



LARA

Department of Licensing and Regulatory Affairs

MERC BASICS..... Overview of Key Points and Services

Designed for Novice & Seasoned Management and Labor Representatives

Michigan Employment Relations Commission

Bureau of Employment Relations

www.michigan.gov/merc

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OVERVIEW OF MERC BASICS

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MERC & BER

- MERC: Michigan Employment Relations Commission
 - Edward Callaghan, Chair
 - Robert LaBrant, Commissioner
 - Natalie Yaw, Commissioner
- BER: Bureau of Employment Relations
 - Agency within the Michigan Department of Licensing and Regulatory Affairs (LARA)
 - Ruthanne Okun, Director
 - 2 segments--

MERC

WAGE HOUR— moved to BER in 2016

operated separately from MERC

MERC Services

Labor Relations Division

- ULPs
 - Employers
 - Unions
 - Individuals

- Elections
 - R petitions
 - UC petitions
 - Union audit filings

Mediation Division

- Labor Mediation
 - Contract Negotiations
 - Grievances
 - Public & Private Sectors
 - Collaborative Bargaining

- Fact Finding

- Act 312 Arbitration

- Grievance Arbitration
 - Arbitrator Appointments only

MERC Authority & Jurisdiction

LMA (1939)

- Private Sector
- Mediate Labor Disputes
- Management & Labor
- ULPs & Elections (outside NLRB)
- Established MERC

PERA (1965)

- Public Sector
- Extends collective bargaining to Public Sector employees
(excl. Federal & State employees)
- Employees free to choose Exclusive Bargaining Representative
- Redress for Employer or Union violations of PERA (e.g., ULPs)

Public Employment Relations Act (PERA)

- Right to organize public sector employees
- Employees can choose union representation
- Establishes duty to bargain (negotiate) in good faith
- Prohibits public sector strikes and lockouts
- Defines certain misconduct as **ULPs**
- Defines certain subjects as “prohibited subjects of bargaining”
- Amended several times since inception

Union Selection– 2 means

VOTE

- Representation Petition
- Employees decide by vote
- Entire unit impacted
- Result: Union “in” or “out”

NO VOTE

- Unit Clarification Petition
- MERC decides by factors
- Certain positions impacted

Union Selection (R & UC Petitions)

Representation Petition

- Employees vote for an exclusive bargaining representative
- Petition needs at least 30% supporting signatures
- Filing window periods may apply
- Majority vote WINS
- Generally, used to pick a union or switch unions (RC); or end union representation (RD)

Unit Clarification

- Dispute about where a position should be placed (*e.g., Union A, Union B or No Union*)
- Placement of a new or substantially modified position(s)
- MERC decides based on multiple factors (*e.g., community of interest; bargaining history, etc.*)
- “Community of interest” analysis examines similarities in duties, skills, working conditions, wages, benefits, reporting relationships and more.

Union Selection— filing periods

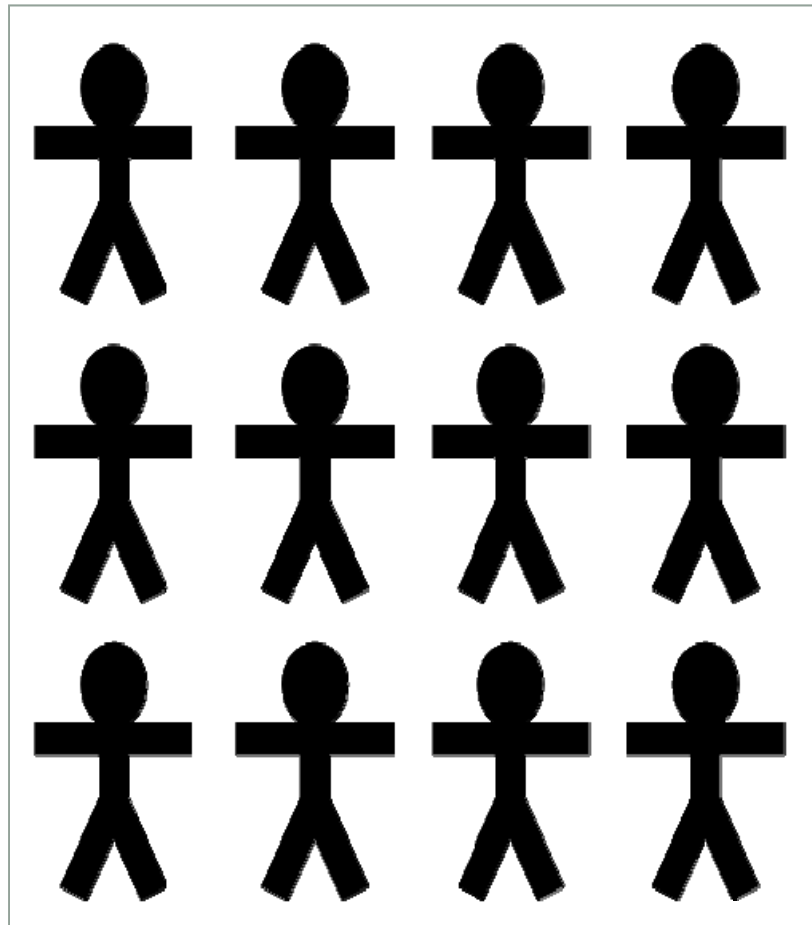
- When can you file the R petition?
- Depends on--
 - If No Union Exists— Anytime
 - After CBA Expires— Anytime
 - Before CBA Expires— Look at Employer Type:
 - Public Sector (general): 90d- 150d before CBA expires
 - Public Schools (school district & higher education):
 - If CBA expires June 1- Sept 30: Jan 2- Mar 31 of year CBA expires
 - Otherwise: Same as Public Sector (general)
 - Private Sector under LMA: 60-90d before CBA expires

Union Selection- R Petition

PopQuiz1: 4 employees in a bargaining unit of 12 sign an election petition to get a new union.....

Is this enough to support the filing of the R petition?

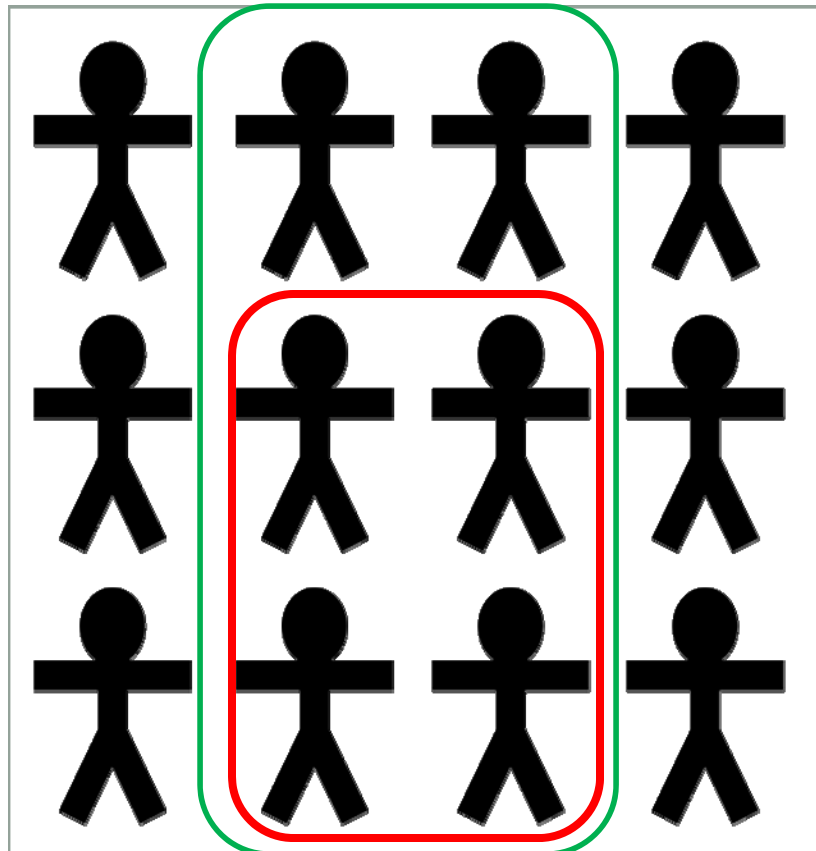
Y or N?



Union Selection

- PopQuiz2: If 6 people vote, could less than a majority of the bargaining unit decide the outcome for all 12 unit members?

T or F



Union Selection- R petition

- PopQuiz3: A Union needs how many votes to become the exclusive representative of a bargaining unit containing 34 members?
 - 1
 - 17
 - 18
 - Any of the above, depends on who votes

Union Selection– UC petition

- No Vote Occurs; MERC Decides
- Puts a position in one unit or another which may (or may not) be represented by a union
- NO Filing Window Periods
- Must file w/i reasonable period after learning of violation or could be viewed as a waiver;
- Decided on various “Community of Interest” Factors

Union Selection– R and UC

EXCEPTIONS

- MERC does not recognize a 1 person unit
[Int'l Union of Bricklayers, 5 MPER 23096 (1992)]
- Executive and Confidential positions excluded
- NO mixing Non-Supervisors with their Supervisors
(Caveat 1: Ok if unit of fire fighters (PERA Sec 13))
(Caveat 2: Unit of multi level supervisors is OK)
- NO mixing Act 312 eligible and Non Act 312 eligible
(Caveat: Existing 'mixed' units mostly grandfathered)
[Oakland Co (Sheriff), 20 MPER 63 (2007) on 8-7-07]

Unfair Labor Practices (ULPs)

- Narrowed application of the term-- ULP
- Violation of a specific section(s) of PERA or LMA
- Generally, PERA section 10; LMA section 16
- 3 major types- Retaliation for Union Activity; Breach of Duty of Fair Representation, Breach of Duty to Bargain.
- Most ULP filings @ MERC are Duty to Bargain claims against employers and unions

Unfair Labor Practices (ULPs)

TYPE	Filing Party (Charging Party)	Alleged Offender (Respondent)	General Claim
Anti-Union Animus (Discrimination)	Individual, Union	Employer	Retaliation/interference due to protected concerted activity
Duty of Fair Representation (DFR)	Unit Member(s)	Union	Breach of standard owed to members
Duty to Bargain	Union, Employer	Employer, Union	Breach of “good faith” standard
Coercion	Unit Member(s)	Union	Coercion related to Union membership / financial support

ULPs continued....

2 key factors:

- **Statute of Limitations (SOL)-- 6 months to file or too late**
 - SOL starts when party knew or should have known of a violation
 - ULP charge must be **filed and served** on party by SOL deadline
 - Pursuit of outside remedy does not toll or extend the SOL
 - SOL cannot be waived [*Traverse Area District Library, 25 MPER 82 (2012) on 5-5-12*]
- **Valid Claim-- Must allege a violation of PERA (or LMA)**
 - PERA section 10
 - Filing must indicate relevant detail (*MERC does not investigate claims*)
 - Not responding to a Show Cause order can result in ULP dismissal
[Detroit Fed of Teachers, 21 MPER 3 (2008) on 1-9-08]

Duty of Fair Representation (DFR)

POPQUIZ4:

P. N. Guinn consistently and timely has paid dues to his union for 25 years. He recently filed his first grievance ever!! The grievance has proceeded to Step 4– Arbitration.

Is the Union obligated to arbitrate the matter because Guinn is a longstanding, dues paying member that never causes friction.

T or F?

Duty of Fair Representation (DFR)

- A Union must: (*3 key elements**)
 1. Serve the interests of all members without hostility or discrimination toward any
 2. Exercise its discretion in complete good faith and honesty
 3. Avoid arbitrary conduct

**[Refer to Goolsby v Detroit, 419 Mich 651, 348; NW2nd 856 (1984)]*

- Applies only to policies and procedures directly impacting the terms and conditions of employment; Not internal Union matters [*Teamsters Local 214, 26 MPER 43 (2013) on 2-26-13*]
- Only unit members can file DFR claims against a Union.

DFR (continued) – Grievance Processing

- Union's duty is to the Membership OVERALL
- Union need not pursue every grievance
- Union need not follow dictates of the grievant(s)
- Union can exercise wide discretion on what action to take
- Union may weigh its decision on factors such as:
 - Likelihood of success
 - Expense to the Union
 - Burden on contractual grievance machinery

Duty to Bargain-- general

- A party's **obligation** to meet and discuss (negotiate) certain terms and conditions of employment (*Layman's definition*)
- Applies to CBA, reopeners, certain changes/additions, grievances...
- PERA, Section 15 states:

...to **bargain collectively** is the performance of the mutual obligation...to meet at reasonable times and confer in good faith **with respect to wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement, or any question arising under the agreement,...and the execution of a written contract...**BUT** this obligation **does not compel either party to agree** to a proposal or require the making of a concession.

Duty to Bargain (continued) -

- Party must “**DEMAND**” to Bargain [*Lakeview Sch, see slide 34*]
 - “Duty” applies to mandatory subjects of bargaining
 - Demand (or request) must be unambiguous
 - Just complaining about a change or issue is not sufficient
 - Reasonable notice required on new or changed areas not covered by CBA
 - If no demand, then Bargaining Duty is waived.

- Must “Bargain in Good Faith” [*DPOA v Detroit, 391 Mich 44 (1974)*]
 - Party must have open mind and desire to reach an agreement
 - Based on a party’s overall conduct
 - Agreement or concession not required

- The Duty ‘Comes and Goes’
 - Once CBA is ratified, no obligation exists to negotiate changes during life of the contract. [*St Clair Intermediate Sch v IEA, 458 Mich 540, 565-66 (1999)*]

Duty to Bargain (continued) -

Good Faith Bargaining:

To determine whether a party has bargained in good faith, we examine 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.

City of Springfield, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Schs*, 1988 MERC Lab Op 86; *Kalamazoo Pub Schs*, 1977 MERC Lab Op 771, 776. [*Grand Rapids Public Museum*, MERC Case No. C01 L-242, 17 MPER 58]

Subjects of Bargaining-- 3 Categories

- Mandatory
- Permissive
- Prohibited/Illegal



Subjects of Bargaining -- Mandatory v. Permissive

- Section 15 of PERA requires a public employer to bargain collectively with the representatives of its employees with respect to "wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement." Such issues are mandatory subjects of bargaining. Either party may insist on bargaining over a mandatory subject, and neither party may take unilateral action on such an issue prior to reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Issues falling outside the scope of such classifications are typically considered permissive subjects of bargaining. *Grand Rapids Comm College Faculty Ass'n v Grand Rapids Comm College*, 239 Mich App 650, 656-657 (2000); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177-178 (1989). When a permissive subject of bargaining is involved, the parties may voluntarily bargain over the issue, but neither party can insist upon a permissive subject as a condition precedent to reaching an agreement on mandatory bargaining subjects. *AFSCME, Local 1277 v Center Line*, 414 Mich 642, 652 (1982). See also *NLRB v Borg-Warner Corp*, 356 US 342, 349 (1958). [*Waterford School District*, 23 MPER 91, 23]

Mandatory Subject of Bargaining

MUST negotiate, if requested

Examples:

- Wages
 - Pay rate and premium rates (e.g., night/weekend/holiday)
 - Frequency of pay (e.g., weekly/bi-weekly)
- Hours
 - Start/end times
 - Length of shift or work day (8 hrs. vs. 10 hrs.)
- Other terms & conditions of employment

Seniority

Layoff-Recall**

Dress code/Uniforms

Leave time

Discipline**

[***unless under Teacher Tenure Act*]

Permissive Subject of Bargaining

PopQuiz5:

A public sector 3- year contract in effect since January 1st states that “the Employer will pay 80% of the health insurance premium”. When is the earliest that the Employer can change the premium share formula from 80% to the statutory hard cap?

- The following January 1st
- At the start of the medical benefit plan year
- After contract expiration

Permissive Subject of Bargaining

- **May** negotiate, but **not required** to do so
- Inclusion in a CBA does not make a permissive subject become mandatory when CBA expires

Examples:

- Employer's choice of hard cap or 80/20 split on health insurance premium contribution [*Decatur Pub Sch*, 27 MPER 41 (2014) on 1-21-14 interpreting 2011 PA 152]
- Employer's decision to provide overtime work & how much (Core of entrepreneurial control) [*City of Detroit*, 23 MPER 30 (2010) on 4-29-10]
- Creating positions within the bargaining unit
[*Menominee Pub Sch*, 1977 MERC Lab Op 666]

Permissive Subject of Bargaining (cont.)

Examples -continued:

- Elimination of bargaining unit positions;
[Centerline Sch Dist, 1982 MERC Lab Op 756; City of Detroit, 23 MPER 30 (2010) on 4 -29-10]
- Positions placed in bargaining unit; *[Detroit Fire Fighter's Ass'n, Local 344 v Detroit, 96 Mich App 543, 546 (1980); Wayne Co, 2001 MERC Lab Op 339, 344]*
- Routine assignments within an employee's normal job duties;
[City of Saginaw, 1973 MERC Lab Op 975]
- Ground Rules during bargaining, such as use of recording devices during negotiations or grievance meetings;
[Charter Township of Flint, 17 MPER 54 (2004) on 8-9-04]

Prohibited/ Illegal* Subject of Bargaining

Parties may discuss, but **UNENFORCEABLE** in a CBA or LOA:

Examples:

- Outsourcing non-instructional support services in public schools; (1994 PA 112)
- Retroactive payment of higher wages & benefits, including step increases, after CBA expiration; (2011 PA 54)
 - Applies to lanes [Waverly Sch, 26 MPER 34 (2012) on 12-14-12].
 - Does not apply to Act 312 eligible groups
- Decisions by a public school employer regarding teacher placement such as hiring, layoff and recall; (2011 PA 103) [Pontiac Sch Dist, 27 MPER 52 (2014) on 5-20-14]

**Note: The terms “Prohibited” or “Illegal” subject of bargaining are used synonymously for collective bargaining purposes.*

Bargaining over a non-mandatory subject

- A party violates its duty to bargain by insisting on negotiating a non-mandatory subject of bargaining (permissive or prohibited/illegal) over the *clear and express refusal* to bargain that subject by the other party; [*Calhoun ISD*, 28 MPER 26 (2014) on 9-15-14, ALJ citing *Laredo Packing Company*, 254 NLRB 1, 18 (1981); and *Ionia Public Schs*, 28 MPER 58 (2014) on 12-18-14]
- **However**, if requested, a party may have a duty to bargain over the *effect or impact* of a decision made on a permissive subject of bargaining; [*Ecorse Bd of Ed*, 1984 MERC Lab Op 615 on 6-4-84; and *Shelby Township*, 28 MPER 21 (2014) on 8-18-14].



LABOR MEDIATION

- Contract
- Grievance

Steps to MERC Mediation

CONTRACT

- New BU or CBA Expires
- Parties Negotiate
- Request Mediation
- Move to FF or 312
- 312 Award or FF Report
- Agreement or Implementation
- CBA in Effect

GRIEVANCE

- Unexpired CBA
- Grievance filed—
CBA violation alleged
- Grievance Procedure Steps
- Request MERC Mediation
- Arbitration

Labor Mediation

- Purpose
 - Assist in resolving disputes in CBA negotiations and grievances
 - Operative word is “Assist”

- Mediators **cannot**:
 - Decide or set the terms of your CBA, LOA or grievance settlement
 - Mandate CBA agreement or grievance settlement
 - Order a party to change positions
 - Determine if parties at impasse

- Mediators **can**:
 - Schedule, facilitate & adjourn meetings
 - Discuss disputed issues & explore options
 - Assist in drafting proposals & agreements
 - Propose recommendations for resolution

Mediation Expectations

- Applies to CBA Negotiations and Grievance disputes
- Mediators are neutral 3rd parties
- Process is confidential & non-binding
- Mediators seek to understand the respective positions
- Mediators seek to identify areas of compromise

Initiating MERC Mediation

- Mediation
 - Status of Negotiations form filed 60d before CBA expires (contract)
 - Grievance Mediation Request filed when ready for assistance (grievance)
 - Either party can file with MERC
 - MERC initiates case and sends parties the case assignment notice

- Assignments notice contains:
 - MERC Case number
 - Name of assigned Labor Mediator
 - Labor Mediator's Contact information

[NOTE: Parties cannot pick their own MERC Labor Mediator]

When to call in the Labor Mediator?



Contacting the MERC Labor Mediator

- Use Assignment Notice info
- Mediation does not require settlement
- Only contact mediator when time is right
- Not too soon....not too late

Not too soon . . .

- Best that parties try to resolve issues w/o intervention
- Labor Mediator is used to assist in reaching settlement
- Labor Mediators do not advocate for either side
- A cooperative, professional working relationship needs to exist long after negotiations/ mediation ends

. . . . Not too late

- Parties frustrated and progress has stalled, BUT....
- Parties not locked into their positions
- Arrive willing to explore possible alternatives
- Remain open to compromise and possible settlement

Fact Finding

- Following mediation, CBA negotiations might settle if facts were determined and made public
- MERC appoints a neutral 3rd party (Fact Finder) to hear both sides of the remaining disputed issues
- Written Recommendation produced to help parties settle
- If no settlement; Employer may implement terms of LBO
[Redford Union Sch Dist, 23 MPER 32 (2010) on 4-15-10]
- Applies to Public Sector CBA Bargaining only
- Fact Finder fees fully paid by the State

Act 312 Arbitration

- Binding resolution of CBA disputes in certain public safety groups
- **Only** applies to public police or fire department employees of a city, county, village or township engaged as:
 - Police officer
 - Fire fighting, or subject to the hazards thereof
 - Emergency telephone operator, if directly employed by a public police or fire department
 - EMS employees employed by a public police or fire department
 - Includes those under a public authority created by 1+ municipalities; (2011 PA 116)
- Does not apply to:
 - Colleges or Community colleges; [*EMU*, 62 Mich App 87 (1975); *MSU (Police)*, 26 MPER 44 (2013)]
 - 911 authority of consolidated dispatch
 - Grievance disputes
 - Non-public safety employees
 - Private sector employees
- 312 Arbitrator's fees paid by the Parties

Grievance Mediation Extras

- Purpose:
 - Assist parties to resolve grievance disputes
 - Operative function is “Assist”
 - Save \$\$\$
 - Preserve Relationships

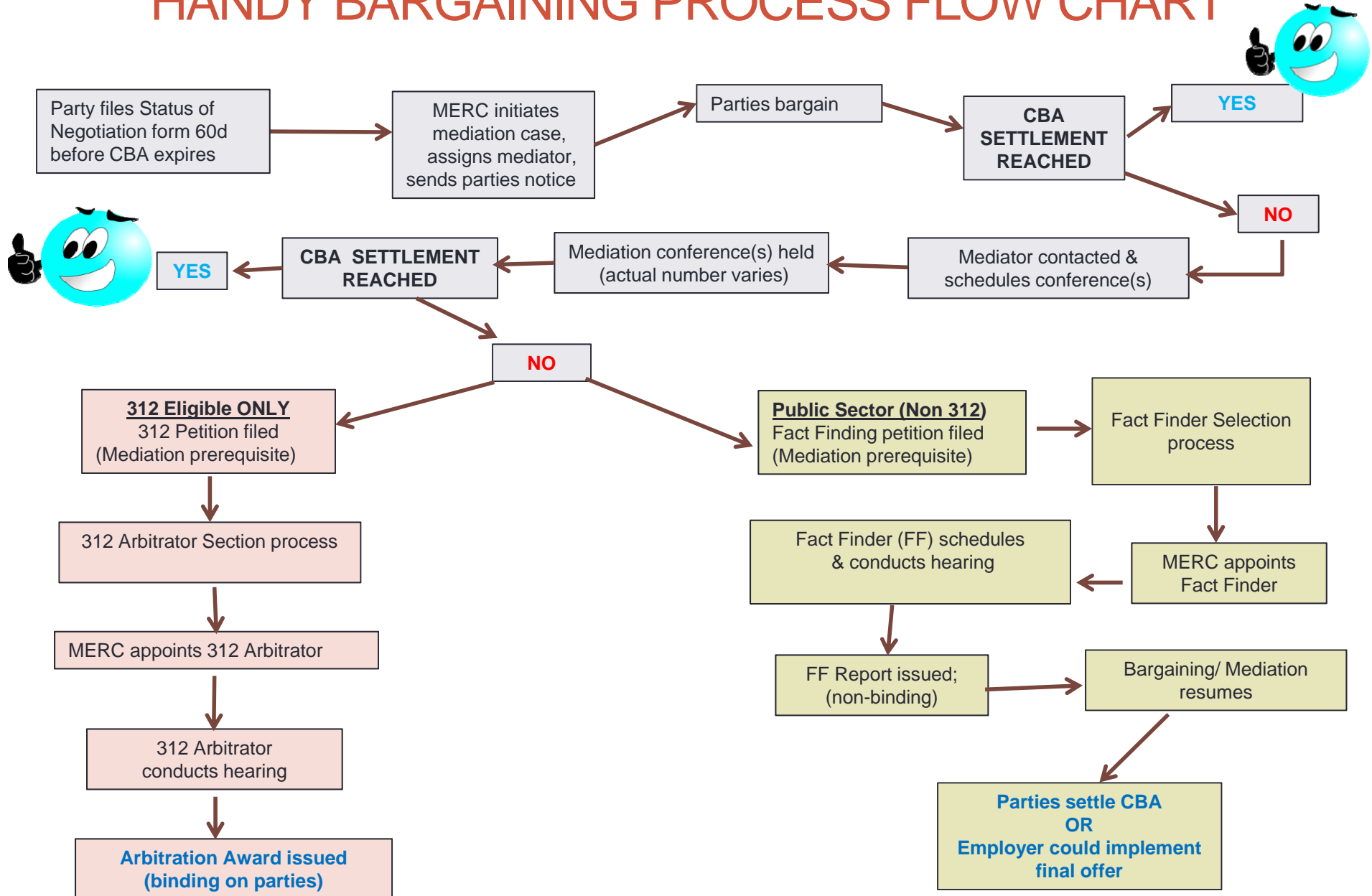
- FYIs:
 - Confidential, Non-binding if no settlement occurs
 - Mediators lack authority to issue decisions
 - Mediators cannot force a party to change its position

- Mediators will:
 - Schedule, hold & adjourn meetings
 - Discuss the disputed issues
 - Assist in seeking and drafting agreements

Grievance Arbitration

- Next step if Grievance Mediation has not resolved dispute
- Neutral 3rd party rules on CBA grievance
- Ruling is binding-- subject to CBA language
- MERC provides appointment service using a list of approved arbitrators
- MERC's appointment service is NO COST to the parties
- Parties pay the grievance arbitrator's costs and fees
- Use of MERC's service subject to CBA or other written agreement

HANDY BARGAINING PROCESS FLOW CHART



KEY MERC AUTHORITY

▪ CBA Expiration

- Generally, Mandatory Subjects of Bargaining continue and unilateral changes cannot occur prior to impasse; *[36th District Ct, 21 MPER 19 (2008) on 4-9-08]*
- Exceptions exist such as recent legislation like 2011 PA 54 and 2011 PA 152
 - No wage increases during CBA expiration; includes steps, lanes and retro pay; *[Waverly Sch, 26 MPER 34 (2012) on 12-14-12]*
 - Increases in insurance costs pass on to employees during CBA expiration
- NOTE: Limits under PA 54 and PA 152 do not apply to 312 eligible groups

▪ DFR Slides 19-21

▪ Duty to Bargain

- **Impasse:** Based on the 'Totality of Circumstances' during bargaining *[City of Detroit, 22 MPER 39 (2009) on 4-16-09; Oakland Cmty Coll, 2001 MERC Lab Op 273 on 10-24-01.]*
- **Information Requests:** Parties entitled to information reasonably related to bargaining & grievance purposes; *[DFT, Local 231, v Detroit Bd of Ed, 406 Mich 579 (1979)]*
- **Demand Required:** Must make a request to bargain before obligation arises; *[City of Dearborn, 20 MPER 110 (2007) on 1-9-07]*
- **Prohibited Subjects of Bargaining:** Slides 31-32

KEY MERC AUTHORITY-- continued

- **Bargaining Unit Placement**

- An employer may not alter unit placement without the Union's agreement or a Commission order.
- Bargaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative, but a matter reserved to the Commission by Section 13 of PERA. *[Detroit Fire Fighters v Detroit, 96 Mich App 543 (1980)]*

- **Effects Bargaining**

Employer can decide non-mandatory areas, but often must bargain “the impact” if requested (See slide 20):

- Hard cap or 80/20 option u/ 2011 PA 152 *[Decatur Sch, 27 MPER 41 (2014) on 1-21-14; Shelby Township, 28 MPER 21]*
- Reorganization of Work Departments; *[Wayne County Community College 20 MPER 89 (2007) on 9-25-07; City of Detroit, 23 MPER 30 (2010) on 4-29-10]*

- **Emergency Manager Law (2012 PA 436)**

- Employer can decline to participate in bargaining (including 312 Arbitration) during State declared financial emergency whether under an EM *[City of Detroit, 27 MPER 6 (2013) on 6-14-13]* or approved Consent Agreement *[Wayne County, 29 MPER 26 (2015) on 10-16-15]*

KEY MERC AUTHORITY-- continued

- **Freedom to Work (FTW)** (2012 PA 348, 349)
 - Does not apply to 312 eligible groups
 - Employees who do not join the union cannot be required to pay agency/other fee as a condition of employment
 - Window periods to resign from union violate PERA.
 - [*Saginaw Educ. Assn.*, 29 MPER 21 (2015) on 9-23-15]
 - **NOTE: Obligation to pay dues payments could continue beyond Union opt out depending on language of dues authorization agreement with the Union.** [*Teamsters Local 214*, 29 MPER 46 (2015) on 12-11-15]

- **Joint Employers:** A Joint employer can be bound to a CBA even where only one and not all ratified or participated in bargaining process. [*Washtenaw Co (Treasurer)*, 21 MPER 27 (2008)]

- **Weingarten Rights**
 - Employee entitled to union representation at investigatory interview if reasonably believes discipline may result. Employee must request; [*NLRB v Weingarten*, 429 US 251 (1976); *City of Dearborn*, 25 MPER 69 (2012) on 3-16-12]

- **Miscellaneous**
 - Public school employers can not assist in dues check off; (2012 PA 53)
 - Public sector unions must file annual audit with MERC; (2012 PA 53)

KEY MERC AUTHORITY-- continued

- **Public School Strikes/ Lockouts (2016 PA 194)**

- Replaces PA 112 process
- Applies to Public School (K-12) strikes and lockouts
- Expedited process– 1 or 2 steps depending if strike or lockout
- Strike– 2 stages w/ hearings:
 - Stage 1:
 - a. Proof of Strike conditions supported by affidavits
 - b. MERC rules on preponderance if strike existed
 - c. Violators Names filed if strike existed; otherwise matter dismissed
 - Stage 2:
 - a. Violators Seek to Defend against violation
 - b. ALJ conducts hearing and rules;
 - c.. Violators can be fined or worst (loss of cert)
- Lockout– 1 Stage w/ hearing:
 - Stage 1:
 - a. Proof of Strike conditions supported by affidavits
 - b. MERC rules on preponderance if lockout existed
 - c. If YES-- Violation exists; If NO-- case dismissed

MERC WEBSITE

www.michigan.gov/merc

- Invaluable Resource for MERC/BER information
- Readily available – 24 hours day / 7 days week
- FAQs, Forms, MERC Decisions, “What’s New” etc....
- Agency Policies such as Fax & Email Filing
- MERC Guide has overview of agency processes & history

Michigan Employment Relations Commission

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GLOSSARY OF ACRONYMS

TERM	MEANING
AFL – CIO	American Federation of Labor and the Congress of Industrial Organizations
BER	Bureau of Employment Relations
CBA	Collective Bargaining Agreement
DFR	Duty of Fair Representation
FAQ	Frequently Asked Question
LARA	Michigan Department of Licensing and Regulatory Affairs
LBO	Last Best Offer
LMA	Labor Relations and Mediation Act (1939 PA 176)
LOA	Letter of Agreement
LOU	Letter of Understanding (aka MOU--Memorandum of Understanding)
MERC	Michigan Employment Relations Commission

GLOSSARY OF ACRONYMS (CONT.)

TERM	MEANING
MERC Lab Op	MERC Labor Opinions (published MERC Decisions until 2002)
MPER	Michigan Public Employee Reporter
NLRA	National Labor Relations Act (Private Sector)
NLRB	National Labor Relations Board (Administers the NLRA)
ULP	Unfair Labor Practice (Often referred to as a “Charge”)
PA	Public Act (e.g., 2011 PA 54)
PERA	Public Employment Relations Act (1947 PA 336)
RTW	Right to Work (also known as FTW)
SOL	Statute of Limitations