply with the state or federal Constitutions.

COUNT II: THE ACTS VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

The United States Supreme Court has recognized that requiring public employees to be part of a bargaining unit impinges on their First Amendment freedoms. *Janus* at 894. The Court has recognized that requiring public employees to fund a union which speaks on their behalf and promotes messages and positions that the employees do not agree with violates free speech rights. *Janus*, supra. Before *Janus*, in *Harris*, the Court made that same determination for home help caregivers like Plaintiffs. However, *Harris* and *Janus* did not explicitly answer the question of First Amendment freedom of association. Can the state force its employees to associate with a union that advocates on their behalf—i.e., is mandatory bargaining permissible? Employees should be able to choose their own advocate or be their own advocate in the workplace.

While this may be a more difficult question for full-fledged public employees, the analysis in *Harris* makes it an easier determination—albeit one that has not been explicitly answered yet by the Supreme Court. As a First Amendment question, impositions on associational freedoms are subject to a heighted scrutiny greater than rational basis—exacting scrutiny or strict scrutiny. *Janus* at 916. Under these heightened standards, mandatory bargaining cannot be justified for home help providers. As noted in *Harris*, the justifications that past court decisions had used as a basis for allowing such infringements do not apply for these limited-purpose-for-collective-bargaining-

only-public employees. Forcing these caregivers into a union is not necessary for "labor peace." Federal labor law already excludes in-home caregivers from the National Labor Relations Board. *Harris* at 650. Caregivers are usually taking care of friends or family—they are not likely to strike against them or otherwise have an adversarial relationship. Strikes would be highly unlikely and therefore avoiding them cannot be a compelling state interest. *Id*. The caregivers do not work together in a common facility with similar concerns. Instead, they work in individuals' homes. *Id*. And in *Harris*, as here, "The union's very restricted role under Illinois law is also significant. Since the union is largely limited to petitioning the State for greater pay and benefits, the specter of conflicting demands of personal assistants is lessened." *Id*.

For these reasons, just as with payment to a union, Plaintiffs should not be forced into compelled association with a union. There is no rationale for doing so that can withstand a heightened scrutiny. Because these Acts force Plaintiffs and others to associate with a union against their will, they are unconstitutional.

SEVERABILITY

The Acts clearly violate constitutional rights and provisions. The question then becomes; can the Acts be retained by severing the offending portions? The answer is "no" since the offending portions are the primary purpose of the Acts and removing those portions makes the Acts pointless.

Michigan has a statutory-construction provision that states:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

MCL 8.5

Where a provision is unconstitutional, if that provision is inseparable from the statute, the whole statute must fail:

> Where a statute contains an unconstitutional provision, and another provision which, standing by itself, would be valid, the latter should be given effect if the two are so independent of each other that the court can say that the legislature would have passed the latter even if the former had been omitted. *Attorney General v Loomis*, 141 Mich 547 (1905). However, where they are so interconnected or so dependent one upon the other, that it is apparent that the legislature would not have passed the act, except as a whole, the entire statute must fall. *Id*.

Assoc Builders and Contractors, Saginaw Valley Area Chapter v Perry, 869 FSupp 1239 (ED Mich 1994), rev'd on other grounds, 115 F3d 386 (1997).

The Act has no other purpose than to create a new class of state employees and deny the Civil Service Commission its rights and duties. The Legislative Analysis by the House Fiscal Agency began its summary of the bills' purpose with:

> [F]or collective bargaining purposes, caregivers under the Home Help Program are public employees of the director of the Department of Health and Human Services (DHHS) or the director's representative. … The bills also would create the Home Help Caregiver Council in DHHS to provide orientation, education, and other supports to caregivers. Caregivers would, as public employees, be subject to provisions of the public employment relations act.

See page 12 of the Appendix as Exhibit 3.

The unconstitutional provisions are the purpose of the Acts. They seek abrogation of the Civil Service Commissions authority and to place these state employees under the jurisdiction of PERA. All of this is for the purpose of creating and funding a union to be the bargaining representative of these 31,616 home caregivers.

A court cannot remedy the matter by severing the portions of 2024 PA 144 that place the home caregivers as state employees outside of the state civil service. The most recent Annual

Workforce Report states that there are 47,546 employees in the state civil service.[23] Adding to that number 31,616 new state employees would increase the number of state civil service employees by 66%. A very rough estimate is that these new employees could cost the state around $2.1 billion.[24] For comparison, the Governor's budgetary recommendation DHHS, which is the department these employees are placed in 2024 PA 144, for fiscal year 2025-26 is $37.7 billion.[25] The $2.1 billion rough estimate would represent a 5.5% increase from the Governor's recommended budget. It is obvious that the Legislature tried to avoid the fiscal impact by exempting these public employees from the Civil Service. And, again, the clear intent of the Acts was not to make these employees of the state civil service, but instead to make them some new sort of quasi state employee for the sole purpose of collective bargaining. The Acts must be struck down in their entirety.

REMEDIES

---

[23] "Forty-fifth Annual Workforce Report, FY 2023-24" Michigan Civil Service Commission, at 1-1. https://www.michigan.gov/mdcs/-/media/Project/Websites/mdcs/workforce/23-24/45th_AWFR_Complete.pdf?rev=8524e548600c4a60a2619f4eca95019c&hash=B3EC0E15A1B27A15598BD9E62853019A (accessed July 20, 2025).

[24] The author's calculations in making this estimate are made as follows: The most closely comparable position in the classified civil service is that of "home aid." This position has an annual salary of $43,763. Benefits and deferred compensation add an additional $22,145 per employee, for a total of $65,908 per employee per year. Multiply this by the 31,616 members of the new unit sums to $2.1 billion. Of course, some employees might be part time and amounts from the federal and state Medicare programs may provide an offset. The author acknowledges how imprecise this calculation is. But the point remains that this is a very considerable sum, especially as compared to the current budget wherein the totality of the adult home help program costs $593 million. See the latest state budget for the state departments, 2024 PA 121, Sec 120 at page 129, accessible here: https://sfa.senate.michigan.gov/Departments/BudgetBill/BBhhs_initial.pdf

[25] Executive Budget: Fiscal Years 2025 and 2026, Governor Whitmer, at B-33 to B-42. https://www.michigan.gov/budget/-/media/Project/Websites/budget/Fiscal/Executive-Budget/Current-Exec-Rec/FY25-Budget-Book.pdf

The Constitution provides the remedy for violations of art 11, § 5: "Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state."

Injunction.

Preliminary injunctions are provided for in the Michigan Court Rules at MCR 3.310. MCR 3.310(A)(4) states: "At the hearing on an order to show cause why a preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued, whether or not a temporary restraining order has been issued."

"The Court of Appeals has succinctly stated that '[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.'" *Kernen v Homestead*, 232 Mich App 503, 509 (1998). "A court's issuance of a preliminary injunction is generally considered equitable relief." *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch Dist*, 293 Mich App 143, 146 (2011). To obtain a preliminary injunction, the moving party "bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008).

This four-part test involves the trial court's determination that

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Hammel v Speaker of the House of Representatives, 297 Mich App 641, 648 (2012).

The discussion above shows that Plaintiffs meet the first element—they will likely succeed on the merits as the Acts are clearly unconstitutional. As to (2), if an injunction does not issue

then, in all likelihood, MERC may certify an illegitimate election for which it lacks jurisdiction. Plaintiffs' First Amendment rights of association will be harmed as they will be forced to associate with a union which will represent them whether or not they are members and will speak on their behalf regardless if Plaintiffs agree with them or not. (3) MERC will suffer no harm if it is required to delay the certification of an election for which it lacks jurisdiction under the Michigan Constitution. And (4) if an injunction does not issue and a union is certified, undoing the whole unconstitutional scheme will be a calamitous mess that harms the public interest—dues will be paid to an improper bargaining representative, and the state will spend money on an unconstitutional council and enforce an unconstitutional scheme. Further, injunction is the stated remedy for violations of Const 1963, art 11, § 5. The same arguments are true for the federal constitutional claim.

Mandamus.

"Mandamus is the appropriate remedy for a party seeking to compel action by 'state officers.'" *Taxpayers for Mich Const Gov't v Dep't of Tech*, 345 Mich App 1, 23 (2022).To obtain a writ of mandamus, a plaintiff must meet four elements: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgement, and (4) the plaintiff has no other adequate legal or equitable remedy." *Wilcoxon v Detroit Election Comm'n*, 301 Mich App 619, 632-33 (2013); *Deleeuw v State Bd of Canvassers*, 263 Mich App 496, 500 (2004). "A clear legal right is a right 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal questions to be decided.'" *Att'y Gen Bd of State Canvassers*, 318 Mich App 242, 249 (2016) (citation omitted).

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 884, 885 (2016) (citation omitted).

Mandamus is the proper relief where a plaintiff seeks to prohibit an agency from undertaking a proceeding that violates the Constitution:

> On the basis of defendant's statutory obligations and those governing its discretion under the administrative code, we conclude that defendant had a clear legal duty " 'inferable as a matter of law from uncontroverted facts,' " ***to refrain from considering facts prohibited by law*** … and that plaintiff had the ability to challenge defendant's alleged improper omission or ministerial error during its deliberation process and enforce defendant's statutory obligations through mandamus.

Adams v Parole Board, 340 Mich App 251, 262-263 (2022) (emphasis added, citation omitted).

Regarding the four elements: (1) Plaintiffs have a clear legal right to not be included in a union when the certification of that union is unconstitutionally conducted by MERC under PERA when state employees are properly subject to the jurisdiction of the Civil Service Commission. (2) The Defendant MERC has a clear duty to refrain from certifying an election that is unconstitutional and exceeds its jurisdiction. (3) The act of certifying an election is a ministerial duty that requires no discretion or judgment on the part of MERC. And (4) the Plaintiffs have no other adequate legal or equitable remedy—if they are forced to associate with a union there is no remedy for their loss of First Amendment rights.

Again, most importantly, the state Constitution states that mandamus is the proper remedy for violations of Const 1963, Art 11, § 5.

Respectfully submitted,

July 30, 2025

By: /s/ Derk A. Wilcox
Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for the Plaintiffs

STATE OF MICHIGAN
COURT OF CLAIMS

TAMERA MARTIN, an individual, and RICHARD SULLIVAN, an individual,

Plaintiffs,

v.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION (MERC), a state government agency, TINAMARIE PAPPAS, MERC Chairperson (in her official capacity), WILLIAM F. YOUNG, MERC Commissioner (in his official capacity), ROBERT L. CHIARAVALLI, MERC Commissioner (in his official capacity), MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY (LEO), a state government agency, and SUSAN CORBIN, LEO Director (in her official capacity),

Defendants.

No. 25-_____-MM

Hon. _____

INDEX OF APPENDIX EXHIBITS

EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 5 Classified state civil service; scope; exempted positions; appointment and terms of members of state civil service commission; state personnel director; duties of commission; collective bargaining for state police troopers and sergeants; appointments, promotions, demotions, or removals; increases or reductions in compensation; creating or abolishing positions; recommending compensation for unclassified service; appropriation; reports of expenditures; annual audit; payment for personal services; violation; injunctive or mandamus proceedings.

Sec. 5. The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

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 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; 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.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the

ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

History: Const. 1963, Art XI, § 5, Eff. Jan. 1, 1964;—Am. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

Former constitution: See Const. 1908, Art. VI, § 22.

EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

Act No. 144
Public Acts of 2024
Approved by the Governor
October 8, 2024
Filed with the Secretary of State
October 8, 2024
EFFECTIVE DATE: Sine Die
(91st day after final adjournment of the 2024 Regular Session)

STATE OF MICHIGAN
102ND LEGISLATURE
REGULAR SESSION OF 2024

Introduced by Senator Hertel

ENROLLED SENATE BILL No. 790

AN ACT to create the home help caregiver council and to prescribe its powers and duties; to designate certain individuals as public employees for certain purposes; to require collective bargaining of certain terms and conditions of employment for certain public employees; to provide for the mediation and arbitration of grievances; to provide for the deduction of wages; and to provide for the powers and duties of certain state and local governmental officers and entities.

The People of the State of Michigan enact:

Sec. 1. This act may be cited as the "home help caregiver council act".

Sec. 2. As used in this act:

(a) "Activities of daily living" includes eating, toileting, bathing, grooming, dressing, mobility, and transferring.

(b) "Agency provider" means any of the following:

(*i*) A current Medicare certified home health agency.

(*ii*) An entity, other than the department, with a federal employer identification number that directly employs or contracts with caregivers to provide home or community-based services.

(*iii*) A community mental health services program under section 202 of the mental health code, 1974 PA 258, MCL 330.1202, that works with clients who use arrangements that support self-determination.

(c) "Bargaining representative" means that term as defined in section 1 of 1947 PA 336, MCL 423.201.

(d) "Board" means the board of directors of the council.

(e) "Council" means the home help caregiver council created in this act.

(f) "Department" means the department of health and human services.

(g) "Individual home help caregiver" means a caregiver, selected by a participant or the participant's representative, who provides individual home help services to a participant. Individual home help caregiver does not include a caregiver who provides services through an agency provider, an integrated care organization, or other similar entity.

(h) "Individual home help service" means services under the Home Help Program that provides assistance with 1 or more activities of daily living or instrumental activities of daily living through caregivers in a home or community-based setting.

(i) "Instrumental activities of daily living" includes, but is not limited to, tasks such as laundry, light housework, shopping, meal preparation or clean up, and medication administration.

(j) "Integrated care organization" means a managed care entity under 42 CFR part 438 that has contracted with the department and the Centers for Medicare and Medicaid Services to provide Medicare and Medicaid covered services to individuals who are dually eligible for full Medicare and Medicaid.

(k) "Interested parties advisory group" means the individuals described in section 3(14) that make recommendations concerning adequate payments and other workforce supports for personal care attendants providing services under the state Medicaid program.

(*l*) "Participant" means a person who receives individual home help services.

(m) "Participant's representative" means a participant's legal guardian or an individual having the authority and responsibility to act on behalf of a participant with respect to the provision of individual home help services.

Sec. 3. (1) The home help caregiver council is created within the department. The council possesses the powers, duties, and jurisdictions vested in the council under this act and other laws.

(2) The council is directed and governed by a board of directors consisting of the following 7 members:

(a) The director of the department or the director's designated representative from within the department.

(b) The director of the department of labor and economic opportunity or the director of the department of labor and economic opportunity's designated representative.

(c) The director of the department of treasury or the director of the department of treasury's designated representative.

(d) Two members appointed by the director of the department to represent participants or participant representatives.

(e) Two members appointed by the director of the department who represent nonprofit organizations that advocate on behalf of older adults or people with disabilities.

(3) Except as otherwise provided in this subsection, board members of the council must be appointed for a term of 4 years. Of the board members initially appointed by the director, the following board members' terms must be as follows:

(a) One member who represents participants or participant representatives must be appointed for a term that expires on July 31, 2025.

(b) One member who represents nonprofit organizations that advocate on behalf of older adults or people with disabilities must be appointed for a term that expires on July 31, 2026.

(c) One member who represents participants or participant representatives must be appointed for a term that expires on July 31, 2027.

(d) One member who represents nonprofit organizations that advocate on behalf of older adults or people with disabilities must be appointed for a term that expires on July 31, 2028.

(4) After the initial appointments under subsection (3), if a vacancy occurs among the board members described in subsection (2) by expiration of a term, the director of the department shall appoint an individual satisfying the requirements of subsection (2) to a new 4-year term. If a vacancy occurs on the board among the board members described in subsection (2) other than by expiration of a term, the vacancy must be filled by the director of the department for the remainder of the term of the unexpired term. Board members may continue to serve until a successor is appointed. Unless otherwise specified, a board member's resignation is effective upon written notice received by the director.

(5) Appointments under this section must be filed with the secretary of state. Upon appointment to the board described in subsection (2), and upon taking and filing the oath of office required by section 1 of article XI of the state constitution of 1963, the board member shall enter office and exercise the duties of the office of the board member.

(6) Not less than 60 days following the appointment of a majority of the members of the board, the board described in subsection (2) shall hold its first meeting at a date and time determined by the director of the department. The board members shall elect from among the board members an individual to serve as a chairperson of the board and may elect other officers as the board considers necessary. All officers must be elected annually by the board.

(7) The business of the board described in subsection (2) must be conducted at a public meeting of the board held in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. Public notice of the time, date, and place of a meeting of the board must be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. The board shall adopt bylaws consistent with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, governing its procedures and the holding of meetings. After organization, the board shall adopt a schedule of regular meetings and adopt a regular meeting date, place, and time. A special meeting of the board may be called by the chairperson of the board or as provided in bylaws adopted by the board. Notice of a special meeting must be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275.

(8) The board described in subsection (2) shall organize and make its own policies and procedures and shall adopt bylaws not inconsistent with this act governing its operations. A majority of the members of the board serving constitute a quorum for transaction of business. The board shall meet at the call of the chairperson and as may be provided in the bylaws.

(9) The board described in subsection (2) shall keep a written or printed record of each meeting, which record and any other document or record prepared, owned, used, in the possession of, or retained by the council in the performance of an official function must be made available to the public in compliance with the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(10) The council shall do all of the following:

(a) Provide for additional and relevant training and educational opportunities for individual home help caregivers, including opportunities for individual home help caregivers to obtain certification that documents additional training and experience in areas of specialization.

(b) Provide for a mandatory orientation program related to employment in providing individual home help services. All of the following requirements apply to the orientation program described in this subdivision:

(*i*) The orientation program is conducted on paid time.

(*ii*) An individual home help caregiver must attend an initial orientation not more than 45 days after the date the individual begins to provide individual home help services.

(*iii*) A bargaining representative of individual home help caregivers must be allowed to attend each orientation. The bargaining representative must be allowed to distribute materials to and collect materials from attendees and make a presentation to attendees that is not more than 30 minutes long during the orientation.

(*iv*) The council shall provide a bargaining representative of individual home help caregivers who attends an orientation a list of the individual home help caregivers who are registered for the orientation not less than 24 hours before the start of the orientation.

(c) The council may contract with organizations with expertise in providing training and workforce development services to develop and deliver orientations and any additional trainings.

(d) By not later than September 30, 2025, and then semi-annually thereafter, compile and maintain a list of the names, home addresses, home telephone numbers, personal cellular telephone numbers, and personal email addresses, if known, of all individual home help caregivers who have been paid to provide individual home help services within the immediately preceding 6 months. In fulfilling this obligation, the council must follow all applicable laws and regulations related to the protection of personally identifiable information. The list described in this subdivision must not include the name or private data of any participant or participant's representative or indicate that an individual home help caregiver is a relative of a participant or has the same address as a participant.

(e) Maintain a registry of individuals qualified to be individual home help caregivers to promote and coordinate effective and efficient individual home help services. Individual home health caregivers may request to opt out of having the individual's information maintained in the registry created under this section.

(f) Espouse, support, and work to preserve participant selection and self-direction of individual home help caregivers.

(g) Provide support to individual home help caregivers through a variety of methods aimed at encouraging competence, achieving quality services for participants, and improving individual home help caregiver retention through improved job satisfaction.

(h) Collect statewide information and data related to the home help caregiver workforce, including, but not limited to, individual home help caregiver pay, retention and turnover rates, individual home help caregiver job satisfaction, service gaps caused by individual home health caregiver shortages, and other relevant information as requested by the interested parties advisory group.

(i) Serve as a communications hub for the home help caregiver workforce to disperse information relevant to individual home help caregivers.

(11) Any funds allocated for the provision of relevant training and education opportunities as described in subsection (10) may be used to provide career education, wraparound support services, and job skills training in areas of specialization for individual home help caregivers. Funds may also be used for program expenses, including, but not limited to, hiring instructors, marketing and recruitment efforts, space rental, and supportive services to help individual home help caregivers attend trainings.

(12) The council shall convene and support an interested parties advisory group at least every 2 years and as often as the council's members determine to be necessary to meet the council's obligations in accordance with federal Medicaid requirements or any other requirements. For purposes of this subsection, the interested parties advisory group membership must include Home Help participants, individual home help caregivers, representatives of the department, and the bargaining representative of individual home help caregivers.

(13) Except as otherwise provided in this act, the council may do all things necessary or convenient to implement the purposes and provisions of this act and the purposes, objectives, and jurisdictions vested in the council or the board by this act or other law.

(14) The council may receive local, state, federal, and other funds to pay for individual home help services and to accomplish the purposes and provisions of this act. Funds to support the operation of the council may be provided by the department.

(15) The council may employ, appoint, engage, and compensate employees to accomplish the purposes and provisions of this act.

(16) The council may enter into contracts and agreements, and contract for the services of persons or entities, to accomplish the purposes and provisions of this act.

(17) The departments and agencies of this state shall cooperate with and assist the council in the performance of its powers and duties under this act and in the implementation of any agreements entered into by the council as authorized by the act.

(18) The council and the department shall immediately commence all necessary steps to ensure that individual home help services are offered in conformity with this act, to seek any necessary federal approval for program modifications from the Centers for Medicare and Medicaid Services, and to gather all information that may be needed for promptly compiling lists required under this act. The council and the department shall complete the steps described in this subsection by not later than September 30, 2025.

Sec. 4. (1) Solely for the purposes of collective bargaining, and as expressly limited under this section, individual home help caregivers are considered, by virtue of this section, public employees of the director of the department of health and human services or the director's representative. This act does not require or provide for the treatment or classification of individual home help caregivers as public employees for any other purpose, and the department's role as employer solely for the purposes of collective bargaining does not serve as a basis to establish an employer-employee relationship. Individual home help caregivers are not employees of the state or political subdivisions of this state for any other purpose and are not subject to the provisions of section 5 of article XI of the state constitution of 1963. 1947 PA 336, MCL 423.201 to 423.217, applies to the governance of the collective bargaining relationship between the department and the bargaining representative of a bargaining unit composed of individual home help caregivers as provided in this section.

(2) Except for the limited purposes described in subsection (1), participants or participants' representatives are the sole employer of individual home help caregivers and retain the rights to select, hire, direct, schedule, supervise, or terminate the services of any individual home help caregiver who provides individual home help services for the participant in accordance with the laws and regulations governing the Home Help Program. This act does not alter those rights. A provision of any agreement reached between the department and any bargaining representative of individual home help caregivers does not interfere with the rights of a participant or participant's representatives to select, hire, direct, schedule, supervise, or terminate the employment of the participant or participant's representative's individual home help caregivers in accordance with the laws and regulations governing the Home Help Program.

(3) Without limiting any bargaining obligations under 1947 PA 336, MCL 423.201 to 423.217, except for those identified as rights of participants or participants' representatives, at the request of the exclusive bargaining representative, the board or the board's chosen representative on behalf of the department shall engage in collective bargaining with the exclusive bargaining representative concerning the terms and conditions of employment that are within the state's control. Once an exclusive bargaining representative is selected by a majority of individual home help caregivers under 1947 PA 336, MCL 423.201 to 423.217, or other applicable collective bargaining statute or regulation, that representative continues to be recognized by the director, and any other state entity or body charged with regulating individual home help caregivers' conditions of employment, unless and until the representative is decertified by a vote of the majority of individual home help caregivers.

(4) This section does not modify the department's authority to deny participation in the Medicaid program to individuals who do not or will not comport with program requirements under state and federal law and regulation, or to terminate the participation of individual providers. This act must not be construed as modifying or limiting this authority.

(5) Notwithstanding an individual home help caregiver's status as a public employee under subsection (1), the individual home help caregiver is not a government actor and the state, the department, the council, and the board bear no liability for any actions undertaken by the individual home help caregiver in the performance of the individual home help caregiver's duties. The state, the department, or contractors of the state or department are not vicariously or jointly liable for the action or inaction of any individual home help caregiver, whether or not that individual home help caregiver was included on any referral registry maintained by the state,

department, or contractors of the state or department, or referred to a consumer or prospective consumer by the state, department, or contractors of the state or department. The existence of a collective bargaining agreement, the placement of an individual home help caregiver on any referral registry, or the development or approval of a plan of care for a consumer who chooses to use the services of an individual home help caregiver and the provision of case management services to that consumer, by the department, does not constitute a special relationship with the consumer. The state, the department, or contractors of the state or department shall not indemnify any home help caregiver for claims against them arising from actions taken during the course of the home help caregiver's employment.

(6) Individual home help caregivers may, in accordance with the procedures set forth in sections 12 and 14 of 1947 PA 336, MCL 423.212 and 423.214, choose a bargaining representative to bargain collectively and enter into collective bargaining agreements with the department under sections 9, 11, and 15 of 1947 PA 336, MCL 423.209, 423.211, and 423.215. If a bargaining representative of individual home help caregivers is certified, the mutual rights and obligations of the department and the bargaining representative to bargain collectively over the terms and conditions of individual home help caregivers' employment extend to the subjects covered under section 15 of 1947 PA 336, MCL 423.215, but do not include those subjects reserved to participants and participants' representatives under subsection (2). If there is not an agreement between the bargaining representative and the department, the department has no obligation to engage in effects or impact bargaining with respect to the subjects reserved to participants and participants' representatives under subsection (2).

(7) Notwithstanding section 13 of 1947 PA 336, MCL 423.213, the only appropriate unit for individual home help caregivers is a statewide unit of all individual home help caregivers. Individual home help caregivers who are related to their participant or their participant's representative must not be excluded from the unit described in this subsection for that reason.

(8) Any aspects of a collective bargaining agreement entered into under this act requiring appropriation by the federal government, this state, or revisions to statutes or regulations must be subject to passage of those appropriations and any necessary statutory and regulatory revisions. If any such appropriations or revisions are not adopted, the council or the bargaining representative may reopen negotiations on all or part of the collective bargaining agreement.

(9) Acts made unlawful under section 10 of 1947 PA 336, MCL 423.210, are prohibited and considered unlawful if carried out by either of the following parties:

(a) The department.

(b) A labor organization representing or seeking to represent individual home help caregivers.

(10) Any alleged violation of subsection (9) may be filed with the employment relations commission as an unfair labor practice and considered and ruled upon in accordance with sections 10 and 16 of 1947 PA 336, MCL 423.210 and 423.216, and the commission's rules and regulations.

(11) As provided for under sections 2, 3, and 6 of 1947 PA 336, MCL 423.202, 423.203, and 423.206, an individual home help caregiver shall not strike.

(12) Whenever in the course of mediation of a bargaining representative dispute, except a dispute concerning the interpretation or application of an existing agreement, if the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties agree, the exclusive bargaining representative or the department may initiate binding arbitration proceedings by prompt request, in writing, to the other, with copy to the employment relations commission. Except as otherwise provided in this subsection, an arbitration described in this subsection must be conducted in the same manner and under the same procedures as a binding arbitration under 1969 PA 312, MCL 423.231 to 423.247. Notwithstanding the procedures of binding arbitration under 1969 PA 312, MCL 423.231 to 423.247, the majority decision of the arbitration panel is binding on the parties only with respect to those economic issues identified by the arbitration panel as described in section 8 of 1969 PA 312, MCL 423.238. The arbitration panel is not required to adopt the last offer of settlement from either party as to each economic issue, but may render an award that falls between the parties' last offers of settlement on each economic issue, so long as such award is based on the applicable factors described under section 9 of 1969 PA 312, MCL 423.239. Without limiting any of the department's obligations as described under section 10 of 1969 PA 312, MCL 423.210, the department may implement its last best offer of settlement on each economic issue 60 days after the decision of the arbitration panel. Nothing in this act is intended to curtail or infringe on the legislature's constitutional appropriation authority.

(13) The council shall, upon request and agreement by the requesting party to protect the data described in this subsection and use it only in furtherance of the purposes outlined in this section or 1947 PA 336, MCL 423.201 to 423.217, provide lists compiled under section 3 of this act to both of the following parties:

(a) Any labor organization wishing to represent the appropriate unit of individual home help caregivers.

(b) A bargaining representative of individual home help caregivers.

(14) Negotiations between the board or the board's chosen representative on behalf of the department and the bargaining representative of individual home help caregivers must begin not later than July 1 of any year before the year in which an existing collective bargaining agreement expires.

Sec. 5. The department shall make any deductions from the wages of individual home help caregivers that are authorized under section 7 of 1978 PA 390, MCL 408.477, or otherwise authorized by law. Those deductions include, but are not limited to, deductions of the dues of a bargaining representative where authorized by the individual home help caregiver. As described in section 7 of 1978 PA 390, MCL 408.477, this act expressly allows deductions from the wages of individual home help caregivers in writing or pursuant to any form of authorization given by the caregiver that is permitted and valid under the uniform electronic transactions act, 2000 PA 305, MCL 450.831 to 450.849. A deduction for a bargaining representative may only be revoked pursuant to the terms of the individual home help caregiver's authorization. A bargaining representative that certifies that it has and will maintain individual home help caregivers' authorizations must not be required to provide a copy of an individual authorization to the department unless a dispute arises about the existence or terms of the authorization. An individual home help caregiver's request to cancel or change deductions for bargaining representatives must be directed to the labor organization and not to the department. The labor organization is responsible for processing the request to cancel or change deductions. The department shall rely on information provided by the bargaining representative regarding whether deductions for a labor organization were properly canceled or changed, and the labor organization shall indemnify the council for any claims made by the individual home help caregiver for deductions made in reliance on that information.

Enacting section 1. This act does not take effect unless Senate Bill No. 791 of the 102nd Legislature is enacted into law.

Secretary of the Senate

Clerk of the House of Representatives

Approved_____

_____

Governor

EXHIBIT 3

EXHIBIT 3

EXHIBIT 3

Legislative Analysis

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

HOME HELP CAREGIVER COUNCIL

Senate Bill 790 (proposed substitute H-2)
Sponsor: Sen. Kevin Hertel

Senate Bill 791 (H-1) as reported from committee
Sponsor: Sen. Sylvia A. Santana

House Committee: Appropriations
Senate Committee: Appropriations [Discharged]
Complete to 9-25-24

SUMMARY:

Senate Bills 790 and 791 would provide that, for collective bargaining purposes, caregivers under the Home Help Program are public employees of the director of the Department of Health and Human Services (DHHS) or the director's representative. (Generally speaking, the Home Help Program provides assistance with everyday activities so individuals with functional limitations can live at home.) The bills also would create the Home Help Caregiver Council in DHHS to provide orientation, education, and other supports to caregivers. Caregivers would, as public employees, be subject to provisions of the public employment relations act. They could be represented by a labor organization, and the council would have to maintain and provide a list with caregiver contact information to organizations seeking to represent them. The council's board of directors or its representative would have to collectively bargain with the caregivers' bargaining representative. The bills are described in detail below.

Senate Bill 791 would amend 1947 PA 336, the public employment relations act (PERA), to provide that the term *public employee*, whenever used in the act, includes an individual designated by the legislature as a public employee. The definition of *public employee* also would allow the legislature to designate an individual as a public employee only for the purpose of collective bargaining and provide that this designation does not make the individual an employee of the state or a political subdivision of the state for any purpose other than the limited purpose authorized by the legislature.

In addition, PERA now prohibits a public employer's bargaining unit that consists of individuals who are not public employees from having an election regarding representation or from being recognized by either the public employer or the Michigan Employment Relations Commission (MERC), and it provides that a bargaining unit formed or recognized in violation of those prohibitions is invalid and void. The bill would eliminate these provisions.

PERA now provides that an individual employed by a private organization or entity who receives a direct or indirect government subsidy in the individual's private employment is not an employee of the state or political subdivision providing the subsidy and is not a public employee. The bill would eliminate this provision.

Finally, under PERA, an individual employed by a private organization or entity who provides services under a time-limited contract with the state or a political subdivision of the state is not

an employee of the state or political subdivision and is not a public employee. PERA now adds that this provision supersedes any interlocal agreement, memorandum of understanding or of commitment, or other similar document. The bill would eliminate the language adding that the PERA provision supersedes those other documents.

MCL 423.201 and 423.214

Senate Bill 790 would create a new act called the Home Help Caregiver Council Act. Under the bill, solely for the purposes of collective bargaining and as expressly limited as described below, ***individual home help caregivers*** would be considered public employees of the director of DHHS or the director's representative.[1] The bill states that it would not require or provide for individual home help caregivers to be treated or classified as public employees for any other purpose, and DHHS's employer role for collective bargaining would not be a basis for establishing an employer-employee relationship. Individual home help caregivers would not be employees of the state or a political subdivision of the state for any other purpose and would not be subject to section 5 of Article XI of the state constitution (which establishes the classified state civil service).[2] PERA would apply only to the governance of the collective bargaining relationship between DHHS and the ***bargaining representative*** of a bargaining unit composed of individual home help caregivers as described below.[3]

> ***Individual home help caregiver*** would mean a caregiver who, under the Home Help Program, is selected by a ***participant*** or the ***participant's representative*** and provides ***individual home help services*** to a participant. A caregiver who provides services through an ***agency provider*** or ***integrated care organization***, or another similar entity, would not be considered an individual home help caregiver under the bill.
>
> ***Participant*** would mean a person who receives individual home help services.
>
> ***Participant's representative*** would mean a participant's legal guardian or an individual who has the authority and responsibility to act on a participant's behalf regarding the provision of individual home help services.
>
> ***Individual home help service*** would mean services the Home Help Program that provides assistance with one or more ***activities of daily living*** or ***instrumental activities of daily living*** through caregivers in a home or community-based setting.[4]

---

[1] As described above, Senate Bill 791 would amend PERA to provide that, whenever used in that act, the term *public employee* includes "an individual designated by the legislature as a public employee." Senate Bill 790 appears to designate individual home help caregivers as public employees in a way that would, under Senate Bill 791, include them as *public employees* wherever that term is used in PERA. The bills do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

[2] https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-Article-XI-5

[3] The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

[4] The terms *home or community-based setting* and, used later, *home or community-based services* generally refer to settings outside of institutions such as nursing homes and services provided in those noninstitutional settings. See https://www.cms.gov/training-education/partner-outreach-resources/american-indian-alaska-native/ltss-ta-center/information/ltss-models/home-and-community-based-services

Activities of daily living would include eating, toileting, bathing, grooming, dressing, mobility, and transferring (e.g., moving to or from a bed, chair, or standing position).

Instrumental activities of daily living would include at least laundry, light housework, shopping, meal preparation or cleanup, and medication administration.

Agency provider would mean any of the following:

- A home health agency that is currently Medicare-certified.[5]
- An entity, except for the Department of Health and Human Services (DHHS), that has a federal employer identification number and directly employs or contracts with caregivers to provide home or community-based services.
- A community mental health services program (CMHSP) under the Mental Health Code that works with clients who use arrangements that support self-determination.[6]

Integrated care organization would mean a managed care entity under federal rules[7] that has contracted with DHHS and the Centers for Medicare and Medicaid Services (CMS) to provide Medicare and Medicaid covered services to individuals who are dually eligible for full Medicare and Medicaid.

Bargaining representative would mean (as defined in PERA) a labor organization recognized by an employer or certified by MERC as the sole and exclusive bargaining representative of certain employees of the employer.

The bill states that it would not modify the authority, and must not be construed as modifying or limiting the authority, of DHHS to deny participation in the Medicaid program to individuals who do not or will not comport with state and federal program requirements or to terminate the participation of individual providers.

Immunity from liability

The bill would provide that individual home help caregivers are not government actors, their limited status as public employees under the bill notwithstanding, and that the state (including DHHS, the Home Help Caregiver Council, and the council's board of directors) is not liable for actions undertaken by caregivers in performing their duties.

Further, the state, DHHS, or a state or DHHS contractor could not be held liable, vicariously or jointly, for the action or inaction of an individual home help caregiver, regardless of whether they referred the caregiver to a consumer or included the caregiver on a referral registry. A special relationship with a consumer would not be established or evidenced by the existence of a collective bargaining agreement, the placement of an individual home help caregiver on a referral registry, the development or approval of a consumer's plan of care, or the fact that DHHS provides case management services to the consumer.

[5] With regard to the term *home health agency*, see https://www.michigan.gov/lara/bureau-list/bsc/accs-division/hha

[6] The term *arrangements that support self-determination* is not defined in the bill or in the Mental Health Code. For information on CMHSPs, see https://www.michigan.gov/mdhhs/keep-mi-healthy/mentalhealth/mentalhealth/cmhsp

[7] Specifically, 42 CFR Part 438: https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-438

Finally, the state, DHHS, or a state or DHHS contractor could not indemnify an individual home help caregiver for claims against them arising from actions taken in the course of their employment.

Rights of participants

Under the bill, except for the limited purposes described above (i.e., collective bargaining), participants or participant's representatives would be the sole employer of individual home help caregivers and retain the rights to select, hire, direct, schedule, supervise, or terminate the services of any individual home help caregiver who provides individual home help services to the participant in accordance with the laws and regulations that govern the program. The bill says that it would not alter those rights, and that a provision of an agreement reached between DHHS and a bargaining representative of individual home help caregivers would not interfere with those rights.

Bargaining representatives

The bill would authorize individual home help caregivers to choose a bargaining representative to bargain collectively and enter into collective bargaining agreements with DHHS under specified sections of PERA. Once a bargaining representative is selected by a majority of individual home help caregivers under PERA or another applicable law, that representative would have to continue to be recognized by the director and any other state entity charged with regulating individual home help caregivers' conditions of employment, unless the representative is decertified by a vote of the majority of individual home help caregivers. If a bargaining representative is certified, the mutual rights and obligations of DHHS and the bargaining representative to bargain collectively over wages, hours, and other terms and conditions of employment would not include the subjects reserved to participants and participant's representatives as described above. If there is not an agreement between DHHS and the bargaining representative, DHHS would have no obligation to engage in effects or impact bargaining with respect to the subjects reserved to participants and participant's representatives as described above.[8]

At the bargaining representative's request, the board of directors of the Home Help Caregiver Council (described below) or the board's representative on behalf of DHHS would have to engage in collective bargaining with the bargaining representative concerning the terms and conditions of employment that are within the state's control. This provision would not limit any bargaining obligations arising out of PERA, except for those identified above as the rights of participants or participant's representatives.[9] Negotiations between the board or the board's representative on behalf of DHHS and the bargaining representative would have to begin by July 1 of any year before the year an existing collective bargaining agreement expires in.

The bill would state that, notwithstanding section 13 of PERA (which charges MERC with deciding the appropriate bargaining unit for a given group of public employees),[10] a statewide unit of all individual home help caregivers is the only appropriate bargaining unit for those

[8] Effects bargaining, also known as impact bargaining, involves decisions that an employer has the right to make but that will have effects or an impact on relevant employees.

[9] The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

[10] The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

caregivers. Caregivers who are related to their participant or related to their participant's representative could not be excluded for that reason from the bargaining unit.

Any aspects of a collective bargaining agreement that require federal or state appropriations or revisions of law would have to be made subject to those appropriations or revisions, and either the Home Help Caregiver Council or the bargaining representative could reopen negotiations on all or part of the agreement if the appropriations or revisions are not made.[11]

Arbitration proceedings

If a bargaining representative dispute (except for one about the interpretation or application of an existing agreement)[12] has not been resolved to the agreement of both parties within 30 days after its submission to mediation (or an additional period the parties agree to), DHHS or the bargaining representative could initiate binding arbitration proceedings by prompt request, in writing, to the other, with a copy to MERC. The arbitration would have to be conducted in the same way as a binding arbitration under 1969 PA 312 (which provides for compulsory arbitration of labor disputes in police and fire departments), except that, under the bill, an arbitration panel's decision would be binding only for economic issues identified by the panel as described in section 8 of 1969 PA 312.[13] The panel would not have to adopt the last offer of settlement from either party as to each economic issue, but could adopt an award that falls between those last offers on each economic issue, as long as the award is based on applicable factors described in section 9 of 1969 PA 312.[14] DHHS could implement *its* last best offer of settlement on each economic issue 60 days after the panel's decision, but would also (or still) have to meet all of its obligations under section 10 of PERA.[15]

Wage deductions

DHHS would have to make deductions from the wages of individual home help caregivers that are authorized by law, including under 1978 PA 390 (which regulates the payment of wages and benefits for Michigan workers), and including deduction of the dues of a bargaining representative if authorized by the caregiver.

As described in section 7 of 1978 PA 390,[16] the bill would expressly allow deductions from the wages of individual home help caregivers in writing or using a valid form of authorization

[11] As described above, the responsibility for collective bargaining would be given to the council's board of directors or its representative on behalf of DHHS. In that context, it is unclear why the council, and not the board or its representative, is given specific authority to reopen negotiations.

[12] The bill does not define the term *bargaining representative dispute*.

[13] Section 8 requires the arbitration panel to make a conclusive determination as to which issues in dispute are economic and direct each party to submit, before the hearing, its last offer of settlement on each economic issue. https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-238

[14] https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-423-239

[15] Generally speaking, section 10 prohibits public employers (e.g., DHHS) and labor organizations from interfering with public employees (e.g., individual home help caretakers) in the exercise of their right to form or join a labor organization and prohibits them from refusing to bargain with each other. The section also prohibits other forms of interference in labor organizing or collective bargaining, such as discriminating in employment on the basis of labor organization membership or activity. https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-210

[16] Section 7 prohibits deduction from wages of any amount that includes an employee contribution to a separate segregated fund established for political purposes under section 55 of the Michigan Campaign Finance Act (https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-169-255) without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to allow the deduction. However, this prohibition does not apply to deductions expressly allowed by law.

under the Uniform Electronic Transactions Act. A deduction for a bargaining representative could be revoked only under the terms of the authorization. Caregiver requests to cancel or change bargaining representative deductions would have to be directed to, and processed by, the labor organization and not DHHS. Unless a dispute arises about the existence or terms of an authorization, a bargaining representative that certifies that it has and will maintain caregivers' authorizations would not have to provide DHHS with a copy of an individual authorization. DHHS would have to rely on information provided by the bargaining representative regarding whether deductions were canceled or changed. The labor organization would have to indemnify the Home Help Caregiver Council for any claims made by the caregiver for deductions made based on that information.[17]

Applicability of specific provisions of PERA

The bill would provide that acts prohibited and made unlawful under section 10 of PERA are prohibited and unlawful if performed by DHHS or a labor organization representing or seeking to represent individual home help caregivers.

The bill would provide, as PERA does, that an alleged violation may be filed with MERC as an unfair labor practice and considered and ruled on under sections 10 and 16 of PERA and MERC's rules and regulations.[18]

The bill would provide that, as provided in sections 2, 3, and 6 of PERA, an individual home help caregiver is prohibited from striking.

Home Help Caregiver Council

The bill would create the Home Help Caregiver Council in DHHS. The council would have to do all of the following with regard to individual home help caregivers:

- Provide for a mandatory orientation program for newly enrolled caregivers. The program would have to be conducted on paid time, and a caregiver would have to attend an initial orientation no later than 45 days after they begin providing individual home help services. Both of the following would apply to the orientation program:
  - A caregiver bargaining representative could attend, give material to attendees and receive it from them, and make a presentation of up to 30 minutes in length.
  - At least 24 hours before the orientation begins, the council would have to give an attending bargaining representative a list of caregivers registered for it.
- Provide for additional training and educational opportunities for caregivers, including opportunities for certification of training and experience in areas of specialization.
- By September 30, 2025, and twice a year after that, compile and maintain a list of all caregivers who have been paid for providing individual home help services in the previous six months. The list would include caregivers' names, home addresses, home phone numbers, personal cell phone numbers, and personal email addresses, if known. The list could not include the name or private information of a participant or participant's representative or indicate that a caregiver is a relative of, or has the same address as, a participant. In preparing the list, the council would have to protect personally identifiable information as required by law. Upon request, the council would

[17] Under the bill, DHHS would be responsible for making deductions from wages.

[18] Section 16: https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-216
Rules: https://ars.apps.lara.state.mi.us/AdminCode/DownloadAdminCodeFile?FileName=1833_2018-051LR_AdminCode.pdf&ReturnHTML=True

have to provide the list to the following entities, as long as they agree to protect the information and use it only for purposes of the bill or PERA:
    - A labor organization that wants to represent the appropriate unit of individual home help caregivers.
    - A bargaining representative of individual home help caregivers.
- Maintain a registry of individuals *qualified to be* caregivers. Those who *are* caregivers could, upon request, opt out of having their information maintained in this registry.
- Collect statewide information related to the home help caregiver workforce (i.e., not just individual home help caregivers), including at least information about individual home help caregiver pay, retention and turnover rates, individual home help caregiver job satisfaction, service gaps caused by individual home help caregiver shortages, and any other relevant information as requested by the interested parties advisory group described below.
- Serve as a communications hub to distribute information relevant to individual home help caregivers.
- Support and work to preserve participant selection and self-direction of caregivers.
- Provide supports to caregivers aimed at encouraging competence, achieving quality services, and improving caregiver retention through improved job satisfaction.

The council could contract with experienced organizations to develop and deliver orientations and trainings. Funds for training and education opportunities could be used for career education, wraparound support services, and job skills training in areas of specialization, as well as for such expenses as instructors, marketing and recruitment, space rental, and services to help caregivers attend.

The council would have to convene and support an interested parties advisory group as often as its members consider necessary to meet the council's obligations under federal Medicaid requirements, or any other requirements, but not less often than once every two years.[19] The advisory group would include Home Help participants, individual home help caregivers, their bargaining representative, and representatives of DHHS. The bill defines the group as these individuals who make recommendations about adequate payments and other workforce supports for personal care attendants providing services under the state Medicaid program.

The council could do all things necessary or convenient to implement the provisions described above. The council could receive local, state, federal, and other funds to accomplish the purposes described above. DHHS could provide funds to support the council's operation. The council could hire and pay employees and enter into contracts and agreements to accomplish the purposes described above. A document or record prepared, owned, used, possessed, or retained by the council for an official function would have to be made available to the public under the Freedom of Information Act (FOIA). All state departments and agencies would have to cooperate with and assist the council in performing its powers and duties described above and implementing any agreements it enters into.

[19] CFR 447.203(b)(6): https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-447/subpart-B/section-447.203. Relevant guidance is here, on page 35: https://www.medicaid.gov/medicaid/access-care/downloads/ffs-prov-final-rule-guidance.pdf .

The council could receive local, state, federal, and other funds to pay for individual home help services.[20]

The council and DHHS would have to immediately begin all necessary steps to do all of the following, and complete those steps by September 30, 2025:

- Ensure that individual home help services are offered in conformity with the bill.
- Seek from the CMS any necessary federal approval for program modifications.
- Gather all information that might be needed to promptly compile lists required under the bill.

Board of directors

The council would be directed and governed by a board of directors consisting of the following seven members:

- The director of DHHS or their designated representative from within DHHS.
- The director of the Department of Labor and Economic Opportunity (LEO) or their designated representative.
- The state treasurer or their designated representative.
- Two members appointed by the DHHS director to represent participants or participant's representatives.
- Two members appointed by the DHHS director who represent nonprofit organizations that advocate on behalf of older adults or people with disabilities.

Members would be appointed to four-year terms ending July 31, but initial appointments would be for one, two, three, and four years to stagger the terms. Terms for members appointed to represent participants would expire in odd-numbered years, and those for members appointed to represent nonprofit organizations would expire in even-numbered years. At the end of a term, the director of DHHS would appoint someone to serve a new term. For a mid-term vacancy, the director would appoint someone to serve the rest of the term. A member's resignation would be effective whenever the director of DHHS gets their written notice. A member could serve until a successor is appointed.

Appointments would have to be filed with the secretary of state, and board members would have to take and file the oath sworn by legislative, executive, and judicial officers under section 1 of Article XI of the state constitution.[21]

The board's first meeting would have to be held within 60 days after a majority of members are appointed, at a date and time determined by the DHHS director. The board would have to select a chairperson from its members and could elect other officers it considers necessary. It would elect the chairperson and any other officers annually. A majority of members serving would be a quorum of the board.

[20] It is unclear which of the council's responsibilities (described above) would involve paying for individual home help services.

[21] https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-Article-XI-1

In addition to engaging in collective bargaining (or designating a representative to do so) as described above, the board would have to do all of the following:

- Organize and make its own policies and procedures and adopt bylaws governing its operations.
- Adopt a schedule of regular meetings. A special meeting could be called by the chairperson or as provided in the bylaws.
- Meet at the call of the chairperson and as provided in the bylaws.
- Comply with the Open Meetings Act with regard to its meetings, meeting notices, and bylaws.
- Keep a written or printed record of each meeting, which would be subject to FOIA.

The bill says that nothing in it is intended to curtail or infringe on the legislature's constitutional appropriation authority.

The bill cannot take effect unless Senate Bill 791 is also enacted.

FISCAL IMPACT:

Senate Bills 790 and 791 would have two primary cost drivers. First, the bills would establish new annual costs related to the new Home Help Caregiver Council, which would cost a minimum of $5.0 million Gross ($2.5 million GF/GP) and could be up to $10.0 million Gross ($5.0 million GF/GP). The specific cost estimate would depend on the amount and types of additional trainings the Home Help Caregiver Council would contract with organizations for. Second, and representative of the majority of the bills' potential costs, these bills could significantly increase state costs related to home help services, but those costs would depend on the outcomes of any negotiations and on the legislature's appropriating funds for the cost increases.

Due to the fact that a majority of costs would be attributed to negotiations that have an unknown outcome, the cost estimate below makes a number of assumptions in order to establish a cost range. The assumptions reviewed include:

- The number of home help workers to be part of the negotiations. The bill is clear that Medicaid fee-for service adult home help workers would be a part of the negotiations, but the bill is not clear about whether home help workers that provide services through the Medicaid MI Choice managed care program, and non-Medicaid home help programming provided through area agencies on aging, would be part of any negotiations.
- The negotiated hourly rate. Similar efforts in other states have had hourly rates negotiated up to between $15.00 and $16.15.
- The inclusion of other employment benefits. It is unknown whether other benefits besides the hourly rate would be a part of negotiations, including whether paid leave or health insurance/stipends would be included.

Given the very broad range of possible outcomes of the negotiations, the cost, and subsequent request for a legislative appropriations, could range from an estimated $39.7 million Gross ($13.8 million GF/GP) to $193.2 million Gross ($65.9 million GF/GP) within the state Medicaid program. The non–GF/GP portion of the cost comes from federal Medicaid reimbursements. For FY 2024-25, the federal Medicaid reimbursement rate is 65.13%.

It is also important to note that, while these bills specifically exempt home help services provided through the CMHSPs and integrated care organizations, as managed care providers they are required to have a sufficient provider network. Therefore, any changes in the reimbursement rates paid to home help workers through a different Medicaid program could affect their ability to maintain a sufficient provider network without the CMHSPs and integrated care organizations also increasing the rates, though not necessarily up to the same amount, that they provide to home help workers.

POSITIONS:

A representative of Caring Across Generations testified in support of the bills. (9-25-24)

The Michigan Elder Justice Initiative indicated support for the bill. (9-25-24)

A representative of the Mackinac Center for Public Policy testified in opposition to the bills. (9-25-24)

The following entities indicated opposition to the bills (9-25-24):

- Michigan Chamber of Commerce
- NFIB

Legislative Analyst: Rick Yuille
Fiscal Analysts: Kevin Koorstra
Kent Dell

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

EXHIBIT 4

EXHIBIT 4

EXHIBIT 4

Policy Brief

MACKINAC CENTER FOR PUBLIC POLICY

OCT. 8, 2012 S2012-09 ISBN: 978-0-9883921-2-0

An Analysis of Proposal 4 of 2012: The Unionization of In-Home Caregivers

By Derk A. Wilcox, M.A., J.D.

Executive Summary*

Michigan's statewide ballot in November will include Proposal 4, described officially as "[a] proposal to amend the state constitution to establish the Michigan Quality Home Care Council and provide collective bargaining for in-home care workers." If approved by the voters, the measure would have two general effects.

First, the proposal would place in the Michigan Constitution a provision that in-home caregivers who provide basic care services to recipients of state aid, such as Medicaid, be considered public employees. They would be classified as public employees, however, solely for the purpose of collective bargaining with a government agency through a union; they would not "be entitled to any other legal benefit reserved to such employees." The care recipient would continue to act as the in-home caregiver's employer for all purposes other than collective bargaining, retaining the right "to select, supervise, train and direct, or terminate, an individual provider."

Second, the proposal would create a state agency known as the Michigan Quality Home Care Council. The MQHCC would collectively bargain with any union representing the in-home caregivers, though the negotiated compensation standards would be nonbinding. Compensation would still be set by the Legislature.

The MQHCC would largely assume the responsibilities of the existing Michigan Quality Community Care Council by providing (optional) training opportunities for in-home care providers and care recipients, and by maintaining a registry of in-home caregiver candidates, who would be subject to background checks. The MQHCC would also provide care recipients with "financial management services," such as generating their employer tax forms and making payroll deductions on their behalf. Such financial management services are currently provided by the Michigan Department of Community Health.

Michigan's experience with the Michigan Quality Community Care Council does not suggest that establishing the MQHCC would increase the percentage of care recipients receiving lower-cost, personalized in-home care. State audit figures show that the number of disabled people receiving in-home care through Medicaid's Home Help Program rose from 51,372 to 55,382 between 2002 and 2004, when the Michigan Quality Community Care Council was established. In 2010, however, the average monthly number in that program was 53,516 — no improvement, and even a small decline. Any potential cost savings were never realized.

A line-by-line review of Proposal 4 indicates that it would provide:

1. No programs or services that have not been available to in-home care recipients in the past, with no constitutional amendment necessary
2. No provisions creating new taxpayer savings
3. No provisions for improved care
4. No new options for care recipients.

Proposal 4 would, however, validate the convoluted and disputed unionization of in-home caregivers implemented in 2005 by the Service Employees International Union

* Citations are provided in the main text.

ABOUT THE AUTHOR

Derk A. Wilcox, M.A., J.D., is a senior attorney with the Mackinac Center Legal Foundation, a nonprofit public-interest law firm affiliated with the Mackinac Center for Public Policy. He has practiced extensively in the area of law concerning the elderly and the disabled.

DISCLOSURE

Note that the Mackinac Center Legal Foundation is involved in litigation concerning the 2005 in-home caregiver unionization discussed in this Policy Brief.

and the Michigan Quality Community Care Council. This process has led to more than $32 million in Medicaid money intended for in-home caregivers being diverted to the SEIU for "collective bargaining" with an obscure government entity that had no ability to give the caregivers a raise or improve their working conditions. Collective bargaining with the proposed MQHCC would be no more effective.

Proposal 4 would enshrine in the Michigan Constitution a radical legal approach that classifies people as public employees if they indirectly receive government money for providing a private service. This approach goes against previous labor law and against laws passed by the Michigan Legislature. It has been employed in other states to unionize foster care parents and home-based day care providers.

There has been no threat to the Medicaid-financed Home Help Program at issue in Proposal 4. This program will continue whether or not Proposal 4 is approved. Furthermore, such services as training, registries and background checks for the in-home care program have been provided, and can continue to be provided, without a constitutional amendment. Michigan residents who favor such services need not chain them to the controversial unionization process that would be enshrined by Proposal 4.

Introduction: The Provisions of Proposal 4

On Nov. 6, 2012, Michigan voters will be asked to consider Proposal 4, which would amend Michigan's constitution. If Proposal 4 is approved, the new amendment would affect the unionization and working arrangement of caregivers who receive indirect Medicaid subsidies to work in the homes of disabled adults and provide them with basic care.

Specifically, Proposal 4 would:

- Allow in-home caregivers to unionize and bargain collectively[1]
- Create a new public body called the Michigan Quality Home Care Council, which would operate within the executive branch of state government[2] and:
  - Bargain collectively with the union representing the in-home health care givers[3]
  - Provide training for in-home caregivers[4]
  - Create a registry of in-home caregivers who have passed a background check and make that registry available to care recipients (though recipients are free to choose nonregistered caregivers)[5]
  - Provide patients with "financial management services" to help them comply with applicable laws as employers of in-home caregivers[6]
  - Honor any existing collective bargaining agreement with the Service Employees International Union on behalf of Michigan's in-home caregivers[7]
  - Set "compensation standards" and "other terms and conditions of employment for the employment of individual [in-home care] providers," although these would ultimately be determined by "appropriations by the Legislature."[8]

Proposal 4 was initiated by "Citizens for Affordable Quality Home Care," a coalition supported by advocates for government programs for the disabled and by the Service Employees International Union. Citizens for Affordable Quality Home Care submitted a sufficient number of voters' signatures to have Proposal 4 placed on the ballot and to amend the constitution pursuant to Article 12, Section 2, of the Michigan Constitution of 1963.

The provisions above would be added as a new Section 31 to the existing Article 5 of Michigan's constitution. The MQHCC would succeed the similarly named Michigan Quality Community Care Council (the "MQC3"),[9] which is not in the constitution. The MQC3 will be discussed later in detail.

The MQHCC would be governed by an 11-member council.[10] In general, the governor would directly appoint nine of these members, "no fewer than seven of whom shall be current or former program participants, participant representatives, or participant advocates."[11] Initially, however, Proposal 4 would require that seven of these positions be filled by the current MQC3 directors, who would serve out their current terms.[12] The other two board positions would be filled by the Department of Community Health director (serving as chair) and the Department of Human Services director, both of whom are appointed by the governor.[13] The two directors could also appoint designees to serve in their stead.[14]

As noted, the amendment would require the continued observance of any MQC3 collective bargaining agreement with the SEIU,[15] along with the dues-paying requirement to that union. However, for the first time, the Michigan Constitution would mandate that the in-home caregivers be considered "public employees" for

24

the purpose of collective bargaining. The constitutional requirement that in-home caregivers be considered public employees for the purpose of unionization is, as we will see, a fairly new occurrence.

The In-Home Care Program

At the heart of the matter are the people receiving the care. These are adults with disabilities — often a developmental disability that has impaired them since birth. Often they are the adult children of the caregivers, though they may also be an aged parent. The Anderson Economic Group reports that according to a 2005 survey, "75% of providers stated they had become a home care worker because a family member or close friend was in need of care."[16]

It has been the policy of Michigan and the rest of the United States that these care recipients get the care that they need in the least restrictive setting available. The United States Supreme Court, in 1999,[17] held that any public policy favoring institutionalization of the disabled amounted to discrimination, and that government agencies should seek the least restrictive living arrangement available. The Supreme Court stated, "[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[18] This least-restrictive setting means that state public policy favors the disabled continuing to live in the general community — often in their family homes.

In Michigan, there has long been a program that helps people who qualify for Medicaid assistance to receive in-home nonmedical care from nonprofessional caregivers. This is called the Home Help Program:

> Home help services (HHS) are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. Individuals or agencies provide HHS. The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).[19]

The HHP program has been in place since 1981. Neither the MQHCC, which would be created if Proposal 4 passes, nor its predecessor, the MQC3, is new in this regard. The home-based care program was in place 23 years prior to the creation of the MQC3 and 31 years before Proposal 4 was approved for the November ballot.

In order to qualify for the HHP, a potential recipient needs to first be certified by a physician and then apply to the Medicaid program through the Michigan Department of Human Services.[20] If these requirements are met, a representative of the Department of Human Services conducts an in-home visit with the care recipient.[21] The representative determines which of the 12 activities of daily living — eating, toileting, bathing, etc. — the recipient needs assistance with and whether the applicant caregiver can provide that particular assistance.

The Importance of Collective Bargaining in Proposal 4

As indicated above, Proposal 4 has a number of provisions. Granting a power of collective bargaining is only one of them.

Nevertheless, unionization is fundamental to understanding the proposal's primary effects. The primacy of the unionization power is indicated by the title of the proposal as it will appear on the ballot: "A PROPOSAL TO AMEND THE STATE CONSTITUTION TO ESTABLISH THE MICHIGAN QUALITY HOME CARE COUNCIL AND PROVIDE COLLECTIVE BARGAINING FOR IN-HOME CARE WORKERS." Collective bargaining is likewise the first provision listed in the description of the proposal as it appears on the ballot.* Both the title and the 100-word description were developed by the director of elections in the Secretary of State's office, and they were approved for the ballot by a 3-0 bipartisan vote of the Board of State Canvassers.[22]

Hence, the status and history of collective bargaining for in-home caregivers will be discussed at length below. A discussion of the other provisions of Proposal 4 will follow.

The 'Unionization' of In-Home Caregivers in 2005

Proposal 4 establishes a collective bargaining relationship between the MQHCC and a union or unions representing in-home caregivers. In-home caregivers would be considered "public employees" and the union a public-sector union, though Proposal 4 also stipulates that in-home caregivers "shall not, as a consequence of this

* See the Appendix for both the 100-word summary that will appear on the ballot and the complete language of Proposal 4.

[provision of Proposal 4], be considered public or State employees for any other purpose, nor be entitled to any other legal benefit reserved to such employees."[23]

In-home caregivers are not currently considered public employees under state law.[24] They were, however, unionized as public employees in 2005 by the Michigan Employment Relations Commission through a process whose legality is under dispute.* A federal court has issued a preliminary injunction which permits the continuing collection of union dues and agency fees by the Service Employees International Union† pending the final outcome of the union's federal lawsuit alleging that any failure to withhold dues would be an unconstitutional breach of the existing union contract.[25]

The 2005 unionization of in-home caregivers occurred in an unusual manner. The certification of a labor union as the exclusive collective bargaining representative for a group of employees occurs through different procedures depending on who the employer is. Certification is a necessary prerequisite to creating any union that an employer will be legally required to bargain with collectively.

The federal National Labor Relations Board certifies larger private-sector unions,[26] and it therefore certifies most private-sector unions. The NLRB does not, however, certify public employees of the states; only state governments do this.[27]

In Michigan, the Civil Service Commission has responsibility for certifying unions of state government employees.[28] All other public employee unions, such as those for municipal employees, are certified by the Michigan Employment Relations Commission.‡

In 2005, the Michigan Employment Relations Commission certified the SEIU as the union that would collectively bargain on behalf of Michigan's in-home caregivers.[29] The MQC3, however, presented itself as a public employer, and in-home caregivers did not appear to be public employees under Michigan law.§

The MQC3 was created through an "interlocal agreement." Interlocal agreements are provided for in Michigan's constitution and have been codified as part of the Urban Cooperation Act of 1967.[30] Article 7, Section 28, of the Michigan Constitution provides the specific language:

> [T]wo or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state … for the joint administration of any of the functions or powers which each would have the power to perform separately. …

An interlocal agreement therefore requires the involvement of at least two local governments. These agreements are intended to "find solutions to metropolitan problems."¶ For instance, Dexter Township, the Village of Dexter, Scio Township and Webster Township have recently been negotiating an interlocal agreement to provide fire services for all four municipalities.[31]

In the creation of the MQC3, the interlocal agreement was reached between the Michigan Department of Community

* The Mackinac Center Legal Foundation, a nonprofit public-interest law firm and an affiliate of the publisher of this Policy Brief, is currently involved in litigation challenging the unionization of in-home caregivers. For the MCLF brief in the case, see Patrick Wright, "Haynes and Glossop v SEIU and MQC3, Brief in Support of Charge of Unfair Labor Practice,"(Mackinac Center for Public Policy, 2012), http://goo.gl/z4fH7 (accessed Oct. 4, 2012).

† For simplicity's sake, the union representing the in-home caregivers will be called "the SEIU" in this Policy Brief. The petition for representation originally submitted to the Michigan Employment Relations Commission listed the Service Employees International Union (SEIU), AFL-CIO, as the petitioning union. "Petition for Representation Proceedings," (Mackinac Center for Public Policy (Michigan Employment Relations Commission), 2005), 1, http://goo.gl/YCCkb (accessed Oct. 4, 2012). The first collective bargaining agreement was signed with the Service Employees International Union, Local 79. "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Local 79," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2006), http://goo.gl/dsD57 (accessed Oct. 4, 2012). The second collective bargaining agreement was signed with the SEIU Healthcare Michigan. "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Healthcare Michigan," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2009), http://goo.gl/YFq97 (accessed Oct. 4, 2012). The April 9, 2012, extension of the collective bargaining agreement was signed with the SEIU Healthcare Michigan. Executive Director Susan Steinke, Michigan Quality Community Care Council, email correspondence with Scott Heinzman, Board of Trustees, Michigan Quality Community Care Council, April 9, 2012.

‡ MCL 423.212. MERC, an agency of the executive branch of state government, makes decisions under the direction of three members, who are appointed by the sitting governor. The state statute establishing MERC requires that "not more than 2 members represent any one political party." MCL 423.3. In 2005, at the time of the union certification, a majority of members were appointed by then-Gov. Jennifer Granholm.

§ Whether the in-home caregivers were public employees is analyzed at some length below.

¶ The "Address to the People regarding Article 7, Section 28 of the Constitution of 1963 states: "This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems." 2 Official Record, Constitutional Convention 1961, p. 3394.

26

Health and the Tri-County Aging Consortium, an agency that had previously focused exclusively on the elderly in Clinton, Ingham and Eaton counties.[32] The interlocal agreement was statewide in its scope.[33]

The DCH entered into this interlocal agreement in 2004. Through this agreement, the MQC3 purportedly had "the right to bargain collectively and enter into agreements with labor organizations. The [MQC3] shall fulfill its responsibilities as a public employer … with respect to all its employees."[34] This agreement also, however, recognized that the caregiver was under the exclusive control of the care recipient, not the MQC3, by acknowledging "the Consumers' exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services to that Consumer."[35]

The MQC3 did not exercise control over the terms and conditions of employment for its ostensible employees. It did not hire or fire the caregivers, and it did not handle their payroll.[36]

With the creation of the MQC3 and its purported power under the interlocal agreement to collectively bargain as the public employer of the in-home caregivers, a union representing in-home caregivers had an entity to "bargain" with. In January 2005, the MQC3 and the SEIU presented a petition to MERC seeking certification of the union as the representative of the in-home caregivers.[37]

The petition stated that both the MQC3 and the SEIU consented to MERC's "jurisdiction" over the matter.[38] MERC then ran a mail vote among in-home caregivers to approve the SEIU as their representative union. The proposed bargaining unit was to comprise all 41,000 in-home caregivers in Michigan. The election received an approximate 19 percent response rate — 6,949 voted in favor of unionization, and 1,007 were opposed. The majority of caregivers, approximately 33,000, did not respond.[39] On April 19, 2005, MERC certified the SEIU as the collective bargaining agent for in-home caregivers.[40]

Once the union representation was official, SEIU and the MCQ3 entered into a collective bargaining agreement that permitted the union to collect "union dues" and "agency fees"* from the checks sent by the DCH to in-home caregivers on behalf of the disabled adults in the Home Help Program.[41] Starting in October 2006, the putative dues and fees were automatically deducted from the paychecks of all the in-home caregivers in the program. These dues and fees have since ranged from 2.5 percent to 2.75 percent of the caregivers' checks. As of September 2012, the SEIU had collected more than $32 million in dues and agency fees.

The Legislature Acts to End the Dues Collection

In 2009, the Mackinac Center Legal Foundation, a public-interest law firm that is affiliated with the publisher of this Policy Brief, brought suit against a unionization similar to the 2005 unionization of in-home caregivers. The 2009 lawsuit involved the unionization of home-based day care business owners and other home day care providers who receive indirect state child care subsidies on behalf of low-income parents enrolled in the state's Child Development and Care Program.[42] This lawsuit and the subsequent publicity led to legislative hearings. The Legislature later defunded the MQC3 for fiscal 2012. This defunding was meant to end the MQC3's existence and the collective bargaining agreement that required the in-home caregivers to pay the SEIU's union dues and agency fees. The MQC3, however, continued to operate in a limited capacity.†

Ultimately, in March and April 2012, the Michigan Legislature passed Public Act 45 and Public Act 76, respectively. Both pieces of legislation clearly excluded in-home caregivers and home-based day care providers from the definition of "public employees" under state law.[43] Public Act 76 altered the Public Employment Relations Act specifically to affirm:

> 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**

* As explained in the Mackinac Center Policy Brief "Proposal 2 of 2012: An Assessment," "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." Patrick J. Wright et al., "Proposal 2 of 2012: An Assessment," (Mackinac Center for Public Policy, 2012), 9, http://goo.gl/Bihc2 (accessed Oct. 7, 2012).

† The circumstances surrounding the MQC3's continued operation will be discussed further below under "The Relationship Between the MQC3 and the SEIU."

by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.[44] (Emphasis added.)

Public Act 76 was signed and went into effect on April 10, 2012.[45] On April 9, 2012, however, one day before the new law went into effect, the MQC3 and the SEIU entered into an extension of the existing collective bargaining agreement.[46] This contract extension was approved by MQC3's director, who at that time operated the MQC3 from her home and stated that she could devote only a limited amount of time to the council because she was collecting unemployment insurance.[47]

The Continued Collection of Monies From In-Home Caregivers

On May 24, 2012, Michigan's attorney general issued an informal legal opinion that temporarily halted the DCH's withholding of "union dues" from the payments received by in-home caregivers.[48] On May 29, 2012, however, the SEIU sued Gov. Richard Snyder, State Treasurer Andy Dillon and Department of Community Health Director Olga Dazzo in their official capacities. This lawsuit was brought in the federal courts on grounds that the state's failure to continue withholding money for the SEIU voided the union contract and therefore violated the U.S. Constitution's contract clause.[49] This lawsuit resulted in a preliminary injunction. The judge held that the Department of Community Health had to continue to withhold the union dues and agency fees to preserve the status quo until final resolution of the case or the expiration of the contract.[50]

Because of the contract extension on the eve of the new law, the collection of the union dues and agency fees continues to this day. Without the contract extension, the collective bargaining agreement would have expired on Sept. 20, 2012, and the dues would no longer have been collected, regardless of the federal ruling.

Questions About the 2005 In-Home Caregivers Unionization

There were several questionable steps taken during the unionization process in 2005. These subsequently led to legal and public policy objections that likely prompted Citizens for Affordable Quality Home Care to include collective bargaining provisions in Proposal 4. The problems are therefore discussed below. We address them in chronological order.

The Interlocal Agreement

As noted above, the MQC3 was created through an interlocal agreement between the Michigan Department of Community Health and the Tri-County Aging Consortium. The validity of that agreement is doubtful.

The Michigan Constitution requires that an interlocal agreement be signed among "two or more counties, townships, cities, villages or districts." It does not appear, however, that an agreement between TCAC and the DCH would satisfy the constitutional requirement. The DCH is a state agency. Even if the TCAC, which operates in a three-county region, could be considered sufficiently "local" to somehow meet the constitutional definition, it is only one local agency. An interlocal agreement requires at least two.

If the MQC3 was improperly constituted, it could not have legally served as the public employer in the unionization of in-home caregivers or of any subsequent collective bargaining agreements. The in-home caregivers unionization as public employees of the MQC3 itself would be invalid.

Outside this concern, the formation of the MQC3 raised policy questions. TCAC was an agency that had previously focused exclusively on the elderly.[51] According to the initial interlocal agreement, the MQC3 was able to serve only the elderly until the TCAC modified its charter, which occurred in April 2004.[52] TCAC did not appear to have expertise in the provision of in-home caregiver services to disabled adults statewide, though this was the MQC3's purported area of competence.

MERC's Power to Approve the Unionization

Setting aside the questionable origin of the MQC3, a fundamental question remains: Would the unionization of in-home caregivers as public employees have been legal in the first place? State law and the history of public-sector unionization in Michigan indicate it would not have been.

MERC can take actions only within the limited subject matter over which it has jurisdiction, and its primary jurisdiction is public employees* — specifically local government employment, which is not part of the state's classified civil service.[53]

* MERC also oversees "the law governing labor relations for private sector employers and employees not within the exclusive jurisdiction of the National Labor Relations Act." See "Guide to Public Sector Labor Relations Law in Michigan: Law and Procedure before the Michigan Employment Relations Commission," (Michigan State University and the Michigan Employment Relations Commission, 2011), 1, http://goo.gl/LhALv (accessed Sept. 23, 2012).

28

Local government employees did not get the power to have a union recognized as their exclusive bargaining agent until the revision of the state constitution in 1963.* Michigan's new constitution stated, "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."[54] This provision made clear that the Legislature — not the governor's office, municipalities or interlocal agreements — has the power to make the laws regarding public employees and unionization.

In 1965, following Michigan's new constitutional provision, Michigan enacted the Public Employment Relations Act. PERA was modeled on the 1935 federal National Labor Relations Act, which governs most private-sector unionization.† Notably, the NLRA excludes from its definition of "employee" those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor."[55] Prior to the in-home caregiver unionization, no court had ever held that PERA allowed the unionization of those who receive an indirect payment of money from the government.

Moreover, the Michigan courts had developed a four-factor test to identify who the government employer was in determining public employment under PERA. The Court of Appeals, in Wayne County Civil Service Commission v. Board of Supervisors,[56] set forth the following factors to determine who the employer is:

> (1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that they have the power and control over the employee's conduct.[57]

Note that the MQC3 did not meet the requirements set forth in this four-part test for being the employer of the in-home caregivers. The MQC3 does not hire or fire the caregivers; the Medicaid care recipients do. In fact, the collective bargaining agreement between the MQC3 and the SEIU specifically states:

> The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice. … 2) remove Providers from their service at will and for any reason; and 3) determine in advance under all circumstances who can and cannot enter their home.
>
> The parties reiterate their prior acknowledgement that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.‡, [58]

Even the petition for certification presented to MERC acknowledged that the care recipients or their guardians retained the fundamental duties of employers: "[T]he individual persons receiving care retain authority over their personal selection and retention of particular homecare workers."[59] Thus, the MQC3 did not meet elements (1) or (3) of the court's four-factor test.

Similarly, the MQC3 does not pay in-home caregivers. Formally, the participants do, with assistance from the DCH, which issues the checks and prints the providers' W-2s. These W-2s in turn list the participant as the employer.[60]

Nor, indeed, does the MQC3 determine the compensation in-home caregivers receive through the Home Help Program. In-home caregivers' pay is determined by the Legislature. Compensation levels agreed to in the MQC3's collective bargaining contract with the SEIU are aspirational. They essentially represent an agreement to lobby the Legislature for that level of compensation. The Legislature is not obligated to listen. Thus, the MQC3 did not satisfy element (2) of the court's test.

The MQC3 does not exercise supervisory control over in-home caregivers, who are providing care in tens of thousands of homes across Michigan. The only agency visiting the home is the Department of Human Services, and it does so only as an initial visit;[61] there is no ongoing supervision, except by the participant (to the extent he or she is able). The MQC3 did not meet element (4), meaning that the MQC3 had none of the hallmarks of an employer.

In 1996, PERA was amended in a way that made it even more clear that the in-home caregivers where not public

* Prior to this, public employment was regulated by the Hutchinson Act. The Hutchinson Act did not require state or municipalities to bargain with public-sector employees or with their union representatives. See Public Act 116 of 1947.

† One important difference between the two acts, however, is that the NLRA authorizes both employee strikes and employer lockouts, while PERA does not. See, for instance, MCL § 423.202. Other than that, PERA follows the NLRA model closely.

‡ Proposal 4 maintains this distinction in its proposed Article 5, Section 31(5). This subsection refers to providers as "participant-employed" and states, "Collective bargaining under this Section shall not deprive [Home Help Program] participants of their right to select, supervise, train and direct, or terminate, an individual provider."

employees. The statute was amended to exclude from public employment any sort of contractor:

> [A] person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.[62]

This was how the law stood when the MQC3 and the SEIU approached MERC to certify the unionization in 2005. The Legislature, which has the sole power to determine public employment, had not classified in-home caregivers as public employees, and the MQC3 did not qualify under Michigan law as their employer.* Given this, in-home caregivers were not public employees, and the Commission lacked jurisdiction. MERC should not have become involved.

Apparently, MERC did not consider whether it had the authority to be involved in the union certification. On May 4, 2010, the Michigan Senate Appropriations Subcommittee on Human Services, while discussing a similar certification involving home-based day care providers, received testimony from MERC Director Ruthanne Okun. Okun indicated that MERC never determined if it had jurisdiction in that case because the two parties consented to MERC's involvement:

> There was a consent election agreed to. In other words, indicating the employment relationship and that — who was in the bargaining unit and who would be eligible to vote. And it was that consent election. When that happens — **when there's a consent election, there never is an independent determination to — by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this [home-based day care providers] case.** Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission. (Emphasis added.)[63]

As noted above, the MQC3 and SEIU indicated in their petition that they "consented" to MERC's jurisdiction. One of the foundations of the law, however, is that a court or administrative agency does not have jurisdiction over a matter simply because the parties consent to it. The Michigan Supreme Court recently restated: "It is a recognized doctrine that parties cannot confer jurisdiction over a subject-matter by their consent, upon courts from which the law has withheld it."[64] Hence, MERC lacked authority to approve the unionization in the first place.

The Relationship Between the MQC3 and the SEIU

Like the original unionization, the current relationship between the MQC3 and the SEIU is questionable. As described earlier, the Michigan Legislature responded to public attention on the unionization of in-home caregivers by ending state funding of the MQC3.

This did not shut down the MQC3, however. Instead, the MQC3 began to receive funding from nongovernmental sources. Notably, in January 2012, the MQC3 had approximately $22,000 in the bank, of which the SEIU had provided $12,000 — the majority of the MQC3's funding.[65]

In other words, the union was now funding the ostensible employer. The union was bargaining with an entity that it was now funding. With this relationship between the SEIU and the MQC3, the MQC3 and SEIU entered into a contract extension on April 9, 2012 — one day before the effective date of Public Act 76, the second law clarifying that in-home caregivers were not public employees. Because of the federal court ruling, the contract extension therefore made the dues collection arguably legal, despite the new state law, until Feb. 28, 2013 — a date after Proposal 4 would take effect if it were approved by Michigan voters.

This contract extension, however, has all the appearance of a conflict of interest.† The SEIU needed the MQC3 to keep the dues flowing. The MQC3 needed the SEIU to provide operating monies to continue its existence. Under such circumstances, with money changing hands, the ability of the MQC3 to bargain effectively on behalf of taxpayers and the SEIU's ability to bargain effectively on behalf of in-home caregivers is in doubt.

Thus, the unionization of in-home caregivers has proved problematic on several fronts — in the creation of the putative public employer through a questionable interlocal

* As noted previously, the Michigan Legislature amended PERA twice more in 2012 to clearly exclude situations like that presented by the MQC3 and SEIU.

† The Mackinac Center Legal Foundation has alleged that this contract extension was in fact a conflict of interest and is seeking a MERC ruling granting compensatory damages for in-home caregivers of $3 million in back dues and agency fees. Michigan Employment Relations Commission Case No. C12 I-183 & CU12 I-042 (Patricia Haynes) and C12 I-184 & CU12 I-043 (Steven Glossop).

agreement, in the doubtful jurisdiction MERC claimed to certify the union, and in the subsequent relationship between the putative public employer and the union.

The Effect of Proposal 4 on the Unionization of In-Home Caregivers

Proposal 4, however, would enshrine in the state constitution collective bargaining power for the SEIU or any subsequent union representing in-home caregivers. The many legal objections to, and laws against, the previous unionization would be removed, at least prospectively. The provisions of Public Acts 45 and 76 of 2012 would be circumvented for in-home caregivers, who would not otherwise be considered public employees.

The New Public Employer-Employee Relationship Under Proposal 4

Proposal 4's new Article 5, Section 31(5) and Article 11, Section 5, would place the in-home caregivers under the authority of PERA — that is, the labor law governing local government employees — rather than under the Civil Service Commission, which regulates state government employees. This provision would place collective bargaining for in-home caregivers under MERC.*

Proposal 4, having made in-home caregivers public employees of the new MQHCC, also stipulates that they would not be public employees for any other purpose than collective bargaining. This provision means that Proposal 4 would not grant in-home caregivers other conditions and benefits of public employment absent further action by the Legislature. Proposal 4 continues to permit Medicaid care recipients to "select, supervise, train and direct, or terminate, an individual provider."[66] The proposal also reaffirms that in-home caregivers, like other public employees, "shall not have the right to strike."[67]

No Provisions for Higher Pay or Improved Work Conditions

The 100-word summary of Proposal 4 that will appear on the ballot states that the newly created MQHCC would "set minimum compensation standards and terms of employment." The language of the actual constitutional amendment, however, states that the MQHCC's power of "setting compensation standards … and other terms and conditions for the employment of individual providers by program participants" is "subject to appropriations by the Legislature."†, [68]

In other words, any pay increases or improvements in benefits would be dependent on decisions by the Legislature, just as they currently are. Nothing would change. The Legislature would still determine, as it does now, how much the caregivers would be paid. The "collective bargaining agreement" between the MQHCC and any union representing in-home caregivers would be a nonbinding list of desired appropriations and provisions. Proposal 4 does not require the Legislature to make the appropriations necessary to provide the requests in the collective bargaining agreement.‡

The Medicaid money paid to the caregivers comes from the federal government, passes through the state government and is sent to the care recipient. The MQC3 does not handle this money, and neither would the new MQHCC. The union would effectively serve as a lobbyist of the MQHCC and presumably the Legislature.§ The union would receive dues and agency fees withheld from care providers' paychecks, however, meaning that

* The proposed Article 5, Section 31(5), states in-home caregivers "shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency." The proposed Article 11, Section 5 inserts new language stating that the "classified state civil service shall consist of all position in the state service except those filled by popular election, heads of principal departments, … in-home personal care providers subject to the authority of the Michigan Quality Home Care Council. …"

† The 100-word summary and the complete language of Proposal 4 appear in the Appendix. Even though the phrase "subject to appropriation" is left off the ballot that the voters will see, the complete language of Proposal 4 is what the voters would add to the Michigan Constitution.

‡ Note that Proposal 4 does not grant the MQHCC powers to authorize "increases in rates of compensation" as the Michigan Constitution does the Civil Service Commission. Proposal 4 contains none of the elaborate apparatus for the MQHCC that is described in Article 11, Section 5, for coordinating the CSC's authorized compensation increases with the governor and the Legislature and the state budget process. Nor is the MQHCC elevated to the same level as the CSC, which regulates collective bargaining for state employees; rather, the MQHCC is subordinate to the collective bargaining regulation of MERC.

§ If Proposal 4 were approved, the SEIU would remain the home help providers' certified union if a collective bargaining agreement between the MQC3 and the SEIU were in force at the time Proposal 4 was adopted. (See Proposal 4 of 2012, Article 5, Section 31(4).) The existence of a collective bargaining agreement would depend, in turn, on the April 9, 2012, contract extension's validity, which is in doubt. If that extension were found to be invalid, Public Act 76 would render the home help providers private employees until Proposal 4 took effect. Hence, a new union certification election for home help providers as public employees would be necessary.

caregivers could actually receive less take-home pay than they would without union representation.

Requirement That Caregivers Pay Union Agency Fees

Proponents of Proposal 4 maintain that the caregivers could withdraw from the union if they don't want to be a member. While this is technically true, the collective bargaining agreement can — and with virtual certainty would, as it does now* — still require care providers to pay so-called "agency fees" to the union as compensation for the union's collective bargaining and administrative work.

Other Provisions of Proposal 4

No New Options for Care Recipients

The proposal specifies, "State programs to assist elderly persons and persons with disabilities … shall afford to program participants who are able to do so the option to hire and direct individual providers of such services."[69] The care recipient's ability to maintain supervisory control over the care provider is reiterated elsewhere in the proposal.[70]

This ability, however, is already vouchsafed in the current Home Help Program, and various materials available to care recipients and providers acknowledge this.[71] There's no movement to reverse this provision, which is ingrained in the program.

No New Program for In-Home Care Recipients

As discussed previously, Michigan has had a program to subsidize, certify and monitor in-home caregivers since 1981 — the Home Help Program. This program will continue whether or not Proposal 4 passes. Proposal 4 does not mandate a state program for disabled adults or the elderly.†

No Provisions for Taxpayer Savings

Proponents of Proposal 4 maintain that it will save the taxpayers money. However, even the proponents acknowledge that these savings arise from providing home care rather than institutionalizing the care recipients in nursing homes or assisted care facilities.

Nothing in the proposal makes a shift of Medicaid recipients out of nursing homes more likely than it is now. The Home Help Program to assist with home care has been underway for more than three decades. No provision in Proposal 4 would increase the payments made to the recipients for their care or for paying caregivers, so there would be no new economic incentive to provide new in-home services.

Nor does Proposal 4's establishment of the MQHCC seem likely to increase outreach to in-home care candidates who might otherwise be relegated to institutional care. A DCH audit of the Home Help Program found that in fiscal years 2002, 2003 and 2004 — the period just prior to and including the early months of the MQC3 — the Home Help Program had 51,372, 53,812 and 55,382 care recipients, respectively.[72] A 2011 report by Anderson Economic Group indicated, however, "In 2010, the average monthly number of Home Help consumers was 53,516" — if anything, a slight decline.[73] The MQHCC is a successor to the MQC3 in mission and scope, so it appears no more likely than the MQC3 to affect the ratio of institutionalized and home-based care recipients.

No Provisions for Improved Care

The proposed Article 5, Section 31(2) describes duties and functions of the proposed MQHCC. Proponents of Proposal 4 contend that the MQHCC would improve the quality of in-home care.

There appears to be no basis for this claim. The proposal provides for a registry of caregivers.[74] However, such a registry has been provided in the past, and nothing prevents Michigan from continuing to provide such a registry in the future.[75] Similarly, the MQC3 required providers hoping to place their names on the registry to undergo a background check, and the DCH appears to be continuing the practice.[76] It is also worth noting that because most caregivers are family members, no referral — and no registry — is necessary in most cases.

Other provisions would require the MQHCC to provide financial management services to care recipients "to facilitate their ability to employ providers, to ensure

* The 2009-2012 collective bargaining agreement — putatively extended to 2013 — states, "Providers may elect instead [of joining the union] to decline membership in SEIU HCMI and instead pay to SEIU HCMI a uniformly assessed agency fee." See "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Healthcare Michigan," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2009), 5, http://goo.gl/YFq97 (accessed Oct. 4, 2012).

† The proposed Article 5, Section 31(1), requires state programs for the elderly and disabled to give recipients control over hiring and supervision of the providers, but it does not require that such programs exist.

32

compliance with applicable laws, and to make appropriate employment-related payroll deductions."[77] This service would include helping care recipients file W-2s acknowledging payments to care providers and complying with other state and federal employment laws. Amending the constitution and creating a new government agency is not necessary to provide this service, however; the service is already provided by the DCH.[78]

Proposal 4 states the MQHCC would furnish "training opportunities for providers, to improve provider skills."[79] Backers of the measure allege that this would improve the available care. Notably, however, these training opportunities would not be mandatory. Moreover, such programs have been provided in the past; a constitutional amendment is not required to continue them.[80]

The Principles of Unionization at Issue in Proposal 4

The unionization of in-home workers, such as the in-home caregivers discussed here, has been a goal of labor unions. But in addition to the difficulties of reaching and persuading home-based workers to join a union, there are numerous statutory obstacles.

As noted at the outset of this Policy Brief, the National Labor Relations Act does not allow the unionization of such private in-home care workers. The NRLA specifically excludes those employed "in the domestic service of any family or person at his home." The NRLA likewise excludes independent contractors and any employee of a "State or political subdivision thereof."[81] State laws have not specifically allowed someone to be classified as a public employee simply because he or she is paid money by a government program for providing services.

A New Model of Public-Sector Union Organization

The push to unionize home health care workers as public employees was a campaign that originated in the 1980s in California under the direction of the SEIU. Many organizers credit Craig Becker, then a law professor at the University of California-Los Angeles, for orchestrating the new strategy of categorizing employment status by looking at the source of funding of the employee. A co-founder of the controversial community-organizing group Acorn, Wade Rathke, has stated: "For my money, Craig's signal contribution has been his work in crafting and executing the legal strategies and protections which have allowed the effective organization of informal workers, and by this I mean home health-care workers."[82]

The first successful unionization of this kind involved the SEIU organizing in-home caregivers in Los Angeles County in 1999, though the attempt originally failed when the union tried to organize against the county government. A California court ruled that the county was neither an employer nor a joint employer of the in-home care providers because the county did not control the employment.[83]

The California Legislature subsequently enacted a statute that allowed counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services."[84] This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to [the home help care] recipients," although the recipients would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them."[85] An organizing drive against one of these entities in Los Angeles County netted organized labor 74,000 additional members and was hailed as "[o]ne of the most significant gains in union membership in fifty years."[86]

Similar organizing efforts spread on the West Coast, seeking to duplicate the success of the Californian organizing drive. The next state to allow the organization of in-home caregivers was Oregon, which did so through a 2000 ballot initiative to amend the state constitution.[87] Washington followed in 2001 after organizers implemented a voter-initiated ballot measure.[88] Illinois was the next state to enact such a policy, which it did on March 4, 2003, via an executive order signed by then-Gov. Rod Blagojevich.

In 2009, Illinois attempted to expand the range of in-home caregivers who would be unionized as government employees. However, a majority of participating caregivers rejected both the SEIU and AFSCME affiliate, and these caregivers were never unionized.

This new model of what constitutes a "public employee" was summarized by the National Women's Law Center: "Notwithstanding the absence of a traditional employer-employee relationship, this model used the provider's relationship with the state — receipt of payment from the state under a program administered by the state — as the nexus to find or fashion an 'employer of record' with whom to bargain."[89]

This nontraditional approach has led to uncertain results for workers. In Michigan, the experimental nature of

such unionization was acknowledged by a union official involved in organizing home-based day care providers (a unionization that was later ended by the Legislature). Nick Ciaramitaro, director of legislation and public policy for American Federation of State, County and Municipal Employees Council 25, wrote in an email: "Much of the [collective bargaining contract] however is dependent on legislative or administrative action by the state of Michigan. In many ways, this [day care provider unionization] is an experiment with little guidance from statute and virtually no administrative or judicial precedent to follow."[90]

Practical and Political Aspects of the New Model

Practically speaking, unionizations of in-home service providers as public employees can yield large sums of money, even though the individual care providers are typically not highly paid. The collection of union dues and agency fees by the SEIU in the unionization of in-home caregivers in Michigan has provided an estimated $32 million in income to the union since 2005. This money was withheld from the Medicaid payments sent to care recipients for the payment of in-home caregivers.

Given unions' expenditures generally, it is likely that a significant portion of this money was not spent on collective bargaining.[91] In part, this is because the incentives for public-sector collective bargaining are different from those for private-sector collective bargaining. In the private sector, although the two sides in theory have a common goal of keeping the business profitable, the two sides both bargain in the distinct best interests of their own side. The same does not necessarily hold true in public-sector bargaining. In the public sector, government-employee unions have a bargaining advantage that the private sector employees do not: The government-employee unions can work to elect their employers — i.e., the elected officials who sit on the other side of bargaining table (or have authority over those who do).

There is evidence that this dynamic is at work in the unionization of in-home workers as public employees. In 2008, following the 2006 unionization of home-based day care providers in Michigan, then-Gov. Jennifer Granholm told an international AFSCME convention, "In Michigan, because of the partnership between AFSCME and the governor's office, this means that 45,000 new AFSCME members — quality child care providers — will be on the ground providing care to children."*

A similar relationship may have occurred in the case of the Illinois unionization of in-home caregivers (discussed above). Then-Gov. Rod Blagojevich signed the executive order enabling the unionization in 2003. In 2006, the SEIU was reportedly the biggest contributor to Gov. Blagojevich's re-election campaign.[92]

The SEIU has asserted that political expenditures are part of the union's current use of the dues collected from in-home caregivers in Michigan. In the SEIU's federal lawsuit against the state for discontinuing the dues collection, the SEIU's attorney cited political concerns to argue that the union would suffer irreparable harm if the collection of money from caregivers' paychecks did not continue:

> Any delay in receiving those funds will be ruinous for the Union, which will have to lay off a significant portion of its staff and will be unable to represent the providers and to protect their interests, whether in collective bargaining, in upcoming legislative matters, during the impending general election, or otherwise. ...
>
> ... The Union is an advocacy organization, and the inability of the Union to advocate vigorously on behalf of its members *now* could no more be remedied after the fact than if a political candidate's campaign treasury were placed into escrow and released to the candidate after the election is over.[93] (Emphasis in original.)

Related Principles at Issue in the New Model

There is one other very important aspect of union law that is affected by what occurred here with the SEIU and MQC3, and by what Proposal 4 seeks to set in stone. This goes to the very heart of the purpose which has justified collective bargaining.

---

* Kathy Hoekstra, "The Granholm-AFSCME Partnership," (The Mackinac Center for Public Policy, 2010), http://goo.gl/hh23y (accessed Oct. 7, 2012).The same may have been true in the case of Michigan's temporary unionization of home-based day care providers. In the same email cited above, AFSCME official Nick Ciaramitaro suggests that the interlocal agreement involved creating a government "employer" in the home-based day care unionization — an interlocal agreement similar to the one employed with in-home caregivers — was not initiated by caregivers or even the government agencies involved, but rather by the unions themselves: "The Interlocal Agreement came about at the recommendation of Michigan AFSCME and the UAW with the support of the Executive Office." Tom Gantert, "E-mails Reveal Child Care Union All About the Money," (Mackinac Center for Public Policy, 2009), http://goo.gl/S8FxL (accessed Oct. 7, 2012).

Under collective bargaining, the representative union almost invariably becomes the exclusive representative of the employees. The union then speaks for all the employees in the bargaining unit regarding matters of employment, and the individual employees no longer have the right to negotitate on their own behalf on employment matters.

The courts recognize this restriction as an infringement on a dissenting employee's First Amendment right to free speech and association. The U.S. Supreme Court has held this infringement to be justified because of the government's compelling interest in "industrial peace and stabilized labor-management."[94] In short, the U.S. Congress, in enacting the National Labor Relations Act, put forth a policy of sufficient importance — maintaining "industrial peace" and preventing stoppages to commerce — to legally override First Amendment rights to freedom of association and speech.

While this view may have been plausible in the first half of the 20th century, when labor relations were often marked by work stoppages and industrial sabotage,[95] is there a legitimate concern over "industrial peace" when in-home caregivers are caring for family members? These caregivers were not unionized prior to the novel theories implemented in the 1990s, yet there is no record of in-home caregivers disrupting commerce or resorting to widespread violence with their care recipients. The idea seems largely fanciful.

In fact, a First Amendment constitutional challenge on behalf of in-home caregivers has been brought in Illinois, and it appears to be headed to the U.S. Supreme Court.[96] If Proposal 4 passes, however, this is the new model of public-sector unionization that would be enshrined in Michigan's constitution.

This model holds that the indirect receipt of public money in performing a service renders the recipient a public employee subject to unionization. If someone can be considered a public employee merely because he or she receives public money, then doctors who participate in Medicare can be deemed "public employees" and unionized. So too can landlords who accept payment from housing programs for low-income tenants or grocers who accept food stamps.

This model would therefore unionize a large number of business owners and workers against state and local government, just as it already has unionized home-based day care providers and foster care parents in other states.[97] While the potential for such a large number of unionized employees might be a natural goal of national labor unions, it could have significant consequences for the operation of government and for the potential union members themselves.

Conclusion

The benefits for disabled adults and the elderly that are included in Proposal 4 are either already being provided or can easily be provided without amending the constitution. The proposal contains no new options for care recipients, no new programs for care recipients, no new avenues for taxpayer savings and no new provisions for improved care for recipients.

There has been no threat to the Medicaid-financed in-home care program. Moreover, there has been only one threat to the ancillary programs for training, registry and background checks: the dubious unionization of in-home caregivers and the collection of more than $30 million in union dues from Medicaid money meant for those caregivers. The subsequent public outcry and legislative backlash against the SEIU and the MQC3 for this arrangement led to the defunding of the MQC3. Advocates serious about these programs should consider severing them from unionization, rather than chaining them together, as Proposal 4 does.

Proposal 4, in truth, would serve primarily to validate the unorthodox and illegal unionization of in-home caregivers that has already occurred. It would grant legitimacy to the model of public-sector unionization in which anyone who receives money indirectly from a government program is a government employee subject to collective bargaining and union dues and agency fees.

Appendix

The 100-Word Proposal 4 Summary Appearing on the Ballot

PROPOSAL 12-4

A PROPOSAL TO AMEND THE STATE CONSTITUTION TO ESTABLISH THE MICHIGAN QUALITY HOME CARE COUNCIL AND PROVIDE COLLECTIVE BARGAINING FOR IN-HOME CARE WORKERS

This proposal would:

- Allow in-home care workers to bargain collectively with the Michigan Quality Home Care Council (MQHCC). Continue the current exclusive representative of in-home care workers until modified in accordance with labor laws.
- Require MQHCC to provide training for in-home care workers, create a registry of workers who pass background checks, and provide financial services to patients to manage the cost of in-home care.
- Preserve patients' rights to hire in-home care workers who are not referred from the MQHCC registry who are bargaining unit members.
- Authorize the MQHCC to set minimum compensation standards and terms and conditions of employment.

Should this proposal be approved?

The Complete Language of Proposal 4

The language of the proposal as it would be included in the Michigan Constitution appears below.

The following new Section 31 would be added to Article V of the Michigan Constitution:

§ 31: Michigan Quality Home Care Council

1. State programs to assist elderly persons and persons with disabilities by financing, in whole or in part, in-home personal care services, shall afford to program participants who are able to do so the option to hire and direct individual providers of such services.

2. There is hereby established a Michigan Quality Home Care Council whose purpose shall be to facilitate participants' ability to more effectively exercise that option, including by improving the availability, reliability and skills of the individual provider workforce. Council duties and functions shall include:

a. Providing training opportunities for providers, to improve provider skills, and for participants, to facilitate their ability to hire and manage providers;

b. Providing for a registry that may refer qualified providers who have had appropriate background checks for employment, however participants shall retain the right to hire providers not referred from the registry;

c. Ensuring that financial management services are available to participants to facilitate their ability to employ providers, to ensure compliance with applicable laws, and to make appropriate employment-related payroll deductions;

d. Setting compensation standards, subject to appropriations by the Legislature, and other terms and conditions for the employment of individual providers by program participants; and

e. Other related duties and functions, not inconsistent with the foregoing, as assigned to the Council by law or as necessary or convenient to implement the purposes of this Section.

3. The Council shall be governed by a board of eleven (11) members, including:

a. Nine individuals appointed by the Governor with expertise regarding participant needs, no fewer

36

than seven of whom shall be current or former program participants, participant representatives, or participant advocates; however such positions shall initially be filled by those similarly qualified members of the Michigan Quality Community Care Council board who last filled those positions prior to the passage of this Section. Upon expiration of each such initial member's term of appointment, the position to be filled under this paragraph shall have a term of four years;

b. Serving as Chair, the Director of the Department of Community Health, or of the successor executive department principally responsible for administering State medical assistance programs providing services governed by this Section, or his designee; and

c. The Director of the Department of Human Services, or of such successor executive department, as the Governor determines has responsibilities relating to State programs providing services governed by this Section, or his designee.

4. The Council shall be a public body within the Executive Branch, with the normal powers, duties, rights and responsibilities, including regarding contracting, acquiring and disposing of property, and adopting rules. The Council may accept gifts, grants, bequests, or assets from any source, expend such funds, and accept assistance from other governmental agencies, to effectuate its purposes. The Council shall assume and succeed to the authorities, duties and obligations of the Michigan Quality Community Care Council to the extent consistent with this Section, including any obligations to recognize provider representatives and to honor any unexpired agreements (to the extent of a term not to exceed 3 years) with such representatives, as last incurred or entered into by that Council prior to the adoption of this Section.

5. Consistent with this Section, participant-employed providers governed by this Section shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency. But such providers shall not, as a consequence of this Section, be considered public or State employees for any other purpose, nor be entitled to any other legal benefit reserved to such employees. Collective bargaining under this Section shall not deprive participants of their right to select, supervise, train and direct, or terminate, an individual provider. Such providers shall not have the right to strike.

6. Nothing in this Section shall be construed in a manner that conflicts with a state's obligations under Medicaid. The Department of Community Health or other responsible agency shall cooperate with the Council, including by providing assistance as necessary or convenient to implement the provisions of this Section.

The proposal would amend Article XI, Section 5 of the Michigan Constitution, as follows (new language capitalized):

The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, IN-HOME PERSONAL CARE PROVIDERS SUBJECT TO THE AUTHORITY OF THE MICHIGAN QUALITY HOME CARE COUNCIL, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering

all personnel transactions, and regulate all conditions of employment in the classified service.

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 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; 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.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Endnotes

1 Proposal 4 of 2012, Article 5, Section 31(5).

2 Proposal 4 of 2012, Article 5, Section 31(4).

3 Ibid.

4 Proposal 4 of 2012, Article 5, Section 31(2)(a).

5 Proposal 4 of 2012, Article 5, Section 31(2)(b).

6 Proposal 4 of 2012, Article 5, Section 31(2)(c).

7 Proposal 4 of 2012, Article 5, Section 31(4).

8 Proposal 4 of 2012, Article 5, Section 31(2)(d).

9 Proposal 4 of 2012, Article 5, Section 31(4).

10 Proposal 4 of 2012, Article 5, Section 31(3).

11 Proposal 4 of 2012, Article 5, Section 31(3)(a).

12 Proposal 4 of 2012, Article 5, Section 31(3)(a).

13 Proposal 4 of 2012, Article 5, Section 31(3)(b)-(c).

14 Ibid.

15 Proposal 4 of 2012, Article 5, Section 31(4).

16 Caroline M. Sallee, "The Role of MQC3 and Home Help: Serving Michigan's Long-Term Care Population," (Anderson Economic Group, 2011), 10, http://goo.gl/1dD5b (accessed Oct. 7, 2012).

17 Olmstead v L.C., 527 US 581 (1999).

18 Olmstead v L.C., 527 US 581, 601 (1999).

19 Director James B. Hennessey, Michigan Department of Community Health Office of Audit, "Department of Community Health Audit of the Medicaid Home Help Program," (Michigan Department of Community Health, 2005), 1, http://goo.gl/Fn808 (accessed Oct. 4, 2012).

20 Bradley Geller, "Medicaid and Long Term Care," (Michigan State Long Term Care Ombudsman Program, undated), 11, http://goo.gl/jas4J (accessed Oct. 7, 2012).

21 Ibid.

22 "Meeting of the Board of State Canvassers, August 27, 2012," (Michigan Department of State, 2012), 5, http://goo.gl/V03yQ (accessed Oct. 4, 2012).

23 Proposal 4 of 2012, Article 5, Section 31(5).

24 2012 Public Act 45 and 2012 Public Act 76. See also Patrick J. Wright, "Haynes and Glossop v SEIU and MQC3, Brief in Support of Charge of Unfair Labor Practice," (Mackinac Center for Public Policy, 2012), 10-12, 30-36, http://goo.gl/z4fH7 (accessed Oct. 4, 2012).

25 SEIU Healthcare Michigan v Snyder, Case No. 12-cv-12332 (ED Mich.) Order of June 22, 2012.

26 "National Labor Relations Board: Jurisdictional Standards," (National Labor Relations Board), http://goo.gl/nFbbh (accessed Oct. 4, 2012).

27 USCA § 152(2). Ibid.; Director Stephen Fitton, Medical Services Administration, Department of Community Health, "Taxability of Adult Home Help/Adult Foster Care Payments," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2011), 1, http://goo.gl/6CQlt (accessed Oct. 7, 2012).

28 Const 1963, Article 11, Section 5.

29 "Tabulation of Election Results, Michigan Quality Community Care Council (MQCCC) and Service Employees International Union, AFL-CIO," (Mackinac Center for Public Policy (Michigan Bureau of Employment Relations, Labor Relations Division), 2005), 2, http://goo.gl/YCCkb (accessed Oct. 4, 2012).

30 MCL §§ 124.501-512.

31 "Interlocal Agreement Creating the Washtenaw Fire and Rescue Department," (Village of Dexter, 2012), http://goo.gl/NyXlg (accessed Oct. 7, 2012).

32 "Charter of the Lansing Tri-County Aging Consortium," (Mackinac Center for Public Policy (Tri-County Aging Consortium), 1974), 1, 6-7, http://goo.gl/qhdWq (accessed Oct. 7, 2012).

33 "Interlocal Agreement Betweeen the Department of Community Health and the Tri-County Aging Consortium Creating the Michigan Quality Community Care Council," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2004), 2, 7, http://goo.gl/RThx5 (accessed Oct. 7, 2012).

34 Ibid., 20, Section 6.11.

35 Ibid., 17, Section 6.03.

36 "Transfer Agreement Between the Department of Community Health and the Michigan Quality Community Care Council," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2004), 3, Section IV:2, http://goo.gl/DkaJA (accessed Oct. 7, 2012).

37 "Petition for Representation Proceedings," (Mackinac Center for Public Policy (Michigan Employment Relations Commission, Labor Relations Division), 2005), 1, http://goo.gl/YCCkb (accessed Oct. 4, 2012).

38 "Addendum to Consent Election Agreement," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2005), 2, No. 6, http://goo.gl/sWxKo (accessed Oct. 7, 2012).

39 Author's calculations based on "Petition for Representation Proceedings," (Mackinac Center for Public Policy (Michigan Employment Relations Commission, Labor Relations Division), 2005), http://goo.gl/YCCkb (accessed Oct. 4, 2012); "Tabulation of Election Results, Michigan Quality Community Care Council (MQCCC) and Service Employees International Union, AFL-CIO," (Mackinac Center for Public Policy (Michigan Bureau of Employment Relations, Labor Relations Division), 2005), 2, http://goo.gl/YCCkb (accessed Oct. 4, 2012).

40 "Certification of Representative," (Mackinac Center for Public Policy (Michigan Employment Relations Commission, Bureau of Employment Relations), 2005), 3, http://goo.gl/TPDyF (accessed Oct. 7, 2012).

41 "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Local 79," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2006), 5-6, http://goo.gl/dsD57 (accessed Oct. 4, 2012).

42 Patrick J. Wright, "Sherry Loar, Michelle Berry and Paulette Silverson v. Michigan Department of Human Services: A Legal Brief to the Michigan Supreme Court,"(Mackinac Center for Public Policy, 2011), http://goo.gl/eqbT4 (accessed Oct. 7, 2012). See also "Sherry

Loar, Michelle Berry and Paulette Silverson v. Michigan Department of Human Services," (Mackinac Center for Public Policy, 2009), http://www.mackinac.org/11149 (accessed Oct. 7, 2012).

43 2012 PA 45, which amended MCL 423.201(1)(e), and 2012 PA 76, which amended MCL 423.201(1)(e)(i).

44 MCL § 423.201(1)(e)(i).

45 Public Act 76 of 2012, (Michigan Legislature, 2012), 1, http://goo.gl/6Tyg6 (accessed Oct. 7, 2012).

46 Susan Steinke, email correspondence with Michigan Quality Community Care Council Board of Trustees, April 9, 2012.

47 Susan Steinke, email correspondence with Michigan Quality Community Care Council Board of Trustees, Dec. 12, 2011, 3, http://goo.gl/5rJOA, (accessed Oct. 7, 2012); Susan Steinke, email correspondence with Board of Trustees, Feb. 2, 2012, 4, http://goo.gl/5rJOA, (accessed Oct. 7, 2012).

48 Chief Legal Counsel Richard A. Bandstra, Michigan Department of the Attorney General, letter to State Rep. Paul Opsommer, May 24, 2012 (Mackinac Center for Public Policy (State of Michigan Department of Attorney General), 2012), http://goo.gl/tLb29 (accessed Oct. 7, 2012).

49 SEIU Healthcare Michigan v Snyder, Case No. 12-cv-12332 (ED Mich.)

50 SEIU Healthcare Michigan v Snyder, Case No. 12-cv-12332 (ED Mich.) Order of June 22, 2012.

51 "Charter of the Lansing Tri-County Aging Consortium," (Mackinac Center for Public Policy (Tri-County Aging Consortium), 1974), 1, http://goo.gl/qhdWq (accessed Oct. 7, 2012).

52 "Interlocal Agreement Betweeen the Department of Community Health and the Tri-County Aging Consortium Creating the Michigan Quality Community Care Council," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2004), 7, Section 2.01(d), http://goo.gl/RThx5 (accessed Oct. 7, 2012); "Tri-County Aging Consortium Administrative Board Meeting, April 19, 2004," (Mackinac Center for Public Policy (Tri-County Aging Consortium), 2004), 29-30, http://goo.gl/qhdWq (accessed Oct. 7, 2012).

53 MCL §§ 423.201-217.

54 Const 1963, art 4, § 48.

55 29 USC § 152(3).

56 Wayne County Civil Service Commission v Board of Supervisors, 22 Mich App 287 (1970).

57 Wayne County Civil Service Commission v Board of Supervisors, 22 Mich App 287, 294 (1970).

58 "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Local 79," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2006), 2, http://goo.gl/dsD57 (accessed Oct. 4, 2012); "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Healthcare Michigan," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2009), 2, http://goo.gl/YFq97 (accessed Oct. 4, 2012).

59 "Addendum to Consent Election Agreement," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2005), 2, No. 6, http://goo.gl/sWxKo (accessed Oct. 7, 2012).

60 Stephen Fitton, "Taxability of Adult Home Help/Adult Foster Care Payments," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2011), http://goo.gl/6CQlt (accessed Oct. 7, 2012).

61 Bradley Geller, "Medicaid and Long Term Care," (Michigan State Long Term Care Ombudsman Program, undated), 11, http://goo.gl/jas4J (accessed Oct. 7, 2012).

62 MCL 423.201(1)(e)(i).

63 "Senate Subcomittee -- 5/4/10 -- Ruthanne Okun," (Mackinac Center for Public Policy (Michigan Senate Appropriations Subcommittee on Department of Human Services), 2010), 3, http://goo.gl/nP6Dq (accessed Oct. 7, 2012).

64 Kasper v Metropolitan Life Ins Co, 412 Mich 232, 244; 313 NW2d 904 (1981).

65 Michigan Employment Relations Commission Case No. C12 I-183 & CU12 I-042 (Patricia Haynes) and C12 I-184 & CU12 I-043 (Steven Glossop), Exhibit 20, http://goo.gl/UbsLI, (accessed Oct. 7, 2012).

66 Proposal 4 of 2012, Article 5, Section 31(5).

67 Proposal 4 of 2012, Article 5, Section 31(5).

68 Proposal 4 of 2012, Article 5, Section 31(2)(d).

69 Proposal 4 of 2012, Article 5, Section 31(1).

70 Proposal 4 of 2012, Article 5, Section 31(5).

71 Bradley Geller, "Medicaid and Long Term Care,"(Michigan State Long Term Care Ombudsman Program, undated), 10, http://goo.gl/jas4J (accessed Oct. 7, 2012); "Successfully Employing Your Personal Assistants: A Workshop Series for People with Disabilities ", (State of Michigan, undated), 9, http://goo.gl/c2tk4 (accessed Oct. 7, 2012); "Medical Assistance Home Help Provider Agreement," (Michigan Department of Community Health, 2010), 2, http://goo.gl/oMywJ (accessed Oct. 7, 2012); "Beneficiary Elgibility Bulletin: Health Care Eligibility Policy 04-07," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2004), 1-2, http://goo.gl/E7cuU (accessed Oct. 7, 2012); "Frequently Asked Questions," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2012), http://goo.gl/T4Cp1 (accessed Oct. 7, 2012).

72 James B. Hennessey, "Department of Community Health Audit of the Medicaid Home Help Program," (Michigan Department of Community Health, 2005), 3, http://goo.gl/Fn808 (accessed Oct. 4, 2012).

73 Caroline M. Sallee, "The Role of MQC3 and Home Help: Serving Michigan's Long-Term Care Population," (Anderson Economic Group, 2011), 2, http://goo.gl/1dD5b (accessed Oct. 7, 2012).

74 Proposal 4 of 2012, Article 5, Section 31(2)(b).

75 "Frequently Asked Questions," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2012), http://goo.gl/T4Cp1 (accessed Oct. 7, 2012).

76 Caroline M. Sallee, "The Role of MQC3 and Home Help: Serving Michigan's Long-Term Care Population," (Anderson Economic Group, 2011), 2, http://goo.gl/1dD5b (accessed Oct. 7, 2012);

Patrick J. Wright, phone call with Deborah R. Garcia, Michigan Department of Community Health.

77 Proposal 4 of 2012, Article 5, Section 31(2)(c).

78 See, for instance, Stephen Fitton, "Taxability of Adult Home Help/Adult Foster Care Payments," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2011), http://goo.gl/6CQIt (accessed Oct. 7, 2012); James B. Hennessey, "Department of Community Health Audit of the Medicaid Home Help Program," (Michigan Department of Community Health, 2005), 34-36, http://goo.gl/Fn808 (accessed Oct. 4, 2012).

79 Proposal 4 of 2012, Article 5, Section 31(2)(a).

80 "Welcome to the QC3: Introductory Session & Application," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), undated), 9, http://goo.gl/u78rO (accessed Oct. 7, 2012).

81 29 USC § 152(3).

82 "Acorn's Ally at the NLRB," The Wall Street Journal, Oct. 15, 2009, http://goo.gl/n5qCZ (accessed Oct. 7, 2012).(Subscription Required.)

83 Service Employees International Union, Local 434 v Los Angeles Co, 275 Cal Rptr 508 (Cal Ct App 1991)

84 Cal Welf & Inst Code § 12301.6(a)(2)

85 Cal Welf & Inst Code § 12301.6(c)(1).

86 David L. Gregory, "Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers," (Fordham Urban Law Journal, 2007), 280, http://goo.gl/a2Ih0 (accessed Oct. 7, 2012).

87 Now Article 15, Section 11(f), of the Oregon Constitution.

88 Now incorporated as Wash Rev Code § 74.39A.270.

89 Deborah Chalfie, et. al., "Getting Organized: Unionizing Home-based Child Care Providers," 7 (2007).

90 Tom Gantert, "E-mails Reveal Child Care Union All About the Money," (Mackinac Center for Public Policy, 2009), http://goo.gl/S8FxL (accessed Oct. 7, 2012); http://goo.gl/z6r4K (accessed Oct. 7, 2012).

91 Paul Kersey, "Union Spending in Michigan: A Review of Union Financial Disclosure Reports," (Mackinac Center for Public Policy, 2008), http://goo.gl/mp1HL (accessed Oct. 7, 2012).

92 "SEIU ensnared in political corruption case involving Gov. Blagojevich," (McKnight's Long-Term Care News & Assisted Living, Dec. 15, 2008), http://goo.gl/FXWZO (accessed Oct. 7, 2012).

93 "SEIU Healthcare Michigan v Gov. Richard Snyder et al, Supplemental Brief in Support of Plaintiff's Motion for Preliminary Injunction," (Mackinac Center for Public Policy (United States District Court Eastern District of Michigan Southern Division), 2012), 2, http://goo.gl/7Ujim (accessed Oct. 7, 2012).

94 Railway Employees' Dept v Hanson, 351 US 225, 234, 76 SCt 714 (1956).

95 See, for example, NLRB v Fansteel Metallurgical Corp, 306 US 240, 59 SCt 490 (1939).

96 Harris v Quinn, 656 F3d 692 (7th Cir 2011). The Supreme Court has invited the U.S. Solicitor General to provide it with the view of the United States on this matter — a likely sign that the court will hear this appeal from the 7th circuit. --- SCt ---- 2012, WL 2470091.

97 Patrick J. Wright, "Sherry Loar, Michelle Berry and Paulette Silverson v. Michigan Department of Human Services: A Legal Brief to the Michigan Supreme Court," (Mackinac Center for Public Policy, 2011), 7-11, http://goo.gl/eqbT4 (accessed Oct. 7, 2012).

MACKINAC CENTER
FOR PUBLIC POLICY

Guarantee of Quality Scholarship

The Mackinac Center for Public Policy is committed to delivering the highest quality and most reliable research on Michigan issues. The Center guarantees that all original factual data are true and correct and that information attributed to other sources is accurately represented.

The Center encourages rigorous critique of its research. If the accuracy of any material fact or reference to an independent source is questioned and brought to the Center's attention with supporting evidence, the Center will respond in writing. If an error exists, it will be noted in an errata sheet that will accompany all subsequent distribution of the publication, which constitutes the complete and final remedy under this guarantee.

ISBN: 978-0-9883921-2-0 S2012-09

Mackinac Center for Public Policy, 140 West Main Street, P.O. Box 568 Midland, Michigan 48640 989-631-0900 Fax: 989-631-0964
www.mackinac.org info@mackinac.org

EXHIBIT 5

EXHIBIT 5

EXHIBIT 5

Case
25-D-0699-RC

Case Access Request

Case System Id	Status	Stage	Initiation Date	Type
00014633	Approved	Initiation	4/16/2025	Certification of Representation (RC)

Case Information

Case Name
Home Help Caregiver Council and Michigan Department of Health and Human Services and SEIU Healthcare Michigan

MERC Case #
25-D-0699-RC

Case Search ID
C-13628

Status
Approved

Employer Type
Public

Stage
Initiation

Business Type - Private Sector Only

Type
Certification of Representation (RC)

Service Type - Public Sector Only
Health Care

Dispute Category
Elections

Bargaining Unit Type
Health Care

Process Category
Representation

Initiation Date
4/16/2025

Bargaining Unit Information

Description of Bargaining Unit

Total Unit Employees
31,616

Bargaining Unit Excluded
Caregivers who provide services through an agency provider, an integrated care organization, or similar entity.

Date of Recognition or Certification

Bargaining Unit Included
All individual home help caregivers selected by a participant or the participant's representative, who provides individual home help services to a participant.

Date of Claim: (Rqd only if RM Petition)

Contract Expiration Date

Statement of Service

Service Delivery Method:

No Email Address Provided
Yes

Signature

Signature Checkbox

Signature Date

Additional Information

Contact Name

Akeem Pack VA-17037 (/merc/s/detail/003cs00000I6mF0AAI)

System Information

Web Email

Parties

Representatives

Event Filings

Notes

EXHIBIT 6

EXHIBIT 6

EXHIBIT 6

Case
25-F-1170-RC

Case Access Request

Case System Id	Status	Stage	Initiation Date	Type
00015104	Approved	Initiation	6/27/2025	Certification of Representation (RC)

Case Information

Case Name
Home Help Caregiver Council and Michigan Department of Health and Human Services and SEIU Healthcare of Michigan

MERC Case #
25-F-1170-RC

Case Search ID
C-14099

Status
Approved

Employer Type
Public

Stage
Initiation

Business Type - Private Sector Only

Type
Certification of Representation (RC)

Service Type - Public Sector Only
Health Care

Dispute Category
Elections

Bargaining Unit Type
Health Care

Process Category
Representation

Initiation Date
6/27/2025

Bargaining Unit Information

Description of Bargaining Unit

Total Unit Employees
31,616

Bargaining Unit Excluded
Caregivers who provide services through an agency provider, an integrated care organization, or similar entity.

Date of Recognition or Certification

Bargaining Unit Included
All individual home help caregivers selected by a participant or the participant's representative, who provides individual home help services to a participant.

Date of Claim: (Rqd only if RM Petition)

Contract Expiration Date

Statement of Service

Service Delivery Method:

No Email Address Provided
Yes

Signature

Signature Checkbox

Signature Date

Additional Information

Contact Name

Community Contact A-00002 (/merc/s/detail/003t000000ILgIEAA1)

System Information

Web Email

Parties

Representatives

Event Filings

Notes

EXHIBIT 7

EXHIBIT 7

EXHIBIT 7

The New York Times | https://www.nytimes.com/2008/12/12/us/politics/12union.html

Union Is Caught Up in Illinois Bribe Case

By Steven Greenhouse
Dec. 11, 2008

The Service Employees International Union has long boasted that it is on the cutting edge of the labor movement. But the union found itself badly embarrassed this week when it was named in the federal criminal complaint charging Gov. Rod R. Blagojevich of Illinois with maneuvering to secure financial gain from the appointment of the state's next senator.

The complaint said Mr. Blagojevich's chief of staff, John Harris, had suggested to a service employees official that the union should help make the governor the president of Change to Win, a federation of seven unions that broke away from the A.F.L.-C.I.O. The complaint said Mr. Blagojevich, a Democrat, was seeking a position that paid $250,000 to $300,000 a year.

In exchange, the complaint suggested, Mr. Blagojevich had expected the service employees union and Change to Win to seek to persuade him to name President-elect Barack Obama's first choice, Valerie Jarrett, to succeed Mr. Obama in the Senate. The union would also receive help from the Obama administration, presumably for its legislative agenda.

Several union officials in Chicago and Washington said the service employees official approached by Mr. Harris was Tom Balanoff, the president of the union's giant janitors local in Chicago and head of the union's Illinois state council. Mr. Balanoff, one of the union officials closest to Mr. Obama, is widely seen as an aggressive, successful labor leader, who has helped unionize thousands of janitors not just in the Chicago area but also in Texas.

Reached by telephone on Tuesday, Mr. Balanoff said, "I can't comment on anything right now."

The Illinois branch of the service employees issued a statement Wednesday night saying, "We have no reason to believe that S.E.I.U. or any S.E.I.U. official was involved in any misconduct." It added that the union and Mr. Balanoff were cooperating with federal investigators.

Change to Win's spokesman, Greg Denier, said the federation "had no involvement, no discussion, no contact" with Mr. Blagojevich or his staff about Mr. Obama's successor.

"The idea of a position at Change to Win was totally an invention of the governor," Mr. Denier said, "and his stance has no basis in reality."

Mr. Denier added that the presidency of Change to Win was an unsalaried position. The federation's president, Anna Burger, is the service employees' secretary-treasurer and receives only her union salary.

Service employees officials said the criminal complaint did not accuse the unnamed “S.E.I.U. official” of having done anything wrong. All the official did, they said, was listen to Mr. Blagojevich and his chief of staff and ferry some messages for them.

Tom Balanoff, a union leader who was said to have been approached by an aide to Gov. Rod R. Blagojevich of Illinois.
Ron Edmonds/Associated Press

A senior service employees official who insisted on anonymity because prosecutors had asked union officials not to talk said his union was one of many that backed Mr. Blagojevich and received favors from him. But he said it was understandable that Mr. Blagojevich would ask the service employees for a favor because it was so powerful and was one of the unions closest to Mr. Obama. (Patrick Gaspard, the former political director of the service employees’ huge New York health care affiliate, 1199, was political director of Mr. Obama’s campaign and has been named the White House political director.)

If Mr. Blagojevich was going to approach a union to help land a high-paying job after leaving the Illinois governorship, it probably made sense for him to approach the service employees, the nation’s fastest-growing union.

With more than 1.8 million members nationwide, it is the largest union in Illinois, was an early and generous backer of his ambitions to become governor and received some important favors from him.

In 2005, the governor issued an executive order that enabled the service employees to unionize 49,000 in-home child care providers who were paid through state and federal funds. Afterward, the service employees negotiated a 39-month contract that raised the child care providers’ daily rates by 35 percent on average and provided them with health coverage.

With Mr. Blagojevich evidently hoping to trade favors with Mr. Obama, the service employees seemed like a sensible intermediary because it was widely seen as having done more than any other union to elect Mr. Obama. The service employees’ political action committee spent at least $26 million on Mr. Obama’s behalf in the presidential campaign, making it by far the largest single PAC donor in the campaign.

The service employees union was also the top overall donor to Mr. Blagojevich’s 2006 re-election campaign, with records showing it donated more than $900,000, or about 5 percent of his total campaign funds.

Michelle Ringuette, a spokeswoman for the service employees’ union, said such political contributions were not unusual.

“Many unions make donations to political candidates,” Ms. Ringuette said, “in the interest of making sure we have elected officials who represent the interest of working families, men and women who get up and go to work every day.”

The service employees’ president, Andy Stern, is often seen as the most powerful union official in the nation, serving as both a dynamo and a lightning rod for the labor movement. Mr. Stern led the schism from the A.F.L.-C.I.O., and now is seeking to lead an effort to persuade Mr. Obama to enact two major pieces of legislation in his first 100 days: universal health coverage and a bill that would make it easier for workers to unionize.

Mr. Stern was embarrassed this year when Tyrone Freeman, an official he had appointed to run a large home-care workers local in Los Angeles, was suspended and later banned for misappropriating hundreds of thousands of dollars in funds. Mr. Freeman was found to have improperly directed union funds to his wedding, to his wife’s company and even to membership in a private cigar club.

Mr. Stern has named a panel of experts to develop a tougher ethical code for the union.

EXHIBIT 8

EXHIBIT 8

EXHIBIT 8

https://www.wsj.com/articles/SB122973200003022963

Illinois Scandal Spotlights SEIU's Use of Political Tactics

By Kris Maher and David Kesmodel

Dec. 20, 2008 12:01 am ET

The Service Employees International Union has grown quickly over the past few years by organizing home-health-care workers, often with the help of state governors and lawmakers who received generous campaign donations and other union support.

Using political influence in this way isn't illegal, and businesses that often oppose unions use similar strategies.

But the scandal involving Illinois Gov. Rod Blagojevich has put a harsh spotlight on the SEIU's methods just as it is seeking broad support for federal legislation that would make it easier for workers of all types to unionize.

Federal officials allege Mr. Blagojevich sought to sell the Senate seat vacated by President-elect Barack Obama in a scheme that potentially involved him getting a $300,000-a-year job at a group affiliated with the SEIU, in return for promising to appoint a pro-union official to the seat. The SEIU says that it doesn't believe any of its officials engaged in any wrongdoing, and the governor on Friday denied wrongdoing.

Next month, an antiunion group plans to air television and radio ads that play up the SEIU's alleged involvement in the saga as part of its campaign against the legislation, known as the Employee Free Choice Act.

SEIU President Andy Stern defends his union's heavy engagement in politics. "The strength of the union is that it allows people that are otherwise powerless against the K Street lobbyists and the big donors to join their voices so they can be heard," he says, referring to the Washington street where many lobbyists have offices.

That is especially true, he adds, at a time when union membership has fallen to 7.5% of the private-sector work force, half what it was 25 years ago.

The SEIU emerged in recent years as a model of success amid this dreary picture. In the past 12 years, the union has doubled its size to roughly two million members, adding more than 400,000 home-care workers.

Home-care workers, who aid those with medical or physical problems, fall in a gray area for labor organizers. They aren't state employees, but many are state subsidized. In many states, a governor's executive order has granted collective bargaining rights to these workers, who also aren't covered by federal labor law, opening the way for SEIU to organize them.

But the SEIU's tactics have attracted growing criticism inside and outside the union. Critics say SEIU's leaders cut too many deals with politicians and companies, contributing to an atmosphere that lacks transparency.

The Illinois situation fuels a perception that the SEIU has an "inside track" with elected officials, says Gary Chaison, a professor of industrial relations at Clark University, in Worcester, Mass. "Every union will use political influence to make organizing easier," he said. "They may have gone beyond the usual influence."

Few places more clearly illustrate this than Illinois. The SEIU contributed about $1.8 million to Mr. Blagojevich's two campaigns for governor, in 2002 and 2006, and was his top contributor in the second election. Critics have long charged that it is suspicious that several big SEIU contributions to Mr. Blagojevich occurred close to when he acted in ways that benefited the union.

In one example, the union contributed $200,000 to Mr. Blagojevich on March 3, 2006, according to data compiled by the National Institute on Money in State Politics. Six days later, the governor signed a labor contract covering SEIU home-care workers. Following the contract, membership at SEIU Local 880 in Chicago increased to 45,000 workers from 24,000, according to Labor Department records.

The SEIU's top official in Illinois is Tom Balanoff, a close aide to Mr. Stern and the SEIU official was identified in an internal union communication as having met with Mr. Blagojevich when the governor allegedly suggested selling the Illinois Senate seat. Mr. Balanoff didn't respond to several requests for comment.

The SEIU's relationship with Mr. Blagojevich began when he was a member of the U.S. House of Representatives. In 2001, he took the SEIU's side and opposed a bill in Congress to federalize airport security workers. Three months later, he received a contribution from the SEIU for $250,000.

Later, the SEIU poured more than $800,000 into his first gubernatorial campaign. The previous governor, George Ryan, had refused to sign an SEIU-backed bill that would have given bargaining rights to home-care workers. Soon after being elected, Mr. Blagojevich signed an executive order in 2003 that enabled the SEIU to start organizing these workers.

Mr. Stern strongly denied that campaign contributions were linked to any actions by the governor or that there was any quid pro quo expected for the union's campaign contributions. Organizing the Illinois home-care workers was a 10-year process that began long before the governor was elected, Mr. Stern said.

Kelley Quinn, a spokeswoman for the Illinois governor's office, said she couldn't comment on campaign contributions. Mr. Blagojevich's campaign spokesman couldn't be reached.

Other governors who received big contributions from the SEIU and went on to sign executive orders that ultimately helped the union grow have denied any quid pro quo agreement with the union.

In 2007, Ted Strickland, the Democratic governor of Ohio, signed an executive order giving collective-bargaining rights to 7,000 home-health-care workers. Workers later elected the SEIU as their union. Mr. Strickland had received about $100,000 in campaign contributions from the SEIU during his run for office in 2006, among the biggest amounts he took in.

A spokesman for Mr. Strickland said there was no agreement with the SEIU. He signed the order because it "helps ensure that we have a highly qualified work force to support the long-term needs of Ohio's seniors and disabled citizens," a spokesman said.

The Center for Union Facts, an SEIU foe, plans to air ads in January, using SEIU's ties to Mr. Blagojevich in its campaign against the union-organizing legislation. "We're going to make SEIU the poster child for the Employee Free Choice Act," said Sarah Longwell, a spokeswoman for the group, which has corporate funding.

Write to Kris Maher at kris.maher@wsj.com and David Kesmodel at david.kesmodel@wsj.com