

# Briefly

A Publication of the Government Law Section of the State Bar of Michigan

June 2023 ■ Sonal Hope Mithani, Chair ■ Kevin A. McQuillan, Editor-in-Chief

## 23rd Annual MAMA/Government Law Section Summer Joint Educational Conference

**Crystal Mountain Resort**  
**June 23-24, 2023**

Please join us for the 23rd Annual MAMA/Government Law Section Summer Joint Educational Conference, which will take place on Friday and Saturday, June 23-24, at the Crystal Mountain Resort in Thompsonville. This year's conference will focus on issues related to housing and homelessness, and will include updates on the Section's amicus participation and recent United States Supreme Court decisions. Attendees are also encouraged to participate in the 10th Annual Jack Beras Memorial Cup Bocce Tournament on Saturday.

Registration information is available on the Section's [website](#).



Photos Courtesy Crystal Mountain Resort

# Government Law Case Summaries

By Debari T. Gordon-Lehman  
Rosati, Schultz, Joppich & Amtsbuechler

## ***Goldblum v University of Cincinnati***

In *Goldblum v University of Cincinnati*, Case No. 22-3289 (March 10, 2023), the U.S. Court of Appeals Sixth Circuit held that the Plaintiff, Andrea Goldblum, failed to show Defendant-University of Cincinnati's (UC) reasons for asking her to resign from her position were a pretext for discrimination. Plaintiff was UC's Title IX Coordinator, and was responsible for ensuring the University's policies and practices complied with Title IX and other laws. Plaintiff claimed the University forced her to resign after she sent a letter to the student newspaper about UC awarding a "triumph cord" to a convicted sex offender after her supervisor instructed her not to submit anything. The supervisor reported Plaintiff for insubordination, prompting an investigation which revealed Plaintiff repeatedly ignored Title IX complaints, criticized her colleagues in front of her staff, and missed reporting deadlines. The district court dismissed the claims and the Sixth Circuit affirmed. The Court held the University had legitimate non-retaliatory reasons to fire Plaintiff and Plaintiff failed to demonstrate pretext. Moreover, the Court held that her letter was not protected activity because it did not complain of sex discrimination. Additionally, the Court found that because her "own files and correspondence confirmed that she failed to meet many of her reporting deadlines, UC had a factual basis to terminate her for poor work performance."

## ***Blue Water Cannabis Co., LLC v City of Westland***

In *Blue Water Cannabis Co., LLC v City of Westland*, COA No. 359144 (April 13, 2023), Plaintiffs challenged Defendant-City's application process to acquire a license to sell marijuana. Each application included a waiver clause in which the Plaintiff-Applicants acknowledged the application process was a competitive process for which they waived any right to challenge the City's selection process or selection criteria. The trial court granted summary disposition in favor of the City. On appeal, the Michigan Court of Appeals held (1) waiver clauses were valid and enforceable; (2) the City's adopted criteria for evaluating applications did not conflict with the Michigan Regulation and Taxation of Marihuana Act ("MRTMA"); and (3) the Open Meetings Act was not violated when the City's Selection Committee met in private to score the applications and arrive at the recommendations it made to the City Council regarding which applications qualified for licenses.

The waivers were valid and enforceable because Plaintiffs failed to offer "any factual reasons why the waivers would not be enforceable." Additionally, Plaintiffs failed to demonstrate "that any provision of the MRTMA clearly prohibits the waivers adopted by the" City. The Court next rejected Plaintiffs' claims that the City was not permitted to adopt criteria for evaluating an applicant's suitability to operate a marijuana business within the community that were not directly relevant to the applicant's suitability to operate a business in compliance with the MRTMA. The Court explained that "there is nothing in the language of MCL 333.27956 or MCL 333.27959(4) that suggests that the state intended to restrict the criteria a municipality can consider when evaluating competing licensing applications, other than those limitations specifically prescribed in MCL 333.27956. Thus, a municipality may consider criteria unique to its own community and citizens, subject to the restrictions in MCL 333.27959(4)." Finally, the Court found that because the City's selection committee





“was not operating as a public body, it was not required to comply with the OMA.”

### ***Heos v. City of E. Lansing***

In *Heos v. City of E. Lansing*, COA No. 361105, 361138 (April 12, 2023), the Plaintiff, James Heos, filed a class-action lawsuit claiming the franchise fee between the City of East Lansing and the Lansing Board of Water and Light (LBWL) was an unlawful tax under the Headlee Amendment and the Foote Act. The City sought dismissal arguing the Headlee Amendment, unjust enrichment, and assumpsit claims were time barred and that Plaintiff was not a real party in interest for purposes of enforcing the Foote Act. The trial court denied the motion and the City appealed. The Court of Appeals determined the Headlee Amendment, unjust enrichment, and assumpsit claims were barred by the statute of limitations because the claims were not filed within one year after the franchise ordinance was adopted. The Court of Appeals also reasoned that the Foote Act only applies to electric utility providers, not electric customers, and thus Plaintiff “and the class have no rights or interests stemming from the Foote Act.”

### ***Steward v. School Dist. of the City of Flint***

In *Steward v. School Dist. of the City of Flint*, COA No. 361112, 361120 (May 11, 2023), the Plaintiff, Anita Steward, was the superintendent of Flint City School District. Plaintiff's employment agreement included an arbitration clause for resolution of disputes. A conflict developed between Plaintiff and several members of

Flint's Board of Education which culminated in Plaintiff's removal and replacement with an interim superintendent. Plaintiff claimed the Board created a hostile work environment. The Board moved for summary disposition based on the contractual arbitration provision. The trial court granted relief to the entity Defendants, but not the individual board members because they were not parties to the employment agreement. The Board members appealed, and the Court of Appeals reversed based on agency principles. The Court determined that depriving “the board members of the arbitration provision in the employment agreement that was signed by the district and its superintendent would nullify ‘the effect of the rule requiring arbitration[.]’”

### **About the Author**

***Debani T. Gordon-Lehman*** is an Associate Attorney at Rosati, Schultz, Joppich & Amtsbuechler in Farmington Hills Michigan. Debani focuses her practice on municipal law, employment law, law enforcement and civil rights. She also assists with providing general counsel services to several municipalities. Debani assists these communities by researching and providing legal opinions, drafting ordinances, and assisting with FOIA and OMA compliance. Recently, Debani has lent her expertise to Rosati Schultz's municipal clients to assist in handling water and sewer class action cases and defense work for municipalities being sued due to their adult/medical marijuana licensure process.



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# Attorney General Opinion Updates

By George M. Elworth, Assistant Attorney General, State Operations Division

## Opinion No. 7320

**March 23, 2023**

### INCOME TAX ACT:

**Reduction in the income tax rate where a percentage increase in the general fund/ general purpose revenue for the preceding fiscal year exceeded the inflation rate for that same period and the inflation rate is positive.**

An individual income tax rate reduction under MCL 206.51(1)(c) is temporary (i.e., for one year only) and if the income tax rate for a particular year is reduced under MCL 206.51(1)(c), it returns to 4.25% in the subsequent year, as described in MCL 206.51(1)(b).

## Opinion No. 7321

**April 4, 2023**

### NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT: HAZARDOUS SUBSTANCES:

**The agricultural release exception and due care obligations.**

Despite the applicability of the agricultural release exception in Section 20101(1)(pp)(iv) of Part 201, MCL 324.20101(1)(pp)(iv), a property where a hazardous substance, such as pesticide, has been deposited, disposed of, or otherwise comes to be located, would

still constitute a “facility” within the meaning of Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), where the other required elements of the statutory definition of “facility” are met, and an owner or operator who knows the property is a “facility” must comply with the due care obligations listed in Section 20107a of Part 201, MCL 324.20107a.

## Opinion No. 7322

**May 5, 2023**

### CONST 1963, ART 1, § 2:

**Constitutionality of 2022 PA 196, 197, amending Michigan Election Law.**

### U.S. CONST, AM XIV:

**Modifications to 2022 PA 197 to accommodate individuals with a print disability.**

### AMERICANS WITH DISABILITIES ACT:

On a facial review, Public Acts 196 and 197 of 2022 do not unconstitutionally burden the fundamental rights of overseas voters who do not possess a Department of Defense verified electronic signature.

Whether the Americans with Disabilities Act requires the Department of State to allow individuals with a print disability to use the secure web portal to be developed under Public Act 197 of 2022 cannot be determined without a request for an accommodation by a potential voter and the development of a factual record.

### Mission Statement

The Government Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of *Briefly*. Membership in the Section is open to all members of the State Bar of Michigan and to law students.

# Legislative Update

By Kester So, Laura Bassett, John Weiss, and Amelia Livingway

Dickinson Wright PLLC

A number of bills of public sector interest currently are under consideration in the Michigan Legislature. The following are summaries of several of the most pertinent bills.

## Enacted Legislation

- Civil Rights. Public Act 6 of 2023** codifies the Michigan Supreme Court position that sexual orientation and gender identity or expression are protected categories under the prohibition of “discrimination because of... sex” in the Elliott-Larsen Civil Rights Act (ELCRA). Amends title & secs. 102, 103, 202, 203, 204, 205, 206, 207, 209, 301, 302, 302a, 402, 501, 502, 504, 505 & 506 of 1976 PA 453 (MCL 37.2102 *et seq.*).
- Labor. Public Act 9 of 2023** removes “Right to Work” laws from the Public Employment Relations Act. Amends secs. 9, 10, & 15 of 1947 PA 336 (MCL 423.209 *et seq.*).
- State Agencies. Public Act of 7 of 2023** amends the Revised School Code to amend requirements for the retention of a grade 3 pupil if the pupil is one or more years behind grade level in reading proficiency. The legislation, among other things, deletes provisions previously included in the Revised School Code prohibiting the promotion of a pupil to grade 4 unless the pupil demonstrates a satisfactory reading score, or otherwise demonstrates a grade 3 reading level. Amends sec. 1280f of 1976 PA 451 (MCL 380.1280f).
- secs. 3, 11, 12, 21, 24 & 52 of 1976 PA 388 (MCL 169.203 *et seq.*) & adds sec. 21b.
- Cities. HB 4332** would increase the penalties for certain blight offenders in home rule cities. Amends sec. 4q of 1909 PA 279 (MCL 117.4q).
- Civil Procedure. HB 4484** would revise the statute of limitations and notice requirements for actions against the state government. Amends secs. 6431 & 6452 of 1961 PA 236 (MCL 600.6431 & 600.6452). Tie-barred with **HB 4482** and **HB 4483**.
- Civil Rights. SB 73** would amend the Freedom of Information Act to exempt disclosure of information revealing the identity of an anonymous party in a civil action alleging sexual misconduct and investigating records compiled for law enforcement purposes to the extent that disclosure as a public record would disclose the identity of an anonymous party in a civil action alleging that he or she was the victim of sexual misconduct. Amends sec. 13 of 1976 PA 442 (MCL 15.243).
- Civil Rights. SB 224** would create the legislative open records act as part of the FOIA. Amends secs. 1, 2, 3, 4, 5, 6, 10, 10a, 10b & 13 of 1976 PA 442 (MCL 15.231 *et seq.*). Tie-barred with **SB 223**.
- Civil Rights. HB 4346** would amend the Open Meetings Act to allow electronic meetings to be held by a public body responsible for the investment, administration, or management of a municipal public employee retirement system. However, this would not prohibit the public body from requiring in-person participation of its members at any meeting subject to the act. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).
- Communications. HB 4066** would create a new act establishing the Michigan High-Speed Internet Office in the Department of Labor and Economic Opportunity and providing for its powers and duties,

## Pending Legislation

- Campaign Finance. HB 4326** would modify provisions related to officeholders raising funds when facing a recall and require a candidate to establish a separate account used for recall purposes. Amends

including to provide, upon appropriation, grants and other financial and technical assistance related to broadband and digital infrastructure.

- **Constitutional Amendments.** **HJR B** would prohibit the requirement for individuals to wear a face mask to enter certain facilities. Amends the state constitution by adding sec. 29 to art. I.
- **Construction.** **SB 225** would create a new act that regulates public contracts for asbestos abatement projects, including requiring under certain circumstances background investigations, public posting of certain information, and public hearings.
- **Construction.** **SB 314** would allow use of design-build construction for certain school buildings. Amends secs. 1, 1a & 2 of 1937 PA 306 (MCL 388.851 *et seq.*).
- **Construction.** **HB 4091** would require safety guidelines for lockdown procedures of a school building and installation of emergency responder radio coverage systems in K-12 educational facilities. Amends title of 1937 PA 306 (MCL 388.851 - 388.855a) & adds sec. 3a.
- **Construction.** **HB 4649** would require height-adjustable, adult-sized changing tables in public restrooms. Amends 1972 PA 230 (MCL 125.1501 - 125.1531) by adding sec. 13h.
- **Construction.** **HB 449** would prohibit placement of certain antennas on public school buildings, rooftops, and adjacent structures. Amends 1937 PA 306 (MCL 388.851 - 388.855a) by adding sec. 1e.
- **Counties.** **SB 338** would amend the Charter Counties Act to modify the election of county executives in a charter county and change the election schedule to presidential election years. Amends 1966 PA 293 (MCL 45.501 - 45.521) by adding sec. 14b.
- **Crime Victims.** **HB 4420** would allow law enforcement to share victim contact information with survivor programs. Amends sec. 204 of 2006 PA 110 (MCL 125.3204).
- **Crimes.** **HB 4123** and **HB 4124**, tie-barred, would each amend the Michigan Penal Code to prohibit individuals from intentionally using their professional authority over another person to prevent or attempt to prevent that other person from reporting certain crimes. Amends sec. 483a of 1931 PA 328 (MCL 750.483a).
- **Drains.** **HB 4382** and **HB 4383**, tie barred, would revise the processes contained in Chapter 22 of the Drain Code, regarding determination of sufficiency of petitions and proposed water management district boundaries. Amends secs. 551, 552, 553, 555, 556, 557 & 558 of 1956 PA 40 (MCL 280.551 *et seq.*).
- **Economic Development.** **HB 4375** would expand the definition of “qualified city” in the Land Bank Fast Track Act to allow a city with a population of 50,000 or more to create a local land bank authority as long as the city is not located in a county that already has a county land bank authority. Amends sec. 3 of 2003 PA 258 (MCL 124.753).
- **Elections.** **HB 4033** would add a new section to the Michigan Election Law that would require the state to reimburse local units of government for the cost of conducting a special election to fill a vacancy for a state legislative office if the election is called by the governor and is held on a date other than a regular election date. Amends 1954 PA 116 (MCL 168.1 - 168.992) by adding sec. 634b.
- **Elections.** **HB 4324** would expand the definition of identification for election purposes to include a current concealed pistol license. Amends sec. 2 of 1954 PA 116 (MCL 168.2).
- **Energy.** **SB 273** would require all electric providers to participate in the energy waste reduction program by municipally owned utilities and co-ops, as well as set specific targets for such providers. Amends secs. 73, 75, 77 & 78 of 2008 PA 295 (MCL 460.1073 *et seq.*).
- **Health Facilities.** **HB 4550** would require hospitals to develop a staffing plan for nurses. Amends 1978 PA 368 (MCL 333.1101 - 333.25211) by adding secs. 21525 & 21525a.
- **Housing.** **HB 4273** would require an enforcing agency to notify tenants of violations of the Michigan Housing Law in addition to owners of the premises. Amends sec. 132 of 1917 PA 167 (MCL 125.532).
- **Housing.** **SB 293** would modify provisions relating to the Michigan State Housing Development Authority’s housing and community development fund to facilitate financing of “middle income” housing. Amends secs. 58, 58b, and 58c of 1966 PA 346 (MCL 125.1458, MCL 125.1458b, & MCL 125.1458c).



- **Higher Education.** **SB 350** would allow room and board expenses as an eligible expense under the Michigan Promise Zone Authority Act. Amends sec. 3 of 2008 PA 549 (MCL 390.1663).
- **Labor.** **HB 4585** allows local units of government to adopt an ordinance or resolution establishing right-to-work zones. Amends sec. 14 of 1939 PA 176 (MCL 423.14).
- **Labor.** **HB 4582** would require a collective bargaining representative to represent only those public employees who voted for or authorized representation from the bargaining representative. Amends secs. 1, 10, and 11 of 1947 PA 336 (MCL 423.201, MCL 423.210, & MCL 423.211).
- **Labor.** **HB 4581** would require bargaining representatives to receive a majority vote every year to reapprove certification of bargaining unit. Amends 1939 PA 176 (MCL 423.1 – MCL 423.30) by adding sec. 29a (MCL 423.29a).
- **Labor.** **HB 4538** would clarify the procedure for investigations and hearings relating to petitions alleging more than 50% of public employees within a potential bargaining unit wish to be represented for the purpose of collective bargaining. Amends secs. 12 & 14 of 1947 PA 336 (MCL 423.212 & MCL 423.214).
- **Labor.** **SB 185** would modify the definition of “public employee” in the Public Employment Relations Act to remove the exceptions for graduate research assistants and other individuals whose positions do not have sufficient indicia of an employer-employee relationship using the Internal Revenue Service 20-factor test. Amends sec 1 of 1947 PA 336 (MCL 423.201).
- **Land Use.** **HB 4460** would amend the Michigan Zoning Enabling Act to allow rearing of egg-laying hens in residential areas. Amends sec. 204 of 2006 PA 110 (MCL 125.3204). Tie-barred with **HB 4462**.
- **Land Use.** **HB 4527** would amend the Michigan Zoning Enabling Act to modify the conditions under which a local zoning ordinance may prohibit or regulate sand and gravel mining and trucking. Amends sec 205 of 2006 PA 110 (MCL 125.3205). Tie-barred with **HB 4523** and **HB 4526**.
- **Liquor.** **HB 4328** and **SB 247** would allow, notwithstanding local legislative body approval, issuance of liquor licenses to sporting venues on premises of public universities. Amends sec. 531 of 1998 PA 58 (MCL 436.1531).
- **Local Government.** **HB 4360** would allow incorporating municipalities to determine the geographic territory of an emergency service authority’s jurisdiction. Amends sec. 2 of 1988 PA 57 (MCL 124.602).
- **Local Government.** **HB 4428** would create a new act requiring certain public notices be posted on a local government or other governmental entity’s website and distributed to local newspapers and media outlets.
- **Occupations.** **HB 4548** would provide for notary public fees for remote notarization. Amends sec. 25 of 2003 PA 238 (MCL 55.285).
- **Property Tax.** **HB 4350** and **HB 4351**, tie-barred, would create a new act that allows for a matching state grant program for certain local millages.
- **Public Utilities.** **SB 276** would provide for a phaseout of certain coal fired electricity generating plants by 2030. Amends sec. 6t of 1939 PA 3 (MCL 460.6t).
- **Recreation.** **HB 4546** would create a new act that would require athletes to be scored according to their biological sex in publicly funded individual sports programs that provide separate programs for males and females.
- **School Aid.** **HB 4648** would modify the pupil membership count day and the supplemental pupil count to provide for an alternative day for counting pupils who are absent due to a religious observance or holiday. Amends secs. 6 & 6a of 1979 PA 94 (MCL 388.1606 & 388.1606a).
- **Use Tax.** **SB 129** and **SB 131**, tie-barred, would amend the Brownfield Redevelopment Financing Act and other acts to expand the definition of “eligible activity” for a brownfield redevelopment authority to include “housing development activity” and allow the State Brownfield Redevelopment Fund to be used to distribute revenue deposited into said Fund. The legislation specifies that certain work plans or combined brownfield plans that requested reimbursement for housing development activities would have to be approved by the Michigan State



Housing Development Authority. Additionally, the legislation increases the amount for reasonable costs of a brownfield plan or work plan implementation and increases the amounts of tax increment revenue attributable to local taxes that a brownfield redevelopment authority could use each fiscal year. Amends title & secs. 2, 8, 8a, 13, 13b, 13c, 14, 14a, 15 & 16 of 1996 PA 381 (MCL 125.2652 *et seq.*) and amends sec. 4dd of 1937 PA 94 (MCL 205.94dd).

- **Water Supply. SB 88 and 89**, tie-barred, would amend the Child Care Licensing Act and create a new Clean Drinking Water Access Act to require schools and child care centers, respectively, to develop a drinking water management plan within 15 months after each bill's effective date. The legislation specifies that schools would not have to comply with the Act if the Legislature did not appropriate money to the Department of Environment, Great Lakes, and Energy for its implementation. Amends sec. 1 of 1973 PA 116 (MCL 722.111) & adds secs. 3i, 3j, 3k & 3l, and creates new act.

