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# Municipal Law News

January 2013

## REVIEW YOUR POVERTY EXEMPTION GUIDELINES AHEAD OF THE 2013 BOARD OF REVIEWS

- Joshua M. Wease

With March Board of Reviews quickly approaching, it is an important time for the municipality to review its poverty exemption guidelines in light of the State Tax Commission's (STC) latest guidance on the subject. The STC issued updated guidance to assessors and equalization directors regarding property tax poverty exemptions on May 29, 2012 in Bulletin No. 5. The Bulletin enumerates several minimum requirements that local jurisdictions must follow in declaring poverty exemption guidelines. Most importantly, local jurisdictions are required to include both an income test and an asset test in their poverty exemption guidelines.

There are two important requirements that local jurisdictions must satisfy when setting their income test. First, under MCL 211.7u(2)(e), the income levels for poverty exemptions may not be lower than the federal poverty guidelines set by the US Department of Health and Human Services. The income that may be considered is broad and may include not just wages, but also Social Security payments, unemployment, and alimony. However, income may not include money received from the homestead property tax credit per the decision of the Michigan Court of Appeals in *Ferrero v Twp. of Walton*. Second, the income levels established by the municipality must be stated in their poverty exemption guidelines.

Just as with the income test, the asset test also has two important requirements. First, as required by statute, the local assessing unit must actually include an asset test in their guidelines. The test should calculate a maximum amount of assets that are permitted to qualify for the exemption. While the amount of the asset level and what personal or real property is considered in the calculation is left to the discretion of the local assessing unit, it cannot include the taxpayer's equity in the home. Generally, the asset test should be comprised of a dollar amount or a percentage of income.

Given that there are two distinct tests, it is possible that a taxpayer may satisfy the criteria for one of the tests but not the other. For instance, the taxpayer may have household income well below the local jurisdiction's established guidelines, but have assets that are greater than allowed under that jurisdictions asset test. In that case, the jurisdiction would be justified in denying the exemption. Another important procedural note addressed by the STC Bulletin is that the local governing unit may deviate from its guidelines, but they are required by statute to provide written notice to the claimant as to the substantial and compelling reasons for the deviation.

Reviewing the STC's Bulletin along with the terms of a local jurisdiction's poverty exemption guidelines can have important implications in not only administration of the exemption, but subsequent appeals of denials that taxpayers may make to the Michigan Tax Tribunal.

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# NEW NOTICE REQUIREMENTS ADDED TO THE OPEN MEETINGS ACT

- Anne M. Seurynck

Any public body, especially those maintaining a website, should be aware of the amendment to the Michigan Open Meetings Act (OMA) that became effective on December 28, 2012. Public Act 528 amended Section 5 of the OMA by adding additional notice requirements for certain meetings that are open to the public. The important provisions of PA 528 are as follows:

- Under the prior version of the law, notice of a rescheduled regular meeting, special meeting or meeting recessed more than 36 hours was required to be posted at least 18 hours in advance of the meeting. While notice must still be posted 18 hours in advance, PA 528 added further requirements for the posting. Under PA 528, the notice must be posted at a "prominent and conspicuous place" at both the public body's principle office and, if applicable, on a website.

- The website posting is required if the public body "directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes." The posting must be made on the portion of the website fully accessible to the public, either on:

  1. the homepage or

  2. a separate webpage dedicated to the public notices for nonregularly scheduled public meetings that is accessible from a prominent and conspicuous link on the homepage (the link must clearly describe its purpose).

- PA 528 added additional notice and posting requirements for "emergency public meetings." Emergency public meetings are those that are held without the 18 hour notice because "of a severe and imminent threat to the health, safety or welfare of the public when 2/3 of the members serving on the body decide that delay would be detrimental to efforts to lessen or respond to the threat." MCL 15.265(5). For emergency meetings, the public body shall make paper copies of the notice available at the meeting. The notice must include an explanation of the reasons the 18 hour notice could not be met. The reasons must be specific and not generalizations. If the public body maintains an "internet presence," (same description as above) the notice and explanation must be posted on the website as described above. Within 48 hours of the emergency meeting, the public body must also send "official correspondence" to the County Board of Commissioners of the County in which the public body is principally located explaining the emergency meeting. The County's correspondence must include the notice (including the explanation) and can be sent by first class or electronic mail.

- PA 528 also clarified that the durational requirements for notices is the time that the notices are accessible to the public. Put another way, if the OMA requires 18 hour notice for a meeting, the notice must be accessible to the public for the entire 18 hours.

Since the amendment may require the public body to post on its website with short notice, the public body should be aware of this new law before its next applicable meeting.

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# MUNICIPAL LAW REFRESHER: THE "EQUAL DIGNITY" DOCTRINE

- Laura J. Genovich

Municipalities often put great care and effort into deciding whether to amend their zoning or regulatory ordinances. While the substance of those amendments is important, so too is the form of the amendments. A municipality's amendments may be invalid if they are not properly adopted.

Michigan law is clear that "an ordinance or resolution cannot be amended, repealed, or suspended by another act by a council of less dignity than the ordinance or resolution itself." *McCarthy v Village of Marcellus; City of Saginaw v Consumers Power Co*. This "equal dignity" doctrine means that **an ordinance can only be amended by an ordinance, not by a resolution or motion**, because resolutions and motions are acts of less "dignity" than an ordinance. See *Risk v Lincoln Charter Twp. Bd. of Trustees*.

The Michigan Zoning Enabling Act further makes clear that "[a]mendments or supplements to the zoning ordinance **shall be adopted in the same manner** as provided under this act for the adoption of the original ordinance." MCL 125.3202. That is, a zoning ordinance (including any zoning map) must be amended by ordinance, not resolution or motion.

Given the clarity of the law, municipalities should be sure that any ordinance amendments – whether to regulatory ordinances, zoning ordinances, or zoning maps – are accomplished by adopting a new ordinance. The ordinance amending the existing ordinance should be adopted consistent with applicable law, such as the Michigan Zoning Enabling Act or Michigan Charter Township Act.

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## HUMAN RESOURCE GUIDE: EMPLOYEE HANDBOOKS & PERSONNEL POLICIES

Looking for a helpful guide to Michigan and Federal laws applicable to Michigan employers? *The Guide for Employee Handbook Policies* reviews topics appropriate for employee handbooks and personnel policies. Authored by the employment attorneys at Foster Swift and published by the Michigan Chamber, this guide is a great reference for supervisors and includes sample policies and job descriptions.

For more information, visit:
**michamber.com/publications-store**

# HOW MICHIGAN'S NEW RIGHT-TO-WORK LEGISLATION WILL AFFECT MUNICIPALITIES

- Michael R. Blum

On December 11, 2012, Governor Snyder signed into law right-to-work legislation covering both private and public sector employment in Michigan, becoming the 24th state to enact such legislation. In summary, Michigan's right-to-work law prohibits an individual from being required, as a condition of obtaining or continuing employment, to do any of the following:

- Join or support a labor organization.
- Engage in, or refrain from, collective bargaining activities.
- Pay dues, fees, assessments or other charges or expenses of any kind or amount, or provide anything of value to a labor organization.
- Pay to any charitable organization or third party any amount in lieu of or equivalent to full or partial dues, fees, assessments or other charges or expenses required of members.

Any agreement, contract, understanding or practice between or involving an employer and a labor organization in violation of these prohibitions is unlawful and unenforceable. Michigan's right-to-work laws will apply to collective bargaining agreements that become effective or are extended or renewed after the scheduled effective date in late March 2013. So what does this mean for public sector employers in Michigan?

Public sector employees employed by the state, its political subdivisions, or public school systems are covered by the right-to-work legislation. However, police and firefighters are specifically exempt because of the unique nature of their jobs. In addition, there is disagreement among experts and political officials whether right-to-work legislation could constitutionally be applied to state employees, so the courts will ultimately need to answer that question.

Under current law, employees who object to full union membership status have the right to refrain from paying any portion of the dues spent on politics and other non-bargaining activities. However, once the right-to-work law takes effect, employees who are not members of or withdraw from membership in the union will no longer have an obligation to pay any portion of the amount of the assessed dues. Thus, if an employee is not a union member and has not signed a dues check-off authorization card, the employer should cease deducting dues from the employee's paycheck when the right-to-work law takes effect.

However, an employer's legal obligations may be different if an employee has signed a valid dues check-off authorization, as dues check-off provisions are common in right-to-work states and likely will be viewed by the Michigan Employment Relations Commission as a separate, lawful agreement between the employee and the union. Thus, even after the effective date of the right-to-work law, an employer who has agreed to a dues check-off provision in the collective bargaining agreement may have a contractual obligation to continue to remit monthly dues to the union for employees who have signed dues check-off authorizations. To the extent any such employee no longer wishes to pay dues, s/he should both exercise his/her rights under the right-to-work law and revoke his/her check-off authorization in accordance with the language on the authorization form and applicable law. ■►

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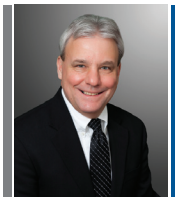
The exercise by an employee of his/her rights under the right-to-work law does not affect any other term or condition of employment. First, it is unlawful for an employer to discriminate against an employee based on his/her non-membership in the union. In addition, the union is legally obligated to represent all employees in the bargaining unit regardless of union membership. Any benefits provided by an employer pursuant to the collective bargaining agreement (e.g., wages, seniority, vacations, pensions, and health insurance) would not be affected by an employee's non-membership.

In other words, if a member resigns from union membership under the right-to-work law, s/he will still be entitled to all wages and benefits of the negotiated collective bargaining agreement. In fact, a union commits an unfair labor practice if it fails to fully represent both members and non-members in a bargaining unit, whether in contract negotiations, grievances or other representative activities. However, if an employee is not a member, the employee will not be able to participate in union elections or meetings, vote in collective bargaining ratification elections, or participate in other "internal" union activities.

Until Michigan's right-to-work legislation takes effect, non-member employees will still be subject to "union" dues or an "agency fee" in lieu of full dues assessed to union members. After the effective date of the legislation, however, Michigan employees will have the right to refrain from paying any portion of assessed dues or an agency fee, unless the employee chooses to do so.



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## YES, YOU CAN OPEN CARRY IN THE LIBRARY

- Nichole Jongsma Derks

The Michigan Court of Appeals recently struck down a district library's policy which banned weapons from library premises in *Capital Area District Library v Michigan Open Carry, Inc.* Capital Area District Library (CADL) is a district library established by an agreement between a city and a county. Once established, the district library is essentially an independent public body with the authority to establish its own policies. Pursuant to CADL's policy, all weapons were banned from the library to the fullest extent permitted by law.

Michigan Open Carry, Inc. (MOC) is a nonprofit corporation with the stated purpose to educate the public about the lawful carrying of a firearm. On multiple occasions in late 2011, members of MOC openly carried guns in one of CADL's branches. CADL desired to enforce its policy; however, the Lansing police refused to remove a person from a CADL branch without a court order.

On February 15, 2011, CADL filed suit seeking a declaratory judgment establishing the validity of its weapons policy and injunctive relief to enforce the policy. CADL received the requested relief but MOC appealed. On appeal, the Court stated that the Library's "no weapons" policy was preempted by state law and therefore unenforceable.

The Court applied the standards of "preemption," which means either:

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1. the local regulation directly conflicts with the state statutes or

2. that the state exclusively occupies the field of regulation and that local units of government have no authority to regulate even if there is no direct conflict.

Addressing the first prong, the Legislature adopted a series of statutes that prevented "local units of government" from adopting local policies regarding firearm regulations. Under the statute, "local unit of government" meant a "city, village, township or county." MCL 123.1101(a). From the strict reading of the definition, district libraries or "authorities" were not specifically defined. Here, there was no direct conflict under the first prong because a district library was not prohibited by statute from adopting the no weapons policy.

However, the Court found the district library was preempted under the second prong of the preemption analysis. Simply stated, the Court reasoned that the regulation of firearm possession is a matter better left to the state legislature rather than allowing a multitude of local governmental policies to exist.

The State Legislature could take up the issue and pass specific laws which regulate weapon possession in a library, but no such proposals have been made yet.

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# PART OF LIQUOR LAW STRUCK DOWN – STRIPPING MUNICIPALITIES OF A VOICE IN DANCE PERMIT APPLICATIONS

- Ronald D. Richards, Jr.

Recently, a federal court in Michigan struck down part of the Michigan Liquor Control Act. *S.A. Restaurants, Inc. v Deloney*. Many of you may know that MCL 436.1916(10) of the Liquor Control Act requires the Michigan Liquor Control Commission (MLCC) and local municipal approval to get a dance-entertainment permit for dancing and live entertainment at an on-premises liquor-licensed business.

The federal court in *Deloney* held that MCL 436.1916(10) is unconstitutional and unenforceable as a prior restraint on expressive activity.

At the moment, the impact that this ruling has on municipalities is unclear. A strict and broad view of the ruling may lead one to conclude that on-premises

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licensees do not have to get state and local approval for dance-entertainment activity. On the other hand, a municipality may still be able to file objections with the MLCC regarding a licensee's proposed activities. Also, courts in other contexts have upheld limits on speech – so-called "prior restraints" – if there are certain protections expressly stated in the law, such as strictly defined and objective requirements that are not content-based and a prompt judicial review process. Yet, ultimately, the MLCC may only deny proposed activities through a decision that complies with freedom of speech principles.

If you have questions about the *Deloney* decision and a municipality's ability to regulate proposed activities in this context, feel free to contact Ron Richards.

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# ACT 329 AUTHORIZES BONDS FOR PENSION AND OPEB LIABILITIES

- John M. Kamins

A new Michigan law allows some municipalities to issue bonds to fund unfunded pension liabilities or unfunded liabilities for retiree health care benefits (aka OPEB, other post-employment benefits). Before Public Act 329 became law on October 9, 2012, Michigan municipalities had no power to issue bonds for those purposes.

PA 329 has amended the Revised Municipal Finance Act to authorize a Michigan county, city, township or village to issue limited tax general obligation bonds for funding its *unfunded pension liability* or *unfunded accrued health care liability* (as defined in PA 329). However, PA 329 is not for everyone, in practical effect. PA 329 includes conditions that limit the municipalities that can undertake such bond transactions. Those conditions include the following:

- The bonds must be issued no later than December 31, 2014;
- The municipality must have a credit rating of AA or higher from at least one nationally recognized rating agency;
- The municipality must have received the Michigan Department of Treasury's prior approval for issuance of the bonds;
- The municipality must have published a notice of intent to issue the bonds and regarding the right to petition for a referendum on the issuance of the bonds; and
- The municipality must have prepared and made publicly available a comprehensive financial plan including:
    1. an analysis of its current and future obligations for each of its retirement programs and post employment health care benefit programs and
    2. evidence that the bond issuance together with other available funds will be sufficient to eliminate the unfunded pension liability or the unfunded accrued health care liability.

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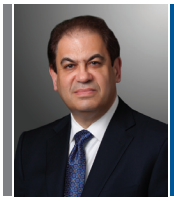
PA 329 also imposes other limitations on issuing pension or OPEB funding bonds. For example, a municipality may issue pension funding bonds only in connection with shifting from a defined benefit retirement plan to a defined contribution plan (e.g., ceasing accruals to a defined benefit plan or closing a defined benefit plan to new or existing employees and implementing a defined contribution plan). Also, PA 329 mandates that the amount of taxes necessary to pay principal and interest on an issue of pension funding bonds, together with taxes levied for the same year, cannot exceed the limit authorized by law.

If you have questions regarding issuing bonds under PA 329 to fund unfunded accrued pension or OPEB liabilities, please contact John Kamins.



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