

# We CAN learn from our past and impact our future

MNA Spring Conference

March 14, 2014

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# It's Complicated!

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# What School Negotiators Need To Know

It is not necessary that a negotiator be fully conversant with legislation to be effective.

It is essential, however, that the negotiator have a command of the basic concepts underlying good faith bargaining requirements.

The ability to spot potential issues, avoid obvious violations, and the good sense to seek competent legal advice will suffice in the vast majority of contract negotiations.

- Paraphrased from *Negotiating a Labor Contract – A Management Handbook*, 2<sup>nd</sup> Ed. by Charles Loughran

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# The Challenge

Multiple statutes affect school district academic and business operations, some may change or be repealed during or shortly after a TA is reached.

In addition to knowing current statutes, we need to keep up with what might happen to the current statutes and anticipate how that may impact the collective bargaining agreement during its term.

Important to maximize board/management rights and retain flexibility in an era of substantial change.

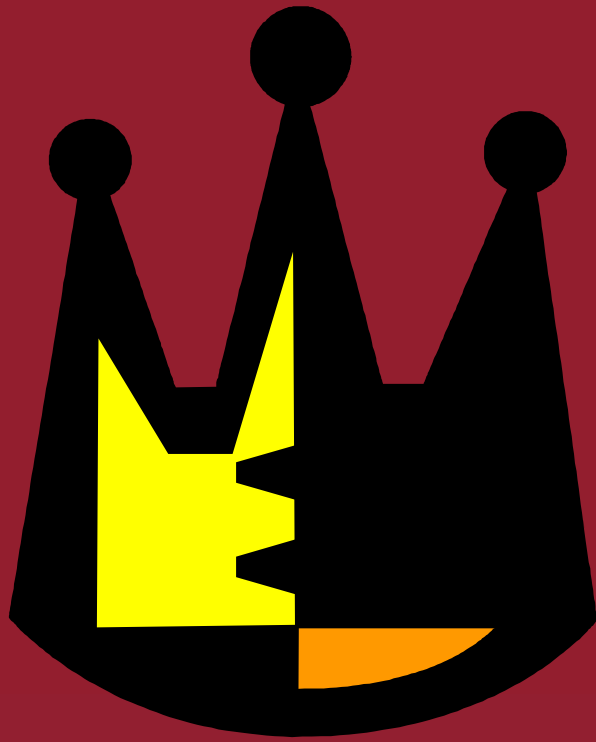
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# It Takes A Team!

Having a diverse bargaining team helps ensure that the key categories will be covered  
– HR, Finance, Curriculum, Calendar, Special Ed, Etc.

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# Power



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# Money



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# Time



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# Practical Suggestions

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# Preparation

- ❖ Educating the Board
- ❖ Selecting Team
- ❖ Selecting Chief Negotiator
- ❖ Identifying parameters/issues/needs
- ❖ Developing and prioritizing proposals
- ❖ Planning for the long haul
- ❖ What is your “Plan B”?

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# Effective Management Of Negotiations

- ❖ Legal, Practical and Emotional Preparation
  - Board
  - Superintendent
  - Central Office
  - Building Principals
  - Community
- ❖ Clear Vision of the Necessary Outcome & Unwavering Commitment To Achieving It
- ❖ Delegate Negotiations to Bargaining Team

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# Board Is Most Critical Indicator of Success

## ❖ Indicators

- Willingness to adapt to new reality
- Providing Administration Resources Needed
- Development & Implementation of Effective Communications Plan
- Stamina to Stay the Course

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# Prepare the Board for the “End Run”

- ❖ Before bargaining even begins, the Board should be consulted to review objectives that the Board wants to achieve
- ❖ The realistic possibility of achieving the objectives should be candidly discussed with the Board (i.e. “an objective to negotiate a different healthcare plan could result in a work stoppage (albeit unlawful)”)
- ❖ The Board should be prepared for potential union pressure tactics
- ❖ Be Mindful of Board Elections!

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# Understand Dynamics of Public School Bargaining

- ❖ If you don't understand it, you will be more vulnerable to union tactics and will not be able to de-personalize the attacks to think objectively about an effective counter strategy
- ❖ If you don't understand available tools, you will be reluctant to use them

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# Dual-track Bargaining Efforts

1. At the bargaining table, to reach agreement and position the Board to exercise its options under the law –
  - a. Formal table position (postured for possible fact-finding and implementation of LBO)
  - b. Informal position (where the Board can go; those positions typically explored in mediation)
2. Away from the bargaining table, to counter the Union's pressure tactics and efforts to elect/recall Board members –
  - a. Prepare Board and administrators for Union tactics
  - b. Development of a communications plan – setting the climate and communicating key messages

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# “Big Picture”

The possible final outcomes in negotiations –

1. Agreement
2. No agreement

If no agreement –

1. The Board will either implement its Last Best Offer or maintain the status quo indefinitely
2. The Union will increase its efforts to change Board bargaining goals through either electing/recalling Board members, or through more pressure

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# Proposals

- ❖ Map out proposals
  - What are desired end results?
  - When must result(s) be realized?
  - Can you get there?
  - How?
  - If you can't get there, what is your fallback or other options?

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# Multiple Proposal Options

- ❖ Identify multiple alternatives
- ❖ Prioritize them
- ❖ Collective alternative samples and ideas
- ❖ Determine whether time is on the Board's side
- ❖ Multi-year bargaining strategy
- ❖ Assess “crisis mode”

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# Preparing Proposals

- ❖ Financial Information
  - Budget picture, short and long term
  - Internal and external comps
  - Cost data, current and anticipated
- ❖ Meetings with administrators about problems and needs
- ❖ Contract Review and Bargaining History
  - Prior Union demands
- ❖ Grievance Review
- ❖ Review of Legal Context
  - School Reform
  - Tenure Reform
  - Reform, Reform, Reform!

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# Prioritize Proposals

- ❖ Necessary (will risk strike or other disruptive conduct)
- ❖ High priority
- ❖ Nice to get
- ❖ Fodder
- ❖ Consider distraction/trading value
  - Snow days
  - Insurance issues
  - Etc.

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# Hierarchy of Proposals

- ❖ Initial
- ❖ Compromise
- ❖ Bottom line

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# Remember the Progression of the Collective Bargaining Process

- ❖ Negotiation
- ❖ Mediation
- ❖ Fact Finding

# The Tactic of Unfair Labor Practices

- ❖ Expect the union to file them
- ❖ Boards should consider this tactic when warranted
  - Union insists bargaining over prohibited or permissive subjects
  - Union pursues prohibited or permissive subjects to arbitration

# Fact Finding Trends

1. Concessions from other employee groups, including Administration
2. Reduced staffing in response to reduced enrollment
3. Account for Title money
4. How large are the variances in budget projections to final audited budget – hopefully within 2%
5. Prepare communication plan in case of an unsatisfactory award
6. Expect to negotiate the full 60 days post award



# How Michigan Legislation Impacts Public School Bargaining

- ❖ Creates the right/obligation to bargain for public employees and defines scope of that bargaining obligation, *i.e.*, PERA
- ❖ Directly impacts mandatory terms and conditions of employment, *e.g.*, FLSA and PA 152
- ❖ Indirectly impacts and thus creates an obligation to engage in impact bargaining, *e.g.*, FMLA
- ❖ Mandates minimum instructional time needed to receive maximum State Aid.
  - Establishes “best practices” which may impact terms and conditions of employment, *e.g.* 90/10 insurance benefit costs

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# Since 1994...

- ❖ Each of the broad topics of collective bargaining have been dramatically impacted by legislation

# PERA: The Dominant Labor Law

## ❖ The Michigan Public Employment Relations Act

- Adopted 1947; first amended 1965
- Amended again 1994 with first set of prohibited subjects and to strengthen strike penalties
- Amended 2011 with second set of prohibited subjects school reforms
- Amended 2012 by Right to Work and to exclude graduate student research assistants and independent contractors

## ❖ “It is well established that PERA is the dominant law regulating public employee labor relations in Michigan.”

- Wayne County, 22 MPER 65 (2009), citing *Rockwell v Crestwood School Dist*, 393 Mich 616, 629, (1975)

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# No Obligation to Agree or Concede

## ❖ Good faith bargaining

- “[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but this obligation does not compel either party to agree to a proposal or require the making of a concession*”

- MCL 423.215(1)

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# Sincere Desire to Reach Agreement

## ❖ An Imprecise Standard

- “In assessing whether a party has fulfilled its bargaining obligation, [MERC] ha[s] always been mindful of the language of Section 15, which states that agreement or concessions cannot be compelled. To determine whether a party has bargained in good faith, [MERC] examine[s] the **totality of the circumstances** to decide whether a party has approached the bargaining process with an open mind and a **sincere desire to reach an agreement**.
  - *Grand Rapids Public Museum*, 17 MPER 58 (2004) (internal citations omitted)
- “Totality of Circumstances”

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# PERA Amendments Have Impacted the Union's Power

- ❖ Freedom To Work – Section 10(3) – added by 2012 PA 349, effective March 28, 2013.
- ❖ Section 10(1)(b) – “use of public school resources to assist in collecting dues or service fees ... is a prohibited contribution ...” added by 2012 PA 53, effective March 16, 2012.
- ❖ Section 15 – prohibited subjects identified - 1994, 2011 and 2012
- ❖ Section 17 – prohibits an education association from vetoing a local unit's agreement with its public school employer or requiring that the local seek ratification by the education association – Added by 1994 PA 112, effective March 30, 1995.

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# Impact of FTW

- ❖ Flurry of negotiations and multi-year contracts in March 2013
- ❖ MERC Labor Specialist
- ❖ MERC Poster & FAQ
- ❖ Windows of Cancelling Membership
- ❖ Unions Explaining What Non-Members Lose
- ❖ Unions Demonstrating Their Value

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# Dues Deductions, §10(1)(b)

- ❖ 2012 PA 53 law banning dues deductions, effective March 16, 2012
- ❖ Enjoined June 11, 2012 by Federal District Judge Hood of the ED Michigan, *Bailey v Callaghan*
- ❖ May 9, 2013, a panel of the Sixth Circuit Court of Appeals lifted the injunction by a 2-1 decision
- ❖ June 28, 2013, Sixth Circuit issued its mandate (order consistent with May 9 decision)
- ❖ July 10, 2013, Judge Hood issued order dissolving temporary injunction

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# Current Status

- ❖ If current CBA was ratified before 3.16.2012 –
  - Honor the dues deduction and agency shop provisions until that contract expires
  - Upon termination, extension or renewal of that contract, 2012 PA 53 goes into effect in your organization (as well as FTW)
- ❖ If current CBA ratified after 3.6.2012 –
  - Dues deduction provisions are not valid or enforceable and after July 10, 2013, must cease
  - Pending disputes, however

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# Varied District Reaction to 2011 PA 53

- ❖ Full statutory compliance
- ❖ Seeking clarification of interplay between March 28, 2013 deadline and March 16, 2012 effective date of PA 53, in light of injunction
  - Arbitrator
  - Courts
- ❖ Statutory nullification?

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# The Prohibiteds

1994 PA 112 & 2011 PA 103

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# The 1994 Prohibiteds

- ❖ Section 15(3)(a) – Determination of insurance policyholder
- ❖ Section 15(3)(b) – Establishment of the starting day of the school year
- ❖ Section 15(3)(c) – Composition of school improvement committees
- ❖ Section 15(3)(d) – Decision to provide open enrollment opportunities
- ❖ Section 15(3)(e) – Decision to organize and operate public school academies
- ❖ Section 15(3)(f) – Decision to contract for non-instructional support services
- ❖ Section 15(3)(g) – Use of volunteers to provide services in school
- ❖ Section 15(3)(h) – Use of experimental or pilot programs and the use of technology to deliver educational programs and services
- ❖ Section 15(3)(i) – Reimbursement or recovery of monetary penalty (for striking)

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# The 2011 Prohibitededs

- ❖ Section 15(3)(j) – teacher placement
- ❖ Section 15(3)(k) – teacher layoff and recall
- ❖ Section 15(3)(l) – teacher evaluation
- ❖ Section 15(3)(m) – discipline or discharge
- ❖ Section 15(3)(n) – classroom observations
- ❖ Section 15(3)(o) – performance-based compensation
- ❖ Section 15(3)(p) – parental notification of ineffective teacher

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# The 2012 Prohibiteds

- ❖ Section 10(1)(b) – A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization.

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# Another Prohibited Subject

- ❖ With the passage of Freedom To Work, section 15(3)(q) was added in 2012, making “any requirement that would violate section 10(3)” a prohibited subject.

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# Impact of 380.1280c – School Reform/Redesign District

MCL 423.215 (6)(a) – Any effect on collective bargaining and any modification of a collective bargaining agreement occurring under section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c.



# Scope of Prohibiteds

- ❖ Some are narrowly defined as the statute does not list “the impact on the individual employee or the bargaining unit” and some do specify that the impact is also a prohibited subject.
- ❖ Use of volunteers does not include the impact of that use.
- ❖ Subcontracting of non-instructional support personnel does include the impact of that use.

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# Unlawful to Insist on Bargaining of Prohibited Subjects

- ❖ *Calhoun Intermediate Ed Ass'n*, MERC Case No. CU12 B-009 (decided August 24, 2012)
  - "The union violated its duty to bargain in good faith by **unlawfully insisting** as a condition of agreement on a contract that the employer agree to include provisions on prohibited topics in the contract ..."
  - The "union violated its duty to bargain in good faith, and obstructed and impeded the bargaining process by continuing to make proposals dealing with non-mandatory subjects after the employer **unequivocally refused** to bargain over the proposals"

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# Impact on Power

Deleted/modified contractual provisions on assignment and transfer of teachers

Deleted role of seniority in such decisions

Deleted entire articles on teacher evaluation

Deleted contractual provisions on role of tenure and seniority in layoff & recall

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# Impact of Prohibiteds

*Pontiac School District*, MERC Case Nos. C11 K-197 and CU12 D-019  
(decided Sept. 27, 2013)

- Employer acted within its authority under Section 15(3)(j) when it unilaterally reassigned a teacher without bargaining with the union
- The union violated its duty to bargain in good faith by processing a grievance concerning that reassignment to arbitration over the employer's objections
- **ALJ recommended that the MERC order the union to reimburse the employer for the costs, including attorney fees, that it incurred while defending itself in the arbitration proceedings regarding the reassignment of the teacher.**

Both *Calhoun ISD* and *Pontiac School District* are ALJ decisions being appealed to MERC.

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# PERA Amendments & PA 152

Have Impacted MONEY

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# Single Largest Impact: Public Act 54

PERA §423.215b, adopted 2011, effective June 8, 2011

“...a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement.”

This is a mandatory preservation of the “status quo.”

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# Application of PA 54

- ❖ No step advancement
- ❖ No lane advancement
  - MERC has ruled that a school district is prohibited from granting lane changes to otherwise eligible employees after a collective bargaining agreement has expired and before a successor agreement takes effect. *Waverly Community Schools*, 26 MPER 34 (2012)
- ❖ No retroactivity
- ❖ PA 54 Interplay with PA 152 at contract expiration
  - Example: If district paying 80%, district does not pay increased dollar amount at contract expiration, notwithstanding %
- ❖ Attempts to circumvent – e.g., sunset clauses

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# Impact of 2011 PA 54

- ❖ More intense, high volume of bargaining right before contract expiration.
  - Incentive to settle
- ❖ When employer needs concessions, PA 54 does not encourage early resolution, however, it minimizes the school district's budget hole from growing larger.

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# Legislation Impacting Insurance Benefits

- ❖ The Publicly Funded Health Insurance Contribution Act, aka 2011 PA 152, MCL §§15.561, *et seq.*
- ❖ *Decatur Public Schools*, MERC, the Board decision whether to elect hard caps or 80/20 cost sharing is a permissive subject of bargaining

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# More Details...

## ❖ PPACA

- Nov 2013 FAQ re PA 152 on PPACA costs and fees
- Flexible Spending Accounts

## ❖ Internal Revenue Code

- Section 125
- HSA Rules

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# It's Getting Tricky...

- ❖ PA 152 amounts are a ceiling, not a floor
- ❖ May be necessary to negotiate District contribution below statutory maximum
- ❖ Best to negotiate dollar amount versus referencing the statute
- ❖ May not be able to afford a culture in which PA 152 maxima are an “entitlement”

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# State Aid Act Impacts Time

- ❖ Effective October 1, 2013:
- ❖ In 2014-2015, instructional time may not include professional development hours.
- ❖ In 2014-2015, minimum number of instructional days is 175 however may not be fewer days than in 2009-2010.
- ❖ If a CBA was in effect as of October 19, 2009, then the above is not applicable until “that” agreement expires.
- ❖ MCL §388.1701(10).

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# Section 21f of the State School Aid MCL 388.1621f

- ❖ Review impact on Agreements
- ❖ What position staffs online classes (mentor)
- ❖ How is the position paid
- ❖ Remember that Section 15(3)(h) of PERA treats the use of experimental or pilot programs and the use of technology to deliver educational opportunities as prohibited subjects

# General Rules

## About Statutes & Collective Bargaining Agreements

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# Leave Well Enough Alone

- ❖ CBA should not unwittingly expand minimum statutory requirements
  - Expanding EEO liability by adding new protected traits or categories not recognized by statute
  - Overtime for hours *paid* versus hours *worked*
  - *Weingarten* rights
- ❖ CBA does not have ability to diminish rights mandated or guaranteed by statute
  - Unlawful and unenforceable to waive certain statutory rights, e.g., FMLA Leave Entitlement

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# “Second Bite at the Apple”

- ❖ CBA should not permit arbitrator to define or clarify statutory rights or award damages when employee has absolute right to seek a second award that could conflict with an arbitrator’s ruling.
  - Include provision within grievance arbitration article excluding a “second bite at the apple”
- ❖ Should CBA replicate or reiterate statutory rights?
  - *Does arbitrator have jurisdiction to interpret statutes?*

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# Arbitrator's Dilemma

## Arbitration

- ❖ “When rights guaranteed by [statutory law] conflict with the provisions of the collective bargaining agreement, the arbitrator must enforce the agreement.”
  - *McDonald v City of West Branch*, 466 US 284, 291 (1984)
- ❖ “As long as an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice in overturning his decisions.”
  - *United Paperworkers Int’l Union v Misco, Inc.*, 484 US 29, 38 (1987)

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# What Arbitrators Say

- ❖ “There are wide differences on the question of applying external law when issuing awards and formulating remedies.” *Common Law of the Workplace*, St. Antoine 335.
- ❖ Savings clauses and legal supremacy clauses “permit external law to be absorbed into the labor agreement and permit the arbitrator to produce awards that are compatible with the external law.” *Practice & Procedure in Labor Arbitration*, Fairweather 421.
- ❖ “A labor agreement or award deriving therefrom that requires a party to violate the law cannot be enforced.” Fairweather 422 and cases cited therein.
- ❖ What happens when external law is “unstable?”

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# Do You Now Agree?

- ❖ It is not necessary that a negotiator be fully conversant with legislation to be effective.
- ❖ It is essential, however, that the negotiator have a command of the basic concepts underlying good faith bargaining requirements .
- ❖ The ability to spot potential issues, avoid obvious violations, and the good sense to seek competent legal advice will suffice in the vast majority of contract negotiations.
  - Paraphrased from *Negotiating a Labor Contract – A Management Handbook*, 2<sup>nd</sup> Ed. by Charles Loughran

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# Your Questions?



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# Thank You!

Note: This document is not intended to give legal advice in any specific situation. It is comprised of general information. School employers facing specific issues should seek the assistance of an attorney.



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