Briefly
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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 will be available on the Section's website starting in May.

Photo Credit: Crystal Mountain Resort

Government Law Case Summaries

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

Denishio Johnson v City of Grand Rapids, et. al., and *Harrison v City of Grand Rapids, et. al.*

In *Denishio Johnson v. City of Grand Rapids, et. al.*, and *Harrison v. City of Grand Rapids, et. al.*, (July 22, 2022), the Michigan Supreme Court held that a policy of fingerprinting and photographing individuals not arrested or charged with a crime is unconstitutional and violates the Fourth Amendment. This case involves a set of appeals to the Michigan Supreme Court concerning two Black teenagers who were detained, photographed, and fingerprinted by the Grand Rapids Police Department (GRPD) despite both teens never facing any criminal charges. The Grand Rapids Police Department had a "photograph and print" (P&P) procedure, which gave officers discretion to photograph and fingerprint individuals they questioned in public when those individuals had no identification on them. The Plaintiffs in these cases were two teenagers who were subjected to the P&P procedure during a pair of stops that did not result in arrests. In 2011, Johnson was stopped in an athletic club parking lot following a complaint to GRPD that an individual was looking into vehicles. Johnson was photographed and fingerprinted by the police and was released without being charged with a crime. In 2012, Harrison was stopped after Captain VanderKooi saw him hand another youth a large model train or fire engine. Captain VanderKooi took his picture and fingerprints, which were held in the police database. Plaintiffs made claims seeking to hold the City of Grand Rapids liable under 42 USC § 1983 for adopting a policy that violated their rights under the Fourth Amendment. In each of Plaintiff's underlying cases, the trial court granted summary disposition to the City. During the first round of appeals, the Court of Appeals affirmed each ruling. The court reasoned that because the P&P procedure was discretionary, the Plaintiffs could not establish the existence of an official policy or custom. After hearing oral argument on the application, the Supreme Court reversed that part of the Court of Appeals ruling and remanded the case to the Court of Appeals for a determination of whether the P&Ps at issue violated the Plaintiffs' Fourth Amendment rights. On remand, the Court of Appeals consolidated the cases and once again affirmed the trial court in a published opinion. The panel found the P&P procedure to be facially valid because neither photographing nor fingerprinting can be considered a search for purposes of the Fourth Amendment. The Michigan Supreme Court granted leave to appeal and on July 22, 2022, the Court ruled that the now discontinued Grand Rapids Police Department (GRPD) policy of fingerprinting and photographing individuals not charged with a crime is unconstitutional. The Court reasoned, "fingerprinting an individual without probable cause, a warrant, or an applicable warrant exception violates an individual's Fourth Amendment rights." "Fingerprinting pursuant to the P&P policy exceeded the permissible scope . . . because it was not reasonably related in scope to the circumstances that justified the stop," the ruling continues. "Having held that fingerprinting constitutes a search, it is clear that fingerprinting does not fall within the limited weapons search that is justified under certain circumstances. . . fingerprinting is simply not related to an officer's immediate safety concerns."

Lindke v Freed

In *Lindke v. Freed*, (June 27, 2022), the U.S. Court of Appeals, Sixth Circuit held that a Facebook page does not automatically carry the force of law simply because the page says it belongs to a person who's a public official. In this case, Defendant Freed is a city manager for the City of Port Huron, Michigan. He had a Facebook page featuring his family and a medley of other personal posts. He later updated it to reflect his new job title, and used the City Hall's address as his page address. During the pandemic, he shared "the policies he initiated for Port Huron and news articles on public-health

measures and statistics." Plaintiff Lindke disapproved of Freed's handling of the pandemic and posted criticism on Freed's page. Freed deleted his comments and eventually blocked him from the page. Lindke argued that Freed maintained the page as part of his "job duties/powers as City Manager" because he used it to regularly communicate with constituents. The court explained that to establish a free speech violation under § 1983, a Plaintiff must show that the Defendant is "acting in a state capacity . . . ." To determine whether Freed was acting in his capacity as city manager, the court applied the "state-official test," a version of the Supreme Court's nexus test. This test "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" The court considered whether Freed's actions were "'entwined with governmental policies' or subject to the government's 'management or control.'" The court looked at his Facebook page to determine whether he was a public official operating a social-media account. "[S]ocial-media activity may be state action when it (1) is part of an officeholder's 'actual or apparent dut[ies],' or (2) couldn't happen in the same way 'without the authority of [the] office.'" The court found that Freed was not legally required to have a Facebook page as part of his duties, the page was created years before he took office, and it will not change hands once another person becomes city manager. No state law, ordinance, or regulation compelled Freed to operate his Facebook page. He also did not "rely on government employees to maintain his Facebook page." Accordingly, the court rejected Lindke's argument that "Freed's use of a city address, email, and website on the Facebook page, along with a profile photo featuring Freed wearing his city-manager pin" made it appear he was acting in his official capacity. "Freed gains no authority by presenting himself as city manager on Facebook. His posts do not carry the force of law simply because the page says it belongs to a person who's a public official." Lindke presents no other reason Freed's Facebook activity relates to his job duties or depends on his state authority. Ultimately, the court held that Defendant-city manager's (Freed) "Facebook activity was not state action." Thus, he was properly granted summary judgment of Plaintiff Lindke's § 1983 action asserting Freed violated his free-speech rights by blocking him from his page. The judge noted that if Port Huron's list of city-manager responsibilities mentioned operating a Facebook page to tell residents about city initiatives, the case might end in a different result.

Lockhart v Quicken Loans, Inc.

In *Lockhart v. Quicken Loans, Inc.*, (July 28, 2022), the Michigan Court of Appeals held that employers are not required to hire the best applicant, only to refrain from discriminating against applicants based on membership in protected classifications. The underlying facts involve Plaintiff, a 54-year-old African-American woman who was employed with a title company affiliated with Defendant, and unsuccessfully applied for four positions with Defendant. Plaintiff filed a discrimination claim based on her not receiving the four positions. As to her disparate treatment claims, the trial court determined that regardless of whether she established she was qualified, she failed to establish "that the positions were given to other applicants under circumstances giving rise to an inference of unlawful discrimination." It also explained that there could "be no inference of unlawful discrimination where half of the jobs at issue went to candidates in the same protected classifications" as Plaintiff, and that this fact alone was detrimental to her claim. The Court of Appeals agreed and noted that Plaintiff did not explain, "how Defendant's hiring of the four applicants in question gives rise to an inference of discrimination. Although two candidates did not share Plaintiff's race and two candidates were under age 40, an inference of discrimination does not arise merely because an employer hires a candidate outside of a Plaintiff's protected class." The court noted that a "Plaintiff does not establish the fourth element of her *prima facie* case by showing merely that she was qualified for the position and a nonminority applicant was chosen instead." The court held that in this instance, Plaintiff showed "even less; the record establishes that two of the applicants hired by Defendant were African-American and two were over age 40. Although Plaintiff contends that her qualifications were superior to those of some of the applicants hired, that fact, even if true, is not determinative." The Court of Appeals ultimately held that Plaintiff did not establish a *prima facie* **case of age or race discrimination based on disparate treatment, or of retaliation in violation of the ELCRA,** and the court affirmed summary disposition for Defendant.

Findler v Department of Tech. Mgmt. & Budget

In *Findler v. Department of Tech. Mgmt. & Budget*, (July 14, 2022), the Michigan Court of Appeals held that it is not enough to argue that "there must be more" documents responsive to a Freedom of Information Act ("FOIA") request; the requester must have some actual facts to support the contention that there must be more. In this case, after Plaintiff unsuccessfully applied for a position with Defendant, he made numerous requests under the FOIA "for documents relating to the hiring process. Although many documents were produced, Plaintiff was not satisfied that Defendant fully complied." He alleged various violations of FOIA in Count I, and in Count II he alleged, "that Defendant destroyed or failed to retain various records in violation of FOIA." The trial court concluded that Defendant "established that it has conducted an exhaustive search for any remaining records and none exist" and that there was "no factual dispute that" it complied with its FOIA obligation, making summary disposition of the remaining Count I claims warranted under MCR 2.116(C)(10). The facts showed that Plaintiff could only point "to two documents that he now possesses and uses to argue that there must be more documents available in response to his request. But the court held that without some actual facts to support the contention that there must be more, the trial court was justified in granting summary disposition on that portion of Count I of the complaint." The court then turned to the grant of summary disposition on Count II. This count was based "upon Defendant's alleged destruction of or failure to retain documents; in particular, interview notes of candidates not chosen for the position." The trial court held that Plaintiff had failed to state a claim, and the court agreed. The court ultimately found that the Defendant committed no error, and the court affirmed the trial court's order granting summary disposition of Plaintiff's claims under the FOIA.

Rouch World, LLC v Department of Civil Rights

In *Rouch World, LLC v. Department of Civil Rights*, (July 28, 2022), the Michigan Supreme Court held that discrimination on the basis of sexual orientation and gender identity is discrimination because of sex prohibited by the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"). The action arose from Defendant-MDCR's investigation into two separate complaints. One complaint alleged Plaintiff-Rouch World discriminated on the basis of sex by declining to host a same-sex wedding at its facility. The other alleged that Plaintiff-Uprooted Electrolysis discriminated on the basis of sex when it denied hair-removal services to a transgender woman. Plaintiffs jointly sued the MDCR and its then director, seeking "a declaratory judgment that sexual orientation and gender identity are not encompassed by the ELCRA's prohibition of sex discrimination in places of public accommodation and an injunction prohibiting the continued investigation of the complaints filed against Plaintiffs." On appeal, the court noted that the cases on which the Court of Appeals relied in *Barbour* were overturned in *Bostock*, in which a majority of the U.S. Supreme Court "held that discrimination based on sexual orientation or gender identity is necessarily encompassed within discrimination because of sex." The Michigan Supreme Court's analysis focused on the proper interpretation of the word "sex" in ELCRA. The court found that the issue was "whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex." It concluded that "a person's sexual orientation necessarily implies conclusions about their sex," and thus, discrimination "on the basis of sexual orientation necessarily constitutes discrimination because of sex. Accordingly, the court held that the denial of 'the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service' on the basis of sexual orientation constitutes discrimination 'because of . . . sex' and, therefore, constitutes a violation of the ELCRA under MCL 37.2302(a)." Key takeaways from the case are that Michigan employers should review their policies and ensure they reflect protections against sexual orientation and gender identity discrimination.

Doe v Alpena Pub. Sch. Dist. et. al.

In *Doe v. Alpena Pub. Sch. Dist. et. al.*, Case No. 359190 (2022), the Michigan Court of Appeals held that ELCRA provides a remedy for plaintiffs who assert hostile educational environment claims on the basis of student-on-student harassment. This case addressed an issue of first impression for the Michigan Court of Appeals. Specifically, whether schools exercise control over their students such that a school may be liable for students' conduct. Plaintiff sued defendants on behalf of a

female student. She alleged defendants created a sexually hostile educational environment by not adequately responding to several incidents of student-on-student sexual harassment at an elementary school. Defendants contended student-on-student sexual harassment is not actionable under the ELCRA and, even if it was, plaintiff did not satisfy the elements of her hostile-environment claim. On appeal, the Court of Appeals held that the ELCRA does provide a remedy for plaintiffs who assert hostile educational environment claims on the basis of student-on-student harassment. However, a school can avoid vicarious liability for these claims if it investigates and takes prompt and appropriate remedial action upon learning of the student's behavior. Examples of prompt and appropriate action found in this case included evidence of a student's IEP, disciplinary reports, evidence of a prompt investigation on behalf of the Defendant, and deposition testimony explaining the Defendant's actions in response to the students harassing conduct.

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 handing water and sewer class action cases and defense work for municipalities being sued as a result of their adult/medical marihuana licensure process.*

Legislative Update

By Kester K. So, Aimee R. Gibbs, Eric McGlothlin, Laura M. Bassett, John Weiss, and Amelia P. Livingway

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With the beginning of a new legislative session, there is a slate of a number of new bills of public sector interest already under consideration in the Michigan Legislature. The following are summaries of enacted bills (including those enacted toward the end of last session) and summaries of a number of the most pertinent bills in the new session.

Enacted Legislation

- Courts. **Public Act of 189 of 2022** amends the Revised Judicature Act to eliminate revenue distribution from the justice system fund to the secondary road patrol fund. Amends sec. 181 of 1961 PA 236 (MCL 600.181).
- Education. **Public Act 184 of 2022** amends Section 61 of the Michigan Public School Employees Retirement Act (MCL 38.1361) to replace numerous existing criteria, restrictions, limitations, exemptions, and procedures for school retirees to return to work in a school setting and simultaneously draw a pension, with a requirement that the retiree not return to work before nine months had elapsed since retirement. The bill also removed a requirement that school employers pay into the retirement system a portion of rehired retirees' wages to support retiree health care benefits and pensions. In addition, the bill 'grandfathers-in' any existing retiree who is working at a reporting unit, which removes any earnings

limitations or sunsets limiting how long that retiree may work during retirement. Amends sec. 61 of 1980 PA 300 (MCL 38.1361).

- Education. **Public Act 213 of 2022** amends the Revised School Code to require the boards of school districts or intermediate school districts (ISDs), the boards of directors of public school academies (PSAs, or charter schools), the Michigan Department of Education, and the State Board of Education to ensure that the following texts are prominently posted in specified areas, beginning on January 1, 2023: (1) Section 1 of Article VIII of the Michigan Constitution of 1963: Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (2) Section 10 of the Revised School Code: It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment. Amends 1976 PA 451 (MCL 380.1 - 380.1852) by adding sec. 10a.
- Elections. **Public Act 2 of 2023** revises the presidential primary election date to fall on February 27, 2024 and the fourth Tuesday in February for all future presidential election years. Previously, the presidential primary took place on the second Tuesday in March. Amends sec. 613a of 1954 PA 116 (MCL 168.613a).
- Energy. **Public Act 218 of 2022** requires the Michigan Public Service Commission to engage an outside consulting firm to conduct a feasibility study on nuclear energy generation in the State and to deliver a report on the study to the Governor and certain members of the Senate and House within 18 months of the bill's effective date. Adds sec. 10hh to 1939 PA 3 (MCL 460.1 to 460.11).
- Juveniles. **Public Acts 200 and 209 of 2022** amend the Juvenile Code and Michigan Adoption Code to modify the definition of "relative." Amends sec. 22, Ch. X and secs. 13a and 18, Ch. XIIA of 1939 PA 288 (MCL 710.22, 712A.13a and 712A.18).
- Land Use. **Public Act 206 of 2022** amends the Michigan Zoning Enabling Act to specify that a qualified residential treatment program is a residential type of property for certain prescribed purposes. Amends secs. 102 and 206 of 2006 PA 110 (MCL 125.3102 and 125.3206).
- Law Enforcement. **Public Act 191 of 2022** allows a county to have a level of secondary road patrol service and expenditure that is below what the county was providing or expending immediately before October 1, 1978, as long as that level is not below what it was providing or expending immediately before October 1, 2021. Amends sec. 77 of 1846 RS 14 (MCL 51.77).

- Medical Marihuana. **Public Act 186 of 2022** amends the Michigan Medical Marihuana Act to provide that provisions in the parts of the revised judicature act of 1961 related to drug treatment courts, mental health courts, juvenile mental health courts, and veterans treatment courts apply if there is a conflict between those provisions and the Michigan Medical Marihuana Act. Amends sec. 7 of 2008 IL 1 (MCL 333.26427).
- Mental Health. **Public Act 146 of 2022**. Add a new section to the Mental Health Code to allow a county board of commissioners to establish a county mental health transportation panel for the purpose of establishing a transportation mechanism to serve as an alternative to a peace officer transporting an individual when required. The act also creates the Mental Health Transportation Fund. Amends secs. 100d, 281c, 282, 408, 409, 426, 427a, 427b, 429, 436, 438, 469a, 498k, 498t, 516, 519 and 537 of 1974 PA 258 (MCL 330.1100d et seq.) and adds secs. 170 and 172.
- Natural Resources. **Public Act 159 of 2022** creates a new act, the Maritime and Port Facility Assistance Grant Program Act, which establishes the maritime and port facility assistance grant program for the purpose of awarding grants of up to $2.5 million annually to owners of port facilities for use for certain public purposes.
- Property. **Public Act 215 of 2022** amends what constitutes qualified data records maintained with county treasurers, and provides that a county treasurer, upon request, must make copies of a record on file in the treasurer's office and prescribes a schedule of fees for doing so. Amends sec. 1 of 1895 PA 161 (MCL 48.101).
- Retirement. **Public Acts 221 and 222 of 2022** amend the Municipal Employees Retirement Act by amending provisions of the Administrative Procedures Act (APA) and adding a new section to the Municipal Employees Retirement Act, to require a hearing, as a contested case, to be provided to a person aggrieved by a decision of the Municipal Employees Retirement System (MERS) under certain provisions of the APA and also allow for a court review of the final decision or order in the case. Amends sec. 3 of 1969 PA 306 (MCL 24.303) and amends 1984 PA 427 (MCL 38.1501-38.1555) by adding sec. 45b.

Pending Legislation

- Administrative procedure. **SB 0014** eliminates a prohibition on adoption of rules by state agencies from being more stringent than federal regulations. Amends secs. 32 and 45 of 1969 PA 306 (MCL 24.232 and 24.245).
- Civil rights. **SB 0154** modifies the definition of public record subject to the Freedom of Information Act to include a writing prepared, owned, used, in the possession of, or retained by an officer, employee, contractor, volunteer, or other agent of a public body in the scope of that person's duties to the public body. Amends sec. 2 of 1976 PA 442 (MCL 15.232). See also **HB 4220**.
- Civil Rights. **HB 4261** subjects the governor's office and lieutenant governor's office to the Freedom of Information Act with certain new exemptions. Amends secs. 1, 2, 3, 4, 5, 6, 10, 10a, 10b and 13 of 1976 PA 442 (MCL 15.231 – 15.246) and designates secs. 1-16 as part 1. Tie-barred with **HB 4262** and **HB 4263**.
- Civil Rights. **HB 4262** creates a new part to the Freedom of Information Act, the "legislative open records act," subjecting certain legislative records to disclosure and creating exemptions and a system for processing requests, among other things. Amends 1976 PA 442 (MCL 15.231 - MCL 15.246) by adding part 2. Tie-barred with **HB 4261** and **HB 4263**.
- Civil Rights. **HB 4263** designates the legislative council administrator as responsible for reviewing and deciding appeals as provided in the legislative open records act, 1976 PA 442, MCL 15.251 to 15.259f. Amends sec. 104a of 1986 PA 268 (MCL 4.1104a). Tie-barred with **HB 4261** and **HB 4262**.
- Civil rights. **HB 4266** exempts the legislative committee to enforce ethics from open meetings. Amends sec. 2 of 1976 PA 267 (MCL 15.262).
- Constitutional Amendments. **SJR B** provides for bills or initiative petitions to take effect upon the expiration of 90 days after the date they are filed with the secretary of state. Amends sec. 27, art. IV of the state constitution. Tie-barred with **SB 0075**.
- Construction. **SB 0041** prohibit local units of government from enacting an ordinance prohibiting the use of energy-efficient appliances in new or existing

residential buildings. Amends sec. 13a of 1972 PA 230 (MCL 125.1513a).

- Criminal procedure. **HB 4024** and **4025** modify the Michigan penal code to allow prosecution of delivery of a controlled substance causing death in the county where delivery, consumption, or death occurred. Amends sec. 317a of 1931 PA 328 (MCL 750.317a) and amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 5a to Ch. II.
- Economic Development. **SB 129** would modify the Brownfield Redevelopment Financing Act to expand the definition of "eligible activity" to include "housing assistance activity" and "housing development activity" and require approval of the work plan or combined brownfield plan by the Michigan State Housing Development Authority for projects with more than 50% of the project, based on square footage, dedicated to residential use when there is a request for reimbursement for housing assistance or housing development activities, among other things. Amends title and secs. 2, 8, 8a, 13, 13b, 13c, 14, 14a, 15 and 16 of 1996 PA 381 (MCL 125.2651 – 126.2672).
- Elections. **HB 4033** requires the state to reimburse local units of government for costs of holding special elections to fill state legislative office vacancies if called by the governor and held on a date other than a regular election date. Amends 1954 PA 116 (MCL 168.1 - 168.992) by adding sec. 634b.
- Fireworks. **SB 0017** modifies the days that fireworks use may be regulated by a local unit of government and increases the sanctions for violations of a fireworks ordinance that a local unit of government must impose. Amends secs. 7 and 12 of 2011 PA 256 (MCL 28.457 and 28.462).
- Holidays. **SB 0050** designates "Juneteenth" as a public holiday observed on June 19. Amends secs. 1 and 2 of 1865 PA 124 (MCL 435.101 and 435.102).
- Labor. **SB 0005** and **HB 4004** allow for inclusion of requirement for agency fee for nonunion members in collective bargaining agreements and as condition of employment in public sector. Amends secs. 9, 10 and 15 of 1947 PA 336 (MCL 423.209 *et seq.*).
- Labor. **SB 0006** creates a new act to reenact prevailing wage hours and wage requirements.
- Law enforcement. **SB 0032** allows agreements between law enforcement agencies that fund police training for recruits and an employee requiring reimbursement for training in certain situations. Amends sec. 8 of 1978 PA 390 (MCL 408.478).
- Local government. **HB 4065** repeals the local financial stability and choice act. Repeals 2012 PA 436 (MCL 141.1541 - 141.1575).
- Property. **HB 4134** prohibits the sale or transfer of real property to foreign entities. Amends title and secs. 35 and 36 of 1846 RS 66 (MCL 554.135 and 554.136) and adds sec. 36a.
- Property tax. **SB 0055** provides for retroactive application of poverty exemption. Amends secs. 7u and 53b of 1893 PA 206 (MCL 211.7u and 211.53b).
- Public employees and officers. **SB 0015** and **HB 4041** prohibit the use of TikTok on state devices. Amends sec. 2 of 1973 PA 196 (MCL 15.342).
- Public utilities. **SB 0010** and **HB 4036** create a new act to prohibit local units of government imposing a ban on the use of natural gas or installation of natural gas infrastructure.
- Traffic control. **HB 4132** allows for the use of automated traffic enforcement devices in work zones to enforce speed limit reductions. Amends secs. 907 and 909 of 1949 PA 300 (MCL 257.907 and 257.909) and adds secs. 2c, 627c and 907a. Tie-barred with **HB 4133**.
- Vehicles. **HB 4074** allocates revenue from vehicle registration fees to county where registrant resides and distributes revenue per lane mile to local road agency. Amends sec. 810 of 1949 PA 300 (MCL 257.810).
- Water supply. **SB 0089** creates a new act to provide quality and standards for clean drinking water in schools and child care centers.
- Weapons. **HB 4127** prohibits possession of firearms at a polling place. Amends sec. 234d of 1931 PA 328 (MCL 750.234d).
- Weapons. **HB 4128** prohibits firearms within 100 feet of an absentee ballot counting board while ballots are being counted. Amends sec. 234d of 1931 PA 328 (MCL 750.234d).

Federal Law Allows Tax-Exempt Entities to Cash in on Energy Tax Credits

By Christie R. Galinski, Samuel L. Parks, Karen L. Boore, and Katrina Piligian Desmond
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Tax-exempt entities (including non-profits, states, local governments and public schools) that are planning energy-efficient projects, such as solar improvements to existing buildings or improvements to provide for electric vehicles, should be aware that the U.S. Treasury may now provide direct payments to those entities to reduce project costs.

New regulations under the Inflation Reduction Act, which have been published as Notice 2022-61, provide some clarification for the rules on how to qualify for these increased direct pay credits under the prevailing wage and apprenticeship requirements.

Prior to the federal Inflation Reduction Act of 2022, Investment and Production Tax Credits were directly available only to for-profit entities that could offset the tax credits with their taxable income. Therefore, tax-exempt organizations, public schools and governmental entities could only take advantage of tax credits through joint ventures with for-profit entities. Now, tax-exempt organizations, such as 501(c)(3) hospitals and colleges, public schools and governmental entities can receive direct payments from the federal government equal to the value of the tax credits, as determined pursuant to the Internal Revenue Code.

It is possible to obtain a credit of up to 50% of qualified costs. To obtain the maximum benefit of the direct payments, projects must adhere to prevailing wage and apprenticeship requirements, use United States-sourced materials, and be located in certain communities. Adherence to the prevailing wage and apprenticeship requirements produces a tax credit equal to 30% of qualified costs. However, failure to meet these requirements produces a credit of only 6% of qualified costs. Sourcing sufficient materials for the project from the United States can net an additional 10% of qualified costs in tax credits. Locating the project in certain communities can net an additional tax credit of 10% of qualified costs.

While these requirements are complicated, the potential amount of direct payments is substantial. Planning and preparing for obtaining these credits can start now, and the benefits may apply to projects that have already commenced.

Michigan Law Expands Police and Fire Special Assessment Authority to More Cities

By Ronald C. Liscombe and Steven D. Mann
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Cities with a population of 15,500 or more now may specially assess for police and fire services under a new law, Public Act 228 of 2022, that becomes effective on March 28, 2023, that amends Act 33, Public Acts of Michigan, 1951, as amended. Previously, generally only townships, villages, and cities with a population of less than 15,500 could exercise special assessment powers.

Now any city with a population of 15,500 or more may exercise the powers of the law, provided that the question of raising money by special assessment and the amount of the special assessment to be levied in such cities is first approved by a majority of the electors in the special assessment district. The act only compels cities with a population of 15,500 or more to seek voter approval to exercise the special assessment powers. Townships, villages and cities with a population of less than 15,500, still may establish the special assessment district pursuant to certain procedures and public hearing on the governing body's own initiative, or pursuant to a petition process by property owners, or by an election.

Municipalities exercising special assessment powers under the act may levy special assessments for police services, fire services or both. Police and fire vehicles, apparatus, equipment and housing may also be funded by special assessment under the act, although there is a 10-mill limit to these non-operational expenditures.

Unlike most special assessments, the act requires that the special assessment be levied based on the taxable value of the properties being assessed. Each municipality specially assessing under the act is required to hold an annual public hearing on the estimated costs and expenses of the police and/or fire services and that year's estimated levy. Lands exempt from ad valorem taxes are also exempt from special assessments levied pursuant to the act.

Don't forget to update your member record. In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- Login to SBM Member Area with your login name and password and make the changes online.
- Complete contact information change form and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- Name Change Request Form—Supporting documentation is required.