

What Executive Order 2020-35 Means For Unionized School Employers

A Few Key Points To Keep In Mind:

1. Although the Order suspends a number of statutory requirements, it does not suspend any provisions of PERA. Therefore, all application of PERA's duty to bargain as well as the statute's recognition of employee, union and employer rights and prohibitions remain intact and fully applicable.
2. PERA's limitations on what must be negotiated and what are deemed prohibited subjects of bargaining remain intact and fully applicable.
3. Collective bargaining agreements remain in place and fully effective. The Order expressly requires that it be implemented "consistent with" existing collective bargaining agreements.
4. Nevertheless, one of the requirements for approval of a Plan is to contain "a description of the manner in which district administrators, board members, teachers, and *any representatives of teachers* collaborated in development of the Plan."

What Unionized Employers Should Not Do Right Now:

1. Do not rush into MOAs, LOAs or other forms of arrangements or promises, or otherwise begin negotiating with your local or regional union representatives regarding any impact of the Order or the specifics of the Plan.
2. Do not interpret the requirement to "collaborate" with unions regarding development of the plan as a requirement to *negotiate* with the union. Good faith attempts to collaborate should be undertaken, but, just as PERA requires you to bargain but does not require you to reach agreement, the Order requires you to collaborate but does not require you to agree to participation by the union in decision making that circumvents the school employer's statutory authority under PERA about issues like teacher placement, evaluation, discipline, and the like.

What Employers Should Do Right Now:

Before you sit down with your union representatives, review the template developed by MDE in collaboration with the Michigan Association of Intermediate School Administrators and Michigan Council of Charter School Authorizers and its application to your district and collective bargaining agreements, consult with your fellow administrators across other districts, look toward establishing collaborations across districts and regions and consult with your labor attorneys regarding the entire process.

The Possible Flash Points in The Order That May Be Challenging to Navigate:

1. To the extent the Plan requires activity and involvement of non-teacher employees covered by CBAs, negotiations may be required over activities that are not otherwise interpretable under the CBA.
2. The use of school buildings for implementation of the Plan may become a safety issue in terms of COVID-19 risks. The Order exempts such use from the restrictions of the prior Stay at Home EO, which is explained in more detail in our previous [e-alert](#) . Workplace safety, however, remains a mandatory subject of bargaining and the onus is on the district to ensure social distancing and building hygiene to establish safe use.
3. While all employer authority over placement and assignment remain intact, the design and implementation of plan will require a different approach to work days and hours, plan time, IEPs, PDs, student evaluation, development and transmission to students of materials, lesson plans that are not easily translatable from current CBA provisions or past practice.
4. Relatedly to point 3, the Order requires that school employees continue to be paid while being redeployed to “meaningful work in the context of the Plan, subject to any applicable collective bargaining agreements.” The interpretation and application of this section may be a point of contention, particularly the definition of “meaningful work!”
5. The Plan must also describe how learning is to be “managed and monitored.” How these undefined tasks will be accomplished by staff under such very different circumstances will have to be navigated.
6. The timing of the current school year relative to continued closure and Plan implementation and the start of the 2020-21 school year will affect:
 - a. Teacher evaluations relative to ineffective/effective sequences
 - b. Completion of probationary periods for teachers and non-teaching employees
 - c. Pending grievances and arbitrations
7. The Order does not expressly require, but states that, a Plan “may provide for the adoption of a balanced calendar instructional program for the remainder of the 2019-20 school year and planning for the adoption of a balanced calendar instructional program for the 2020-21 school year.” as well as for extension of the existing school year and a pre Labor Day start to the 2020-21 school year. Planning the calendars for this and next year given the myriad unknowns may be challenging.