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Municipal Law News

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WILL MAMA BE GOOD TO YOUR LOCAL GOVERNMENT?
A LOOK AT MICHIGAN'S TENTATIVE ATTEMPT TO RESOLVE THE PERSONAL PROPERTY TAX ISSUE.

- Joshua M. Wease

Michigan, like many other states, has been struggling with the issue of how to eliminate the personal property tax without decimating local government budgets. Michigan passed a package of legislation comprised of ten different acts and amendments in late December 2012 in an attempt to partially eliminate the personal property tax. The legislature's *tentative* solution is to create a Metropolitan Area Metropolitan Authority ("MAMA")(2012 PA 407). The new Authority is funded by some direct appropriation by the legislature and appropriating a portion of Michigan use tax collections. This is only a tentative solution because it is only enacted if approved by voters in an election that will be held in August 2014.

Overview of the Legislation

The ten pieces of legislation can be divided into two categories. Four of the ten pieces implement mechanisms for replacement funding for local governments ("funding acts"). The other six acts implement the actual personal property exemptions. The funding acts are House Bill 6025, House Bill 6026, House Bill 6024, and House Bill 6022, all of 2012.

House Bill 6025 enacts the Michigan Metropolitan Area Metropolitan Authority and establishes the Metropolitan Areas Council as its governing body. This is the key piece of legislation because if this Act is not approved by the voters in August 2014, then *all* of the other acts are either repealed or not enacted. It provides for the calculations of loss due to the new exemptions and establishes the criteria for being classified as a "qualified municipality" that would be eligible for a distribution. For purposes of MAMA, a qualified municipality is one that experienced a reduction in taxable value of more than 2.3% due to the new exemptions. A municipality will not receive a MAMA distribution if it has increased its millage rate to replace debt loss or school debt loss.

House Bill 6026 amends several provisions of the Use Tax Act, 1937 PA 94 to fund MAMA. This creates a formula for apportioning part of the use tax collected by calculating two components -- a "state component" and a "metropolitan areas component." The amounts of the components are designed to generate a certain amount of funds for fiscal years between 2015 and 2024. For fiscal years after 2024, the Treasury will apply a "growth factor," but that is not explained or defined in the statute.

Local governments may be able to replace lost revenue by adopting a special assessment district for "essential services." House Bill 6024 enacts the Local Unit of Government Essential Services Special Assessment Act, which would allow local government to pass special assessment districts on commercial and industrial property owners within the boundaries of that local government for funding "essential services" such as police and fire departments. However, a local government may not adopt a special assessment district under this act, if they have increased a millage ■►

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rate for essential services obligations incurred before 2013 as a result of the exemptions provided in the changes to the General Property Tax Act ("GPTA").

Last, House Bill 6022 amends 2002 PA 48 to transfer the duties and powers of the Metropolitan Extension Telecommunications Rights-of-way Oversight Authority (METRO Authority) to MAMA and abolishes the METRO Authority.

The other six acts encompass the actual personal property tax exemptions by amending the GPTA and several other statutes involving already established tax exemptions for commercial and industrial property.

- SB 1066 amends Technology Park Development Act (1984 PA 385) to maintain technology park facility tax exemptions for those entities that currently enjoy a tax exemption as of 12/31/2012.
- SB 1067 amends GPTA, to exempt new eligible manufacturing personal property, which was exempt as of 12/31/2012.
- SB 1068 amends the Enterprise Zone Act (1985 PA 224), maintaining exemptions for that property located in enterprise zones.
- SB 1069 amends GPTA by adding provisions for exempting "eligible manufacturing personal property" from personal property taxes.
- SB 1070 amends GPTA by adding provisions that exempt personal property taxes when the total combined taxable value of all industrial and commercial personal property under the control of the owner is less than $40,000. This requires the owner to file an annual affidavit attesting to attest to the total combined taxable value of its property.
- SB 1071 amends GPTA by adding provisions that owners of qualified previously existing (in the last 10 years) "eligible manufacturing personal property" is exempt from the collection of personal property taxes and must only file an affidavit in the first year in which an exemption is claimed.

The impact of these exemptions will depend on the individual local government's mix of commercial and industrial business. While the enactment of these changes will not be determined until August 2014, local governments may want to assess potential shortfalls based on their current mix of industrial and commercial personal property.

Uncertainty for Local Government

The main problem that local governments face with these changes is uncertainty. First, this legislation is dependent on MAMA being approved by voters in August 2014. Second, even if MAMA is passed by the voters, it remains to be seen which local governments will receive distributions from MAMA and to what extent those distributions will replace the loss of personal property tax revenue. Last, there are details in this legislation that have not been clarified. After reviewing the legislation, local governments will likely be left with a host of questions.

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U.S. SUPREME COURT TO RULE ON EMPLOYMENT CASE IMPACTING MICHIGAN CIVIL RIGHTS LAW

- Karl W. Butterer

The United States Supreme Court is poised to make a decision that may affect how the federal courts treat Michigan employers sued for violations of Title VII, the federal law that prohibits race and gender discrimination and harassment. The question at the heart of *Vance v Ball State University* is "*Who is a supervisor*?"

Federal anti-discrimination laws make an important distinction between workplace discrimination or harassment perpetrated against an employee by a fellow co-worker versus by a supervisor. Where an employee is discriminated against or harassed by a fellow co-worker, the employer may only be held liable for these bad acts if the employer was negligent either in discovering or remedying the harassment. In other words, if the employer did not have notice of the co-worker's bad acts, or took reasonable steps to stop the bad acts, then the employer may avoid liability.

Employers are more likely to be liable for discrimination and harassment committed by an employee's supervisor. For example, where a supervisor terminates, demotes or reduces the pay of an employee because of the employee's race or gender, an employer will automatically be held liable for those acts. However, if a supervisor sexually or racially harasses an employee but does not make a tangible adverse employment decision against the employee (e.g. a demotion), the employer may avoid liability if

1. it exercised reasonable care to prevent and correct the bad behavior, and
2. the victim unreasonably failed to take advantage of the employer's efforts to stop the behavior.

For example, if the employer had a robust anti-discrimination policy and the victim failed to report the harassment under the policy, then the employer may avoid liability for the acts of the supervisor.

Significantly, neither the United States Congress, nor the United States Supreme Court has ever defined the term "supervisor." Lower federal courts define the term differently. As things stand now, whether a person is a "supervisor" or a "co-worker" may depend on where the employer is located. The Sixth Circuit court, the federal court with jurisdiction over Michigan, has never published a decision defining "supervisor."

The United States Supreme Court will likely define the term "supervisor" in the *Vance* case. The employee in *Vance* advocates a broad definition of "supervisor" to include all personnel overseeing the victim's daily work assignments and performance. The employer advocates a much narrower definition, which only includes those with power over formal employment status, e.g. the ability to hire, fire, demote and discipline.

How the *Vance* Court ultimately defines "supervisor" under federal law may be the difference between a Michigan employer winning or losing a federal discrimination case. Please note that Michigan's state anti-discrimination laws differ in some respects from federal law, including whether a supervisor may be held personally liable.

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MICHIGAN SUPREME COURT CLEARS WAY FOR EMPLOYEE WHISTLEBLOWER CLAIMS

- Karl W. Butterer

In a decision surely to be relied on by future plaintiffs, the Michigan Supreme Court issued an opinion which will make it more difficult for employers to defeat whistleblower claims before trial. The case referenced in this article is *Debano-Griffin v Lake County and Lake County Board of Commissioners*.

Cheryl Debano-Griffin sued her employer, a county board of commissioners, after the board terminated her position as the director of the county 911 department. The board asserted that it eliminated her position due to a budget crisis, and relied upon a financial audit and the testimony of the county clerk to demonstrate the crisis. In contrast, Ms. Debano-Griffin claimed that the board fired her because she had complained to the board of commissioners about an unlawful transfer of funds.

Before trial, the board moved to have the case dismissed on the grounds that Ms. Debano-Griffin could not produce sufficient evidence to show that its stated reason for eliminating her position was false. The trial court denied the board's motion and a jury subsequently returned a verdict for Ms. Debano-Griffin. On appeal, the Court of Appeals reversed the verdict finding that, based upon the record; no reasonable jury could have concluded that the board terminated her because of her complaints.

However, on appeal to the Michigan Supreme Court, the Court reversed the Court of Appeals and reinstated the jury verdict. Although the Supreme Court acknowledged the general rule that the mere closeness in time between an employee's whistleblowing and the employer's adverse employment action is simply not enough for a jury to conclude that the adverse action was the result of the whistleblowing, the Court explained that the following additional scenarios may strengthen the "causal link":

1. if the employee makes her complaint directly to the person(s) who then made the adverse employment decision, then the retaliation link is stronger,
2. the greater the negative effect of the whistleblowing activity on the employer, the greater the likelihood that the employer retaliated against the employee, and
3. if the employer took steps to correct the alleged unlawful activity raised by the whistleblower, then the employer more likely retaliated against the employee.

The Supreme Court's opinion also eroded employers' traditional "business judgment" defense. That defense prohibits an employee from trying to prove a retaliation claim by attacking the employer's decision on the grounds that it was unwise, imprudent or incompetent. The Court held that Ms. Debano-Griffin successfully avoided the business judgment defense by asserting that she was not questioning the judgment of the board of commissioners, but rather she was questioning the meaning of the financial data upon which the board relied to make its decision. Similarly, the Court held that Ms. Debano-Griffin avoided the impact of the business judgment defense by questioning the credibility of the county officer who asserted that the county faced a financial crisis, as opposed to questioning the board's judgment.

What does this mean to employers? This opinion will likely make it more difficult for employers to eliminate whistleblower claims with a summary disposition motion, requiring more employers to go to trial.

HEALTH CARE BENEFITS PROVIDED TO SAME SEX COUPLES IN MICHIGAN - ARE THE LAWS CHANGING?

- Mindi M. Johnson

In 2008, the Michigan Supreme Court concluded that domestic partnership policies intended to provide health care benefits to same sex couples violated Michigan law. Specifically, *National Pride at Work v Governor* held that such policies violated the Michigan Marriage Amendment ("Marriage Amendment") by recognizing same sex domestic partnerships as analogous to a marriage or similar union. (The Marriage Amendment recognizes the union of one man and one woman as the only agreement recognized as a marriage and also prohibits public employers from providing health insurance benefits to their employees' same-sex domestic partners.)

Since the decision in *National Pride*, public employers have sought ways to provide health care benefits to their employees and their employees' domestic partners without violating the Marriage Amendment. Employers did so by modifying the language of the benefit policies to exclude the term "same sex" when referring to the individuals eligible to receive benefits. For example, benefits may be offered to state employees and "other qualified adults."

This strategy was recently challenged in the Michigan Court of Appeals decision, *Attorney General v Civil Service Commission*. In this unpublished opinion, the Michigan Court of Appeals upheld a policy providing health care benefits to state employees and "other eligible adult individuals." The provision at issue addressed unmarried employees or those whose spouses were not eligible for enrollment in the plan. In that situation, the employee was allowed to enroll one "other eligible adult individual," provided that certain conditions were met. These conditions included the following: the other eligible adult individual must:

1. be at least 18 years of age;
2. not be a member of the employee's immediate family; and
3. have jointly shared the same regular and permanent residence for at least 12 continuous months, and continue to share a common residence with the employee other than as a tenant, border, renter or employee.

The Court of Appeals initially recognized the holding of *National Pride,* but identified its limits. The Court of Appeals indicated that there was no absolute prohibition against same-sex domestic partners receiving benefits through their relationship with an employee so long as that receipt was not based on the employer's recognition of that relationship as a marriage or similar union. The Marriage Amendment did not prohibit domestic partnership policies, particularly when the employee could share benefits with a wide variety of other people, such as an opposite-sex boyfriend or a housemate.

The Court of Appeals found that the benefits policy at issue in this case was gender-neutral; did not implicate race, ethnicity, national origin or illegitimacy; did not invoke any fundamental right; and did not violate equal protection. It did note that the policy, and in particular the restrictions contained in it were absurd. ("An employee could share his or her benefits with a fraternity brother but not an actual brother.) However, the Court of Appeals concluded that the policy passed muster in that it appeared to serve the negotiated, bargained-for needs of the individuals affected by it.

The Court of Appeals specifically recognized that the policy providing health care benefits to state employees and "other eligible adult individuals"

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was substantially different from the policy at issue in *National Pride*. It found that the provision of health care benefits to same-sex domestic partners, when not tied to the recognition of that relationship as a marriage or similar union, would be upheld.

If you have any questions about how your health care benefit policies may be implicated by this ruling, please contact Mindi Johnson.

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UPCOMING WEBINARS

Avoid Common Freedom of Information Act Mistakes

Speaker: **Anne M. Seurynck**

March 14, 2013 11am-12pm

This session will focus on making sure the public body timely and accurately responds to FOIA requests. We will also focus on avoiding common FOIA mistakes.

REGISTER: bit.ly/FOIAwebinar

Public Sector Employment Law - The Basics

Speaker: **Michael R. Blum**

April 18, 2013 11am-12pm

This webinar will focus on the basic employment issues facing public sector employers.

REGISTER: bit.ly/Employmentwebinar

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