

BULLETIN BOARD

Labor Relations Update

House Bill 4313 was signed into law on July 14, 2017. One of its many repercussions was that it created a new Section (164h) within the State School Aid Act. This provision contains a 5% state aid penalty that may be levied against districts for entering into a collective bargaining agreement that:

1. Establishes racial or religious preferences for employees,
2. Contains union shop provisions,
3. Incorporates language that conflicts with current transparency laws, or
4. *Includes methods of compensation that do not comply with Section 1250 of the Revised School Code.*

This last point has raised several questions within the public school community. What follows is a question-and-answer guide that will attempt to address some of the more confusing aspects of this new legislation.

When does Section 164h go into effect?

Although HB 4313 has immediate effect, Section 164h has a specific effective date of Oct. 1, 2017. Thus, **any teacher contract that is ratified prior to Oct. 1 of this year is not subject to Section 164h's requirements.** After that date, districts will have to consider the implications of Section 164h and decide for themselves how best to proceed.

What are "methods of compensation that do not comply with Section 1250...?"

Section 1250 of the Revised School Code mandates that school districts must implement and maintain a teacher compensation system that includes job performance and accomplishments as a "significant factor" in the determination of wages and raises; i.e., *merit pay*. The new 164h language appears to demand that a merit pay system of some type be incorporated into all future teacher contracts.

But isn't merit pay a prohibited subject of bargaining?

Yes. The Legislature's directives here certainly seem to conflict and leave districts with an unclear path.

Under the Public Employee Relations Act Section 15(3), districts and unions cannot bargain over any "method of compensation required under Section 1250 of the Revised School Code," which, again, is merit pay. Previously, districts have complied with PERA and Section 1250 by negotiating wages within the CBA, usually via the well-established steps and lanes convention, and then implementing a merit pay system that is wholly outside of the bargaining process.

So how do we resolve this?

This remains unclear. Generally, the bargaining season runs from early spring to mid-summer, so negotiations in most districts for 2017 will have concluded well prior to Oct. 1, while 2018 negotiations will not begin until next spring.



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Before the next bargaining season, additional clarification on Section 164h may be provided by the Legislature or via a judicial or administrative opinion. In the meantime, districts that are bargaining contracts that are likely to be ratified after Oct. 1 may wish to consider incorporating some form of merit pay within their teacher contracts in an effort to comply with what appears to be the intent of Section 164h. Before negotiating such a provision, however, districts should consult with their legal counsel or negotiations representative on reconciling the requirements of Section 164h and Section 1250.

Given that Gov. Rick Snyder declared Section 164h unenforceable and that merit pay has been a prohibited subject of bargaining for years, shouldn't we just ignore 164h?

Not necessarily. While it is true that after signing HB 4313 into law, Gov. Snyder's transmittal letter noted that portions of the law, including 164h, could not be enforced, this opinion does not provide districts with any "cover" in the event that they are held to have violated it. Indeed, in a 2009 Attorney General Opinion it was concluded that declarations from the Governor's office of this nature "do not carry the full force and effect of law." However, there remain unanswered questions concerning whether the Governor might have the authority to direct MDE to forego enforcement of this provision, as well as whether or not the Attorney General might have the power to step in as an enforcement agency in place of MDE.

As such, while the Governor's opinion does carry some weight, we cannot advise districts to simply disregard 164h, particularly given the possible penalty (5% of all state aid).

Does this mean that a compensation arrangement that is based upon anything other than merit is illegal?

This is uncertain, but unlikely. Section 1250 specifically provides that a "community district shall not use length of service or achievement of an advanced degree as a factor in compensation levels," subject to two exceptions. This prohibition was added to Section 1250 in 2016. Presently, there is only one community district in Michigan—Detroit Public Schools Community District.

Section 1250 does not include a similar provision for intermediate or general powers school districts, which generally include all other local school districts in Michigan.

Given that only a community district is specifically forbidden from using length of service and achievement of an advanced degree as a basis to compensate teachers, per the legal doctrine of *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others) it is reasonable to infer that for all noncommunity districts, these criteria remain legitimate bases for determining pay.

The Takeaway:

Any teacher contract that is ratified prior to Oct. 1 of this year need not address this issue. It's also possible that the issues created by Section 164h will be resolved by the state before the next bargaining season gets underway. However, for those few districts that may be in the midst of contract negotiations come Oct. 1, some discussion with legal counsel regarding the best course of action should take place. For those who will begin bargaining this spring, be sure to become fully apprised as to the status of Section 164h prior to ratifying any agreement.

