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RECENT LEGAL ISSUES AND DECISIONS

This summary is presented to provide a general reference to recent legal decisions of interest to Michigan public retirement and healthcare plans.

BENEFITS ADMINISTRATION

***In re* Paul Waters**
Michigan Ct. of Appeals ***2018 WL 1832373***
April 17, 2018

The Retirement Board of the City of Negaunee Act 345 Retirement System discovered that a member who retired nine years prior had collectively bargained pension benefit enhancements included in his retirement benefits that were approved without the required supplemental actuarial analysis. The Retirement Board approved recalculation of the member's pension without the enhancements on account of failure to perform the supplemental actuarial analysis. The member challenged the Retirement Board's decision to recalculate his benefit as violative of his collective bargaining agreement. The Court of Appeals agreed with the member reasoning that the Retirement Board did not have the authority to nullify the terms of a collective bargaining agreement; especially when the negotiated benefits had been paid for several years prior to the adjustment.

Duncan, et al. v. Muzyn, et al.
United States Court of Appeals for the Sixth Circuit **885 F.3d 422**
March 16, 2018

Members of the Tennessee Valley Authority Retirement Plan ("Plan") sued their employer and the Plan after the retirement board approved temporary reductions to the Plan's cost-of-living adjustments (COLA) and increasing the age at which certain Plan members would become eligible to receive a COLA. The Members argued that the board failed to give proper notice to the Employer and Plan members before approving the changes to the COLA. The Court of Appeals disagreed holding that the retirement board was only required to provide notice after the board had voted to approve the changes to the Plan. Because the Board had complied with the notice requirement after its decision to approve the COLA amendments, the Court ruled in favor of the Board.

Escott v. Public School Employees' Retirement Board
Michigan Ct. of Appeals ***320 Mich. App. 497***
July 18, 2017

A member of the Public School Employees' Retirement System sued the Retirement Board ("Board") after it denied her application for non-duty disability retirement. The Board's decision was based upon its Independent Medical Advisor's ("IMA") conclusion that the member was able to perform her job duties. The member claimed that the IMA did not adequately address her specific medical issues and that a specialist should have conducted her IMA. The Court of Appeals held that the Board's decision was correct because the Board was not in receipt of a certification from its examining physician that the member was totally and permanently disabled. Absent such a certification the Board had no authority to grant the non-duty disability retirement.

RETIREE HEALTH CARE

Cooper, et al. v. Honeywell International, Inc.
United States Court of Appeals for the Sixth Circuit ***884 F.3d 612***
March 8, 2018

The plaintiffs were retirees of Honeywell International's ("Honeywell") Boyne City, Michigan plant. The applicable collective bargaining agreement ("CBA") between the retirees' union and Honeywell expired in 2016. The CBA stated "[r]etirees under age 65 who are covered under the BC/BS Preferred Medical Plan will continue to be covered under the Plan, until age 65, by payment of 16% of the retiree monthly premium costs . . . as adjusted year to year." The plaintiffs took an early retirement under the CBA and received Honeywell-sponsored healthcare, consistent with the CBA. Before the CBA expired, Honeywell notified the plaintiffs that it planned to terminate retiree medical benefits upon the CBA's expiration. The retirees sued alleging that Honeywell was obligated to continue providing benefits consistent with the CBA until the retirees attained age 65. Honeywell responded that its obligation to pay those benefits ended when the CBA expired in 2016. The trial court granted plaintiffs a preliminary injunction against Honeywell and stopped it from suspending the retiree healthcare benefit. Honeywell appealed and the United States Court of Appeals ruled in favor of Honeywell based on the fact that the CBA had a general durational clause that did not carve out an exception for retiree healthcare benefits.

CNH Industrial N.V. v. Reese, et al.
United States Supreme Court ***138 S.Ct. 761***
February 20, 2018

In 1998, CNH Industrial ("CNH") entered into a collective bargaining agreement ("CBA"), providing group healthcare benefits to "[e]mployees who retire under the . . . Pension Plan." Accordingly, when the agreement expired, CNH retirees sought a declaration that their healthcare benefits vested for life. In 2015, while the CNH lawsuit was pending, the Supreme Court decided *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 935 (2015), requiring interpretation of collective bargaining agreements according to "ordinary principles of contract law." Notwithstanding the *Tackett* decision, the Sixth Circuit U.S. Court of Appeals held that the CBA was ambiguous because the CBA was silent as to the duration of retiree healthcare benefits. The Supreme Court reversed finding that appellate court's determination that the CBA was ambiguous was inconsistent with ordinary principles of contract law, and that a contract is not ambiguous unless it is subject to more than one reasonable interpretation. Accordingly, while the CNH CBA had a general durational clause that applied to some benefits and did not apply to other benefits, it was unambiguous that healthcare benefits were subject to the CBA's durational clause (i.e., expiration in May 2004).

Kaminski, et al. v. Coulter, et al.
United States Court of Appeals for the Sixth Circuit **865 F.3d 339**
July 25, 2017

The City of Lincoln Park was placed under the authority of an Emergency Manager pursuant to the Financial Stability and Choice Act, Public Act 436 of 2012, ("PA 436"), MCL 141.1541 et seq. Pursuant to his powers under PA 436, the Emergency Manager implemented temporary modifications to the City's collective bargaining agreements, replacing existing retiree healthcare benefits with a monthly stipend that retirees could use to purchase individual health-care coverage. The retirees filed suit asserting violations of the Contracts Clause, the Due Process Clause, and the Takings Clause of the U.S. Constitution. The U.S. Court of Appeals ruled that the claimed property right to retiree healthcare benefits derived from the disputed collective bargaining agreements and that a state breach of contract claim was available to the retirees. Therefore, the Court concluded that the retirees should "have sued the City of Lincoln Park alleging a violation of the collective-bargaining agreements, not a suit against current and former state treasurers alleging violations of federal constitutional rights."

Cole, et al. v. Meritor, Inc. et al.
United States Court of Appeals for the Sixth Circuit ***855 F.3d 695***
April 20, 2017

Plaintiffs were retired employees of Meritor who claimed that they had a vested right to lifetime healthcare benefits pursuant to the applicable collective bargaining agreement ("CBA"). In 2008, the lower court agreed with the retirees and Meritor's petition for rehearing was held in abeyance for eight years while the parties attempted to settle the dispute. However, in the interim, the United States Supreme Court rulings in *Tackett* (2015) and *Gallo* (2016) overruled precedent on which the lower court had relied on when it determined plaintiffs had a vested right to lifetime healthcare. Therefore, on rehearing, the United States Court of Appeals ruled in favor of Meritor because the language of the CBA included a general durational clause that did not guarantee lifetime retiree healthcare benefits. Consequently, the lower court's decision was reversed and Meritor was permitted to discontinue retiree healthcare benefits pursuant to the CBA's general duration clause.

UAW, et al. v. Kelsey-Hayes Company, Inc. et al.
United States Court of Appeals for the Sixth Circuit ***854 F.3d 862***
April 20, 2017

Retirees from the Kelsey-Hayes Company ("Company") were members of the United Automobile Workers ("UAW") bargaining unit. The relevant collective bargaining agreement (CBA) provided for comprehensive healthcare for retirees. When a Company plant closed, a plant closing agreement stated that it did not extinguish pension or retiree healthcare obligations to UAW members. The Company continued to provide retiree healthcare coverage for 10 years, consistent with the CBA. Later, the Company announced that it was replacing the current retiree healthcare program with health reimbursement accounts ("HRAs"). The lower court ordered defendants to reinstate the original retiree healthcare offered in the CBA. The Court of Appeals affirmed that decision, distinguishing the language and history of this CBA from the language at issue in *Tackett*. For example, under this CBA there were distinct durational clauses applicable to certain provisions; however, as to retiree healthcare, the CBA stated the benefit "shall be continued" with no applicable durational language, which the Court determined made this provision ambiguous. Therefore, the UAW members submitted extrinsic evidence from the Company's legal counsel regarding lifetime retiree healthcare benefits, statements made by Company personnel that represented to retiring employees that they would have lifetime healthcare, and the Company's Vice President of Personnel and Industrial Relations who testified that he understood that retiree healthcare coverage would

be a lifetime benefit. Consequently, the Court of Appeals determined that the wealth of the outside evidence supported the finding that the UAW and Company shared an understanding that the CBA language provided lifetime retiree healthcare. On February 26, 2018, the United States Supreme Court vacated the lower court's decision and granted the Company's writ of certiorari to reconsider this case in light of the recent decision in *CNH Industrial N.V.* v. *Reese*, et al, which is included in this Case Update. Accordingly, the United States Court of Appeals will reexamine the facts of this case and consider the recent opinion in *Reese*.

COLLECTIVE BARGAINING

The Charter County of Wayne v. Wayne County Retirement Commission
Circuit Court for the County of Wayne ***Circuit Court Case No. 12-004750-AW***
July 31, 2017

Under the authority granted to the Chief Executive Officer of the Charter County of Wayne ("County CEO") pursuant to Local Financial Stability and Choice Act, Public Act 436 of 2012, ("PA 436"), MCL 141.1541 et seq., the County CEO settled collective bargaining agreements ("CBAs") with the various of the County's unions. The proposed changes included, among other things, changes to the composition of the Wayne County Employees' Retirement Commission ("Retirement Commission"). The County Charter expressly provides for the Retirement Commission's composition. Therefore, the Retirement Commission argued that in order to change its composition, the County would need a vote of the people as required under the plain language of the County Charter because the CEO's proposed retirement commission is not applicable to non-union members. The County CEO argued that its powers under PA 436 allowed it to settle the CBAs and implement its new retirement commission without a vote of the people. The Circuit Court disagreed with the County CEO and determined that retirement commission changes require a vote of the people, as mandated in the County Charter because non-union members are not subject to the applicable CBAs.

DOMESTIC RELATIONS

Holloway v. Kelley
Michigan Ct. of Appeals ***2017 WL 2791454***
June 27, 2017

After just over two years of marriage the parties' filed for divorce and plaintiff sought that each party be awarded "his and her own assets and liabilities." The case proceeded to arbitration and the arbitrator ruled that plaintiff's 401K and the appreciation of values in his IRAs were marital property subject to division between the parties. Plaintiff claimed the arbitrator's award to his ex-spouse should not have included any amounts from his retirement accounts and asked the court to award him, as his separate property, the entirety of his retirement accounts. The trial court refused and Plaintiff appealed. The Michigan Court of Appeals found that the award did not violate Michigan law and appropriately resolved the division of each party's interest in the retirement accounts.

FOIA/OPEN MEETINGS ACT

Emsley v. Lyon Charter Township Board of Trustees
Michigan Ct. of Appeals ***2018 WL 1512412***
March 27, 2018

Plaintiff sued the Township claiming that the Township did not take a roll call vote and did not state the purpose of going into closed session in violation of OMA. The Plaintiff sought injunctive relief, compelling compliance with OMA along with money damages for an intentional OMA violation, and declaratory relief. The Township attempted to remedy the issue by reenacting the meeting in compliance with the OMA. The plaintiffs dropped their claim for declaratory relief and to invalidate the board decision after the enactment, but wanted to add an ongoing OMA violation claim based upon the Township Board's historical practices of conducting meetings contrary to the OMA. The lower court dismissed the case. The Michigan Court of Appeals reversed the dismissal and held that plaintiffs are entitled to injunctive relief and were awarded actual attorney fees and court costs because the Township Board, consistently over an eight year period, used voice votes (rather that roll call votes) for closed session meetings and almost never declared a purpose for which the closed sessions occurred, which proved there was an ongoing pattern of OMA violations.

Steinberg v. City of Highland Park
Michigan Ct. of Appeals ***2018 WL 472151***
January 18, 2018

The City of Highland Park ("City") received a FOIA request that it granted and enclosed documents with its response, but that response did not address all of the requested records. The City argued that the request was general; therefore, the response was also, and that the remaining items requested did not exist. If the reason that a public body is denying a request or a portion of a request is that the record does not exist, FOIA requires the public body to certify that the record does not exist. Moreover, the City was required under FOIA to state that this response was granted in part and denied in part, if it produced some records and others did not exist. FOIA does not require a certain method of requesting the public record (i.e., a particular format or a bullet point list), but the request need only be sufficiently descriptive to allow the public body to find public records containing the information sought. As a result, the lower court's determination that the plaintiff was entitled to costs as a prevailing party under FOIA was affirmed.

Wheatley v. Department of Corrections
Michigan Ct. of Appeals ***2017 WL 6502972***
December 19, 2017

The plaintiff filed a FOIA request with the Department of Corrections ("Department"), which requested any and all emails that referenced the plaintiff's name. The Department granted plaintiff's request in part, subject to any exemptions that may apply to the requested documents. Six months after her request, the Department did not produce the records and plaintiff filed suit to force the Department to produce the records. The Michigan Court of Appeals agreed that the passage of six months with no update or production of documents was untimely. However, the Court stated that an untimely response constitutes a final determination to deny the request and permits the plaintiff to appeal that denial (i.e., it does not mean that the Department effectively granted her response, as argued by the plaintiff). In addition, the Department's original response granting plaintiff's request in part was subject to any exemptions after the Department's review of the requested records. The Court of Appeals held that this was sufficiently clear that if all of the requested records were determined to be exempt, the Department was not obligated to release any records to plaintiff.

State of Michigan Attorney General Opinion **Opinion No. 7300**
Freedom of Information Act: Public body's time for fulfilling request for public records
December 12, 2017

The Freedom of Information Act ("FOIA") does not specify a time by which a public body must fulfill a response when it grants a FOIA request but it is guided by a "best efforts estimate." A public body must provide a good faith estimate as to how long it will take to produce the requested records and it should strive to be reasonably accurate. The Attorney General further opined that FOIA does not implement an imposed deadline by which the public body must fulfill a response and is instead guided by the best efforts estimate, which includes a reasonableness standard (i.e., if a reasonable person in the same circumstances as the public would provide a similar estimate for producing the record). Lastly, the Attorney General outlined that the public body's good faith, best efforts estimate may take into consideration events or factors affecting its ability to comply with that deadline (such as a technology disruption), but that FOIA does not contemplate events that occur after the deadline is given to the requestor and that the public body should reach out to legal counsel if that occurs.

Mullendore v. City of Belding, et al.
Michigan Ct. of Appeals ***2017 WL 6061067***
December 7, 2017

The plaintiff sued the City of Belding ("City") and members of the five-member city council claiming that they violated the Open Meetings Act ("OMA") when a councilperson met separately with two other members of the council at their common place of business to discuss one member's intent to bring a motion to terminate plaintiff's employment. Under OMA, to constitute a meeting, it must have: (1) a quorum; (2) deliberation or rending of a decision; and (3) a matter of public policy at issue. The Court of Appeals found that no meeting occurred, as the three members did not come together and deliberate at their place of business but had separate conversations about a motion to terminate plaintiff's employment while the other conversation held that day in the same location with the other councilperson included mere pleasantries and no matters of public policy were discussed. Consequently, as defined by the OMA, there were no deliberations between a quorum of councilmembers to violate the OMA in this case.

Estate of Chance Aaron Nash v. City of Grand Haven
Michigan Ct. of Appeals ***321 Mich. App. 587***
October 10, 2017

The plaintiff filed a Freedom of Information Act (FOIA) request with the City of Grand Haven ("City") for employment records related to a purported City park employee. The City denied the request pursuant to the attorney client privilege exemption of the FOIA. Plaintiff sued and the trial court ordered to the City to produce some documents but did not award attorney fees. Plaintiff claimed that because he did prevail on the merits he was entitled to attorney costs and court costs under the FOIA. The Court of Appeals denied plaintiff's request for costs because the documents that the City was ordered to produce were inconsequential compared to the number of documents requested and that production only occurred after a *in camera* review by the Judge that resulted in 8 pages, which included lengthy redactions.

Forner v. Dept. of Licensing and Regulatory Affairs, et al.
Michigan Ct. of Appeals ***2017 WL 3044106***
July 18, 2017

The Michigan Department of Licensing and Regulatory Affairs ("LARA") received a FOIA request to which it provided 2,358 pages of documents for a fee of $459. Plaintiff sued LARA claiming that it provided too much information, failed to provide the documents in electronic format, and challenging the fee. The Court of Appeals denied plaintiff's claim that the response was excessive as he had requested "all

the documents" and the disclosure of additional information did not prevent him from obtaining the documents he actually sought. Although the Court also determined that LARA was not required to send the documents via email, a question of fact existed as to whether the documents existed in an electronic format, in which case plaintiff would have been entitled to electronic copies and should not have been charged for paper copies of the documents. Additionally, the Court determined that LARA did not properly invoice plaintiff for the fee charged as it did not contain a detailed itemization of the fee in accordance with the FOIA.

Vermilya et al. v. Delta College Board of Trustees, et al.
Michigan Ct. of Appeals ***2017 WL 2607890***
June 15, 2017

Plaintiff sued the Delta College Board of Trustees ("Board") for violations of the Open Meetings Act ("OMA") and sought a declaratory judgment from the court. The Court refused to grant the relief requested and reiterated that OMA only permits three forms of relief: (1) invalidation of the body's decisions made in violation of OMA; (2) injunctive relief; and (3) money damages. Consequently, the Court denied the plaintiff's arguments that OMA permits litigants to seek declaratory relief and affirmed the lower court's decision to dismiss plaintiff's claims.

Ellison v. Department of State
Michigan Ct. of Appeals ***320 Mich. App. 169***
June 13, 2017

The Department of State denied a FOIA request on the basis that it did not possess a responsive record even though the information sought was contained within a computerized database maintained by the Department. The Department reasoned that a computerized database was not a public record. The Court of Appeals disagreed and held that the database contained almost all of the information plaintiff sought and that the database itself was a writing pursuant to FOIA because it was information stored in a computer that the Department used to perform an official function.

Smoke v. Charter Township of Raisin Board of Trustees, et al.
Michigan Ct. of Appeals ***2017 WL 1422837***
April 20, 2017

Plaintiff filed a FOIA request on March 24, 2014 and March 26, 2014 seeking records regarding the Township Board's decision to purchase a new fire truck. After receiving the Township's responses, Plaintiff sued for violations of the FOIA and Open Meetings Act. During litigation the Township Board provided plaintiff with 672 additional pages of responsive documents contending that they were located in a place reasonably likely not to be found. The Court of Appeals found that the Board did not comply with FOIA, that the Township's argument that these documents were not reasonably likely to be found was irrelevant because FOIA requires full disclosure. In addition, the Court of Appeals further found that plaintiff was successful on the merits of his FOIA, as his action prompted the Board to produce further documents; therefore, he was entitled to attorney fees and court costs under FOIA.

OTHER CONSTITUTIONAL ISSUES

Bormuth v. County of Jackson
United States Ct. of Appeals for the Sixth Circuit ***870 F.3d 494***
September 6, 2017

The County of Jackson ("County") was sued by a citizen who objected to the County Commission's practice of opening board meetings with a commissioner-led prayer. The plaintiff argued that the prayer was not historical tradition, as permitted by federal law and that he felt compelled to stand during the prayer. In summary, he argued that he was forced to participate in a Christian prayer in order to participate in the business of county government. The U.S. Court of Appeals determined that the County Commission's use of prayer was in practice with the tradition long followed by the federal government and otherwise supported by federal law. The Court reasoned that the religious-neutral prayer was not coercive, as members of the audience could sit and otherwise participate in the meeting if they chose not to join the prayer and that even though the prayer was led by a member of the County Commission, it was consistent with the practices of legislator-led prayers that are constitutional. In 2017, the United States Supreme Court accepted the plaintiff's appeal in this matter.

City of Riverview v. Operating Engineers Local 324 Pension Plan, et al.
Michigan Ct. of Appeals ***2017 WL 2348730***
May 30, 2017

The City of Riverview ("City") was a participating employer in the Operating Engineers Local 324 Pension Plan ("Pension Plan"), a Taft-Hartley retirement plan governed by the Employee Retirement Income Security Act (ERISA). The City claimed that under Michigan law it was not a lawful participant in the Pension Plan and that it was not bound to contribute to the Pension Plan. However, the Court of Appeals reasoned that state constitutions, like other aspects of state law, must yield to federal law under the Supremacy Clause of the United States Constitution. The remedies sought by the City reflected its claims related to employee benefit plans governed by ERISA "[a]nd, although the City now questions its authority under state law to participate in the plan, the fact is that the City has been contributing to the Fund for more than 15 years," which presents persuasive evidence that the City was subject to ERISA. Therefore, the Court determined that "for the City to suggest that ERISA preemption is inapplicable because the City lacked authority to bind itself to contribute ignores the reality that the City has already voluntarily subjected itself to ERISA regulation by participating in the Fund."