

Negotiating Legal Requirements

Brad Banasik

Legal Counsel & Director of Labor Relations
Michigan Association of School Boards

- I. Overview
 - A. General Guidance on Including Legal Requirements in CBAs.
 - B. Negotiating the Requirements of Specific Laws or Legal Rights
 - 1. Bullard-Plawecki Employee Right to Know Act
 - 2. Weingarten Rights (PERA)
 - 3. Duty to Furnish Information (PERA)
 - 4. Family Medical Leave Act
 - C. Conclusion
- II. General Guidance on Including Legal Requirements in CBAs.
 - A. Laws are constantly changing: When a contract restates the law, the statement of law will continue as a contractual requirement even if the law is amended or repealed.
 - B. Enforcing the legal requirements through the CBA. If legal requirements are incorporated into a CBA, the requirements can be enforced through the grievance and arbitration process.
- III. Negotiating the Requirements of Specific Laws or Legal Rights.
 - A. Bullard-Plawecki Employee Right to Know Act.

1. General Requirements.

- a. The Act gives employees important rights regarding their personnel files if the employer maintains them.
- b. Under the Act, an employee has the right to review, copy, and file a response to any personnel record.
- c. An employee may also request the removal or correction of any personnel record.
- d. The Act defines *personnel record* broadly to include any record that identifies the employee and is related in some way to the employee's employment.
- e. **Exclusions:** The following is a list of items which the Act does not consider to be "personnel records":
 - (1) Employee references if the identity of the person making the reference would be disclosed.
 - (2) Staff planning materials affecting more than one employee (including salary increases, management bonus plans, promotions and job assignments).
 - (3) Sole possession records kept by executive, administrative, or professional employees.
 - (4) Medical reports and records if the records or reports are available to the employee from the doctor or medical facility involved.
 - (5) Information of a personal nature about a person other than the employee if the disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
 - (6) Information that is kept separately from other records and that relates to a criminal investigation.
 - (7) Records limited to grievance investigations which are kept separately and are not related to an employment decision.
 - (8) Student records under FERPA.

- f. An employer may not use personnel record information in a judicial or quasi-judicial proceeding if the information was not included in the personnel record but should have been under the Act.

2. Releasing Personnel Records to Third Parties.

- a. Except when the release is ordered in a legal action or arbitration, an employer must delete disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than four years old.
 - **Exception:** Unprofessional conduct checks pursuant to MCL 380.1230b.
- b. If the disciplinary record is four years old or less, an employer may not release the record without sending written notice of the release by first-class mail to the employee at the employee's last known address.
 - The requirement may be waived by the employee.

B. **Weingarten Rights.**

1. General Requirement: An employee has a right to request and receive union representation at an employer's investigatory interview when a reasonable basis exists for believing that the interview will result in disciplinary action.
 - a. The fundamental purpose of having the union representative present is to aid the employee in answering questions and presenting facts inquired upon by the employer.
 - Does the CBA require notice to Union?
 - b. An examination of the *Weingarten* defense often will focus on whether the employee ever requested union representation and whether the employee reasonably believed the

investigatory interview might culminate in disciplinary action.

2. Limitation: Weingarten protections do not attach where a meeting or interview with an employee is merely to deliver disciplinary action already decided upon by the employer.

C. Duty to Furnish Information.

1. General Requirement. In order to satisfy its bargaining obligations under PERA, an employer must supply requested information which will permit the union to engage in collective bargaining and police the administration of the contract.
2. Relevant. The duty to furnish information applies as long as there is a reasonable probability that the information will be relevant to the union in carrying out its statutory duties.
 - a. Where the information sought relates to discipline or to wages, hours, or working conditions of bargaining unit employees, the information is presumptively relevant.
 - b. The union is not required to express a purpose for requested data unless it appears that data is irrelevant or already available to the public.
3. **Exceptions** to the employer's duty to provide information exists where the requested information could be confidential or readily available to the union from other sources.
 - **EXAMPLES**: Confidential written interview questions and documents covered by the FOIA exceptions.
4. A refusal or unreasonable delay in supplying relevant information is an unfair labor practice.
 - The MERC has not articulated the precise time for employers to respond to information requests. However, it has found violations of PERA in cases

where the delay has ranged from 2-3 months to 9 months.

5. **Cost.** PERA requires that the employer bargain in good faith over the cost of duplication or compilation of the information requested.

D. Family Medical Leave Act.

1. General Requirement. Under FMLA, an employee is eligible to take 12 workweeks of unpaid, job-protected leave for specified family or medical reasons if she or he has been employed by the school district for at least 12 months, and has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.
2. The FMLA was amended in 2008 to provide military family leave. The leave entitlements give specified family members of covered Armed Forces personnel up to 12 weeks off for qualified exigencies due to being called for active duty, or up to 26 weeks off to take care of a service member who was injured while on active duty.
3. 12-month period. An employer may calculate the 12-month period in which the 12 weeks of FMLA leave entitlement occurs in one of a variety of ways (but the method must be the same for all employees):
 - a. the calendar year;
 - b. any fixed 12-month period, such as a fiscal year, or a year starting on the employee's anniversary date;
 - c. the 12-month period measured forward from the date any employee's first FMLA leave begins; or
 - d. a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.
4. Employee's Notice Request.

- a. If an employee anticipates needing FMLA leave, she or he should provide the employer with at least 30 days advance notice of the leave.
- b. When employees learn of a need of FMLA leave fewer than 30 days in advance, they are required to give notice of their leave either the same business day or the next day, absent emergency circumstances.

5. Employer Notice Requirements. Covered employers must:

- a. Post notice explaining rights and responsibilities under the FMLA;
- b. Include information about the FMLA in their employee handbooks or provide information to new employees upon hire;
- c. When an employee requests FMLA leave or the employer requires knowledge that leave may be for a FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility for FMLA leave and her or his rights and responsibilities under the FMLA within five business days; and
- d. Notify employees whether leave is designated as FMLA leave and the amount of leave that will be deducted from the employee's FMLA entitlement within five business days.

6. Certification.

- a. When an employee requests FMLA Leave due to her or his own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider.

- The employer may not request a certification for leave to bond with a newborn child or a child placed for adoption or foster care.
- b. The employer may request a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave.
 - (1) If an employer requires a fitness-for-duty certification, it must provide notice of that requirement and whether the certification must address the employee's ability to perform the essential functions of her or his job with the FMLA designation notice.
 - (2) If CBA governs an employee's return to work, those provisions must be applied.

7. Job Restoration and Health Benefits.

- a. Upon return from FMLA leave, an employee must be restored to her or his original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.
- b. An employee's use of FMLA leave cannot be counted against the employee under a "no fault" attendance policy.
- c. Employees are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave.

8. Likely Bargaining Proposals From Employees. There are several areas where employee groups can bargain for improvements in the FMLA:

- a. Broadening the definition of "family member."
- b. Increasing the amount of leave that an employee is permitted to take under the FMLA.

- c. Choosing the most employee-friendly method for defining the FMLA leave year.
- d. Negotiating for leave banks that could be used in conjunction with the FMLA.
- e. Make a portion of unpaid FMLA leave paid leave.
- f. Negotiating a sick leave policy that would allow employees to use their sick leave for family members.
- g. Continue all benefits during the FMLA leave period.
- h. Require that employees accrue seniority during periods of FMLA leave.
- i. Expand the reasons for which FMLA leave may be taken.
- j. Reduce the notice period for requesting FMLA leave.
- k. Limit requirement for fitness-for-duty certifications to extended absences.

IV. Conclusion.