Policy Brief

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An Analysis of Proposal 4 of 2012: The Unionization of In-Home Caregivers

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Executive Summary*

Michigan's statewide ballot in November will include Proposal 4, described officially as "[a] proposal to amend the state constitution to establish the Michigan Quality Home Care Council and provide collective bargaining for in-home care workers." If approved by the voters, the measure would have two general effects.

First, the proposal would place in the Michigan Constitution a provision that in-home caregivers who provide basic care services to recipients of state aid, such as Medicaid, be considered public employees. They would be classified as public employees, however, solely for the purpose of collective bargaining with a government agency through a union; they would not "be entitled to any other legal benefit reserved to such employees." The care recipient would continue to act as the in-home caregiver's employer for all purposes other than collective bargaining, retaining the right "to select, supervise, train and direct, or terminate, an individual provider."

Second, the proposal would create a state agency known as the Michigan Quality Home Care Council. The MQHCC would collectively bargain with any union representing the in-home caregivers, though the negotiated compensation standards would be nonbinding. Compensation would still be set by the Legislature.

The MQHCC would largely assume the responsibilities of the existing Michigan Quality Community Care Council by providing (optional) training opportunities for in-home care providers and care recipients, and by maintaining a registry of in-home caregiver candidates, who would be subject to background checks. The MQHCC would also provide care recipients with "financial management services," such as generating their employer tax forms and making payroll deductions on their behalf. Such financial management services are currently provided by the Michigan Department of Community Health.

Michigan's experience with the Michigan Quality Community Care Council does not suggest that establishing the MQHCC would increase the percentage of care recipients receiving lower-cost, personalized in-home care. State audit figures show that the number of disabled people receiving in-home care through Medicaid's Home Help Program rose from 51,372 to 55,382 between 2002 and 2004, when the Michigan Quality Community Care Council was established. In 2010, however, the average monthly number in that program was 53,516 — no improvement, and even a small decline. Any potential cost savings were never realized.

A line-by-line review of Proposal 4 indicates that it would provide:

1. No programs or services that have not been available to in-home care recipients in the past, with no constitutional amendment necessary
2. No provisions creating new taxpayer savings
3. No provisions for improved care
4. No new options for care recipients.

Proposal 4 would, however, validate the convoluted and disputed unionization of in-home caregivers implemented in 2005 by the Service Employees International Union

* Citations are provided in the main text.

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DISCLOSURE

Note that the Mackinac Center Legal Foundation is involved in litigation concerning the 2005 in-home caregiver unionization discussed in this Policy Brief.

and the Michigan Quality Community Care Council. This process has led to more than $32 million in Medicaid money intended for in-home caregivers being diverted to the SEIU for "collective bargaining" with an obscure government entity that had no ability to give the caregivers a raise or improve their working conditions. Collective bargaining with the proposed MQHCC would be no more effective.

Proposal 4 would enshrine in the Michigan Constitution a radical legal approach that classifies people as public employees if they indirectly receive government money for providing a private service. This approach goes against previous labor law and against laws passed by the Michigan Legislature. It has been employed in other states to unionize foster care parents and home-based day care providers.

There has been no threat to the Medicaid-financed Home Help Program at issue in Proposal 4. This program will continue whether or not Proposal 4 is approved. Furthermore, such services as training, registries and background checks for the in-home care program have been provided, and can continue to be provided, without a constitutional amendment. Michigan residents who favor such services need not chain them to the controversial unionization process that would be enshrined by Proposal 4.

Introduction: The Provisions of Proposal 4

On Nov. 6, 2012, Michigan voters will be asked to consider Proposal 4, which would amend Michigan's constitution. If Proposal 4 is approved, the new amendment would affect the unionization and working arrangement of caregivers who receive indirect Medicaid subsidies to work in the homes of disabled adults and provide them with basic care.

Specifically, Proposal 4 would:

- Allow in-home caregivers to unionize and bargain collectively[1]
- Create a new public body called the Michigan Quality Home Care Council, which would operate within the executive branch of state government[2] and:
  - Bargain collectively with the union representing the in-home health care givers[3]
  - Provide training for in-home caregivers[4]
  - Create a registry of in-home caregivers who have passed a background check and make that registry available to care recipients (though recipients are free to choose nonregistered caregivers)[5]
  - Provide patients with "financial management services" to help them comply with applicable laws as employers of in-home caregivers[6]
  - Honor any existing collective bargaining agreement with the Service Employees International Union on behalf of Michigan's in-home caregivers[7]
  - Set "compensation standards" and "other terms and conditions of employment for the employment of individual [in-home care] providers," although these would ultimately be determined by "appropriations by the Legislature."[8]

Proposal 4 was initiated by "Citizens for Affordable Quality Home Care," a coalition supported by advocates for government programs for the disabled and by the Service Employees International Union. Citizens for Affordable Quality Home Care submitted a sufficient number of voters' signatures to have Proposal 4 placed on the ballot and to amend the constitution pursuant to Article 12, Section 2, of the Michigan Constitution of 1963.

The provisions above would be added as a new Section 31 to the existing Article 5 of Michigan's constitution. The MQHCC would succeed the similarly named Michigan Quality Community Care Council (the "MQC3"),[9] which is not in the constitution. The MQC3 will be discussed later in detail.

The MQHCC would be governed by an 11-member council.[10] In general, the governor would directly appoint nine of these members, "no fewer than seven of whom shall be current or former program participants, participant representatives, or participant advocates."[11] Initially, however, Proposal 4 would require that seven of these positions be filled by the current MQC3 directors, who would serve out their current terms.[12] The other two board positions would be filled by the Department of Community Health director (serving as chair) and the Department of Human Services director, both of whom are appointed by the governor.[13] The two directors could also appoint designees to serve in their stead.[14]

As noted, the amendment would require the continued observance of any MQC3 collective bargaining agreement with the SEIU,[15] along with the dues-paying requirement to that union. However, for the first time, the Michigan Constitution would mandate that the in-home caregivers be considered "public employees" for

the purpose of collective bargaining. The constitutional requirement that in-home caregivers be considered public employees for the purpose of unionization is, as we will see, a fairly new occurrence.

The In-Home Care Program

At the heart of the matter are the people receiving the care. These are adults with disabilities — often a developmental disability that has impaired them since birth. Often they are the adult children of the caregivers, though they may also be an aged parent. The Anderson Economic Group reports that according to a 2005 survey, "75% of providers stated they had become a home care worker because a family member or close friend was in need of care."[16]

It has been the policy of Michigan and the rest of the United States that these care recipients get the care that they need in the least restrictive setting available. The United States Supreme Court, in 1999,[17] held that any public policy favoring institutionalization of the disabled amounted to discrimination, and that government agencies should seek the least restrictive living arrangement available. The Supreme Court stated, "[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[18] This least-restrictive setting means that state public policy favors the disabled continuing to live in the general community — often in their family homes.

In Michigan, there has long been a program that helps people who qualify for Medicaid assistance to receive in-home nonmedical care from nonprofessional caregivers. This is called the Home Help Program:

> Home help services (HHS) are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. Individuals or agencies provide HHS. The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).[19]

The HHP program has been in place since 1981. Neither the MQHCC, which would be created if Proposal 4 passes, nor its predecessor, the MQC3, is new in this regard. The home-based care program was in place 23 years prior to the creation of the MQC3 and 31 years before Proposal 4 was approved for the November ballot.

In order to qualify for the HHP, a potential recipient needs to first be certified by a physician and then apply to the Medicaid program through the Michigan Department of Human Services.[20] If these requirements are met, a representative of the Department of Human Services conducts an in-home visit with the care recipient.[21] The representative determines which of the 12 activities of daily living — eating, toileting, bathing, etc. — the recipient needs assistance with and whether the applicant caregiver can provide that particular assistance.

The Importance of Collective Bargaining in Proposal 4

As indicated above, Proposal 4 has a number of provisions. Granting a power of collective bargaining is only one of them.

Nevertheless, unionization is fundamental to understanding the proposal's primary effects. The primacy of the unionization power is indicated by the title of the proposal as it will appear on the ballot: "A PROPOSAL TO AMEND THE STATE CONSTITUTION TO ESTABLISH THE MICHIGAN QUALITY HOME CARE COUNCIL AND PROVIDE COLLECTIVE BARGAINING FOR IN-HOME CARE WORKERS." Collective bargaining is likewise the first provision listed in the description of the proposal as it appears on the ballot.* Both the title and the 100-word description were developed by the director of elections in the Secretary of State's office, and they were approved for the ballot by a 3-0 bipartisan vote of the Board of State Canvassers.[22]

Hence, the status and history of collective bargaining for in-home caregivers will be discussed at length below. A discussion of the other provisions of Proposal 4 will follow.

The 'Unionization' of In-Home Caregivers in 2005

Proposal 4 establishes a collective bargaining relationship between the MQHCC and a union or unions representing in-home caregivers. In-home caregivers would be considered "public employees" and the union a public-sector union, though Proposal 4 also stipulates that in-home caregivers "shall not, as a consequence of this

* See the Appendix for both the 100-word summary that will appear on the ballot and the complete language of Proposal 4.

[provision of Proposal 4], be considered public or State employees for any other purpose, nor be entitled to any other legal benefit reserved to such employees."[23]

In-home caregivers are not currently considered public employees under state law.[24] They were, however, unionized as public employees in 2005 by the Michigan Employment Relations Commission through a process whose legality is under dispute.* A federal court has issued a preliminary injunction which permits the continuing collection of union dues and agency fees by the Service Employees International Union† pending the final outcome of the union's federal lawsuit alleging that any failure to withhold dues would be an unconstitutional breach of the existing union contract.[25]

The 2005 unionization of in-home caregivers occurred in an unusual manner. The certification of a labor union as the exclusive collective bargaining representative for a group of employees occurs through different procedures depending on who the employer is. Certification is a necessary prerequisite to creating any union that an employer will be legally required to bargain with collectively.

The federal National Labor Relations Board certifies larger private-sector unions,[26] and it therefore certifies most private-sector unions. The NLRB does not, however, certify public employees of the states; only state governments do this.[27]

In Michigan, the Civil Service Commission has responsibility for certifying unions of state government employees.[28] All other public employee unions, such as those for municipal employees, are certified by the Michigan Employment Relations Commission.‡

In 2005, the Michigan Employment Relations Commission certified the SEIU as the union that would collectively bargain on behalf of Michigan's in-home caregivers.[29] The MQC3, however, presented itself as a public employer, and in-home caregivers did not appear to be public employees under Michigan law.§

The MQC3 was created through an "interlocal agreement." Interlocal agreements are provided for in Michigan's constitution and have been codified as part of the Urban Cooperation Act of 1967.[30] Article 7, Section 28, of the Michigan Constitution provides the specific language:

> [T]wo or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state … for the joint administration of any of the functions or powers which each would have the power to perform separately. …

An interlocal agreement therefore requires the involvement of at least two local governments. These agreements are intended to "find solutions to metropolitan problems."¶ For instance, Dexter Township, the Village of Dexter, Scio Township and Webster Township have recently been negotiating an interlocal agreement to provide fire services for all four municipalities.[31]

In the creation of the MQC3, the interlocal agreement was reached between the Michigan Department of Community

* The Mackinac Center Legal Foundation, a nonprofit public-interest law firm and an affiliate of the publisher of this Policy Brief, is currently involved in litigation challenging the unionization of in-home caregivers. For the MCLF brief in the case, see Patrick Wright, "Haynes and Glossop v SEIU and MQC3, Brief in Support of Charge of Unfair Labor Practice,"(Mackinac Center for Public Policy, 2012), http://goo.gl/z4fH7 (accessed Oct. 4, 2012).

† For simplicity's sake, the union representing the in-home caregivers will be called "the SEIU" in this Policy Brief. The petition for representation originally submitted to the Michigan Employment Relations Commission listed the Service Employees International Union (SEIU), AFL-CIO, as the petitioning union. "Petition for Representation Proceedings," (Mackinac Center for Public Policy (Michigan Employment Relations Commission), 2005), 1, http://goo.gl/YCCkb (accessed Oct. 4, 2012). The first collective bargaining agreement was signed with the Service Employees International Union, Local 79. "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Local 79," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2006), http://goo.gl/dsD57 (accessed Oct. 4, 2012). The second collective bargaining agreement was signed with the SEIU Healthcare Michigan. "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Healthcare Michigan," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2009), http://goo.gl/YFq97 (accessed Oct. 4, 2012). The April 9, 2012, extension of the collective bargaining agreement was signed with the SEIU Healthcare Michigan. Executive Director Susan Steinke, Michigan Quality Community Care Council, email correspondence with Scott Heinzman, Board of Trustees, Michigan Quality Community Care Council, April 9, 2012.

‡ MCL 423.212. MERC, an agency of the executive branch of state government, makes decisions under the direction of three members, who are appointed by the sitting governor. The state statute establishing MERC requires that "not more than 2 members represent any one political party." MCL 423.3. In 2005, at the time of the union certification, a majority of members were appointed by then-Gov. Jennifer Granholm.

§ Whether the in-home caregivers were public employees is analyzed at some length below.

¶ The "Address to the People regarding Article 7, Section 28 of the Constitution of 1963 states: "This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems." 2 Official Record, Constitutional Convention 1961, p. 3394.

Health and the Tri-County Aging Consortium, an agency that had previously focused exclusively on the elderly in Clinton, Ingham and Eaton counties.[32] The interlocal agreement was statewide in its scope.[33]

The DCH entered into this interlocal agreement in 2004. Through this agreement, the MQC3 purportedly had "the right to bargain collectively and enter into agreements with labor organizations. The [MQC3] shall fulfill its responsibilities as a public employer … with respect to all its employees."[34] This agreement also, however, recognized that the caregiver was under the exclusive control of the care recipient, not the MQC3, by acknowledging "the Consumers' exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services to that Consumer."[35]

The MQC3 did not exercise control over the terms and conditions of employment for its ostensible employees. It did not hire or fire the caregivers, and it did not handle their payroll.[36]

With the creation of the MQC3 and its purported power under the interlocal agreement to collectively bargain as the public employer of the in-home caregivers, a union representing in-home caregivers had an entity to "bargain" with. In January 2005, the MQC3 and the SEIU presented a petition to MERC seeking certification of the union as the representative of the in-home caregivers.[37]

The petition stated that both the MQC3 and the SEIU consented to MERC's "jurisdiction" over the matter.[38] MERC then ran a mail vote among in-home caregivers to approve the SEIU as their representative union. The proposed bargaining unit was to comprise all 41,000 in-home caregivers in Michigan. The election received an approximate 19 percent response rate — 6,949 voted in favor of unionization, and 1,007 were opposed. The majority of caregivers, approximately 33,000, did not respond.[39] On April 19, 2005, MERC certified the SEIU as the collective bargaining agent for in-home caregivers.[40]

Once the union representation was official, SEIU and the MCQ3 entered into a collective bargaining agreement that permitted the union to collect "union dues" and "agency fees"* from the checks sent by the DCH to in-home caregivers on behalf of the disabled adults in the Home Help Program.[41] Starting in October 2006, the putative dues and fees were automatically deducted from the paychecks of all the in-home caregivers in the program. These dues and fees have since ranged from 2.5 percent to 2.75 percent of the caregivers' checks. As of September 2012, the SEIU had collected more than $32 million in dues and agency fees.

The Legislature Acts to End the Dues Collection

In 2009, the Mackinac Center Legal Foundation, a public-interest law firm that is affiliated with the publisher of this Policy Brief, brought suit against a unionization similar to the 2005 unionization of in-home caregivers. The 2009 lawsuit involved the unionization of home-based day care business owners and other home day care providers who receive indirect state child care subsidies on behalf of low-income parents enrolled in the state's Child Development and Care Program.[42] This lawsuit and the subsequent publicity led to legislative hearings. The Legislature later defunded the MQC3 for fiscal 2012. This defunding was meant to end the MQC3's existence and the collective bargaining agreement that required the in-home caregivers to pay the SEIU's union dues and agency fees. The MQC3, however, continued to operate in a limited capacity.†

Ultimately, in March and April 2012, the Michigan Legislature passed Public Act 45 and Public Act 76, respectively. Both pieces of legislation clearly excluded in-home caregivers and home-based day care providers from the definition of "public employees" under state law.[43] Public Act 76 altered the Public Employment Relations Act specifically to affirm:

> A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or **who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded**

* As explained in the Mackinac Center Policy Brief "Proposal 2 of 2012: An Assessment," "When a union is certified as a collective bargaining representative in the workplace, it gains a monopoly right to become the 'exclusive representative' of all of the employees during collective bargaining. Employees who support the union's presence may choose to formally join the union, in which case, they would owe membership dues to the union. But in many states, including Michigan, a union also gains the legal power to demand payment from all employees for its negotiations during collective bargaining and 'grievances' (i.e., resolving disputes with management). This payment is generally known as an 'agency fee' and would be collected from all employees not already paying union dues." Patrick J. Wright et al., "Proposal 2 of 2012: An Assessment," (Mackinac Center for Public Policy, 2012), 9, http://goo.gl/Bihc2 (accessed Oct. 7, 2012).

† The circumstances surrounding the MQC3's continued operation will be discussed further below under "The Relationship Between the MQC3 and the SEIU."

by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.[44] (Emphasis added.)

Public Act 76 was signed and went into effect on April 10, 2012.[45] On April 9, 2012, however, one day before the new law went into effect, the MQC3 and the SEIU entered into an extension of the existing collective bargaining agreement.[46] This contract extension was approved by MQC3's director, who at that time operated the MQC3 from her home and stated that she could devote only a limited amount of time to the council because she was collecting unemployment insurance.[47]

The Continued Collection of Monies From In-Home Caregivers

On May 24, 2012, Michigan's attorney general issued an informal legal opinion that temporarily halted the DCH's withholding of "union dues" from the payments received by in-home caregivers.[48] On May 29, 2012, however, the SEIU sued Gov. Richard Snyder, State Treasurer Andy Dillon and Department of Community Health Director Olga Dazzo in their official capacities. This lawsuit was brought in the federal courts on grounds that the state's failure to continue withholding money for the SEIU voided the union contract and therefore violated the U.S. Constitution's contract clause.[49] This lawsuit resulted in a preliminary injunction. The judge held that the Department of Community Health had to continue to withhold the union dues and agency fees to preserve the status quo until final resolution of the case or the expiration of the contract.[50]

Because of the contract extension on the eve of the new law, the collection of the union dues and agency fees continues to this day. Without the contract extension, the collective bargaining agreement would have expired on Sept. 20, 2012, and the dues would no longer have been collected, regardless of the federal ruling.

Questions About the 2005 In-Home Caregivers Unionization

There were several questionable steps taken during the unionization process in 2005. These subsequently led to legal and public policy objections that likely prompted Citizens for Affordable Quality Home Care to include collective bargaining provisions in Proposal 4. The problems are therefore discussed below. We address them in chronological order.

The Interlocal Agreement

As noted above, the MQC3 was created through an interlocal agreement between the Michigan Department of Community Health and the Tri-County Aging Consortium. The validity of that agreement is doubtful.

The Michigan Constitution requires that an interlocal agreement be signed among "two or more counties, townships, cities, villages or districts." It does not appear, however, that an agreement between TCAC and the DCH would satisfy the constitutional requirement. The DCH is a state agency. Even if the TCAC, which operates in a three-county region, could be considered sufficiently "local" to somehow meet the constitutional definition, it is only one local agency. An interlocal agreement requires at least two.

If the MQC3 was improperly constituted, it could not have legally served as the public employer in the unionization of in-home caregivers or of any subsequent collective bargaining agreements. The in-home caregivers unionization as public employees of the MQC3 itself would be invalid.

Outside this concern, the formation of the MQC3 raised policy questions. TCAC was an agency that had previously focused exclusively on the elderly.[51] According to the initial interlocal agreement, the MQC3 was able to serve only the elderly until the TCAC modified its charter, which occurred in April 2004.[52] TCAC did not appear to have expertise in the provision of in-home caregiver services to disabled adults statewide, though this was the MQC3's purported area of competence.

MERC's Power to Approve the Unionization

Setting aside the questionable origin of the MQC3, a fundamental question remains: Would the unionization of in-home caregivers as public employees have been legal in the first place? State law and the history of public-sector unionization in Michigan indicate it would not have been.

MERC can take actions only within the limited subject matter over which it has jurisdiction, and its primary jurisdiction is public employees* — specifically local government employment, which is not part of the state's classified civil service.[53]

* MERC also oversees "the law governing labor relations for private sector employers and employees not within the exclusive jurisdiction of the National Labor Relations Act." See "Guide to Public Sector Labor Relations Law in Michigan: Law and Procedure before the Michigan Employment Relations Commission," (Michigan State University and the Michigan Employment Relations Commission, 2011), 1, http://goo.gl/LhALv (accessed Sept. 23, 2012).

Local government employees did not get the power to have a union recognized as their exclusive bargaining agent until the revision of the state constitution in 1963.* Michigan's new constitution stated, "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."[54] This provision made clear that the Legislature — not the governor's office, municipalities or interlocal agreements — has the power to make the laws regarding public employees and unionization.

In 1965, following Michigan's new constitutional provision, Michigan enacted the Public Employment Relations Act. PERA was modeled on the 1935 federal National Labor Relations Act, which governs most private-sector unionization.† Notably, the NLRA excludes from its definition of "employee" those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor."[55] Prior to the in-home caregiver unionization, no court had ever held that PERA allowed the unionization of those who receive an indirect payment of money from the government.

Moreover, the Michigan courts had developed a four-factor test to identify who the government employer was in determining public employment under PERA. The Court of Appeals, in Wayne County Civil Service Commission v. Board of Supervisors,[56] set forth the following factors to determine who the employer is:

> (1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that they have the power and control over the employee's conduct.[57]

Note that the MQC3 did not meet the requirements set forth in this four-part test for being the employer of the in-home caregivers. The MQC3 does not hire or fire the caregivers; the Medicaid care recipients do. In fact, the collective bargaining agreement between the MQC3 and the SEIU specifically states:

> The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice. … 2) remove Providers from their service at will and for any reason; and 3) determine in advance under all circumstances who can and cannot enter their home.
>
> The parties reiterate their prior acknowledgement that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.‡, [58]

Even the petition for certification presented to MERC acknowledged that the care recipients or their guardians retained the fundamental duties of employers: "[T]he individual persons receiving care retain authority over their personal selection and retention of particular homecare workers."[59] Thus, the MQC3 did not meet elements (1) or (3) of the court's four-factor test.

Similarly, the MQC3 does not pay in-home caregivers. Formally, the participants do, with assistance from the DCH, which issues the checks and prints the providers' W-2s. These W-2s in turn list the participant as the employer.[60]

Nor, indeed, does the MQC3 determine the compensation in-home caregivers receive through the Home Help Program. In-home caregivers' pay is determined by the Legislature. Compensation levels agreed to in the MQC3's collective bargaining contract with the SEIU are aspirational. They essentially represent an agreement to lobby the Legislature for that level of compensation. The Legislature is not obligated to listen. Thus, the MQC3 did not satisfy element (2) of the court's test.

The MQC3 does not exercise supervisory control over in-home caregivers, who are providing care in tens of thousands of homes across Michigan. The only agency visiting the home is the Department of Human Services, and it does so only as an initial visit;[61] there is no ongoing supervision, except by the participant (to the extent he or she is able). The MQC3 did not meet element (4), meaning that the MQC3 had none of the hallmarks of an employer.

In 1996, PERA was amended in a way that made it even more clear that the in-home caregivers where not public

* Prior to this, public employment was regulated by the Hutchinson Act. The Hutchinson Act did not require state or municipalities to bargain with public-sector employees or with their union representatives. See Public Act 116 of 1947.

† One important difference between the two acts, however, is that the NLRA authorizes both employee strikes and employer lockouts, while PERA does not. See, for instance, MCL § 423.202. Other than that, PERA follows the NLRA model closely.

‡ Proposal 4 maintains this distinction in its proposed Article 5, Section 31(5). This subsection refers to providers as "participant-employed" and states, "Collective bargaining under this Section shall not deprive [Home Help Program] participants of their right to select, supervise, train and direct, or terminate, an individual provider."

employees. The statute was amended to exclude from public employment any sort of contractor:

> [A] person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.[62]

This was how the law stood when the MQC3 and the SEIU approached MERC to certify the unionization in 2005. The Legislature, which has the sole power to determine public employment, had not classified in-home caregivers as public employees, and the MQC3 did not qualify under Michigan law as their employer.* Given this, in-home caregivers were not public employees, and the Commission lacked jurisdiction. MERC should not have become involved.

Apparently, MERC did not consider whether it had the authority to be involved in the union certification. On May 4, 2010, the Michigan Senate Appropriations Subcommittee on Human Services, while discussing a similar certification involving home-based day care providers, received testimony from MERC Director Ruthanne Okun. Okun indicated that MERC never determined if it had jurisdiction in that case because the two parties consented to MERC's involvement:

> There was a consent election agreed to. In other words, indicating the employment relationship and that — who was in the bargaining unit and who would be eligible to vote. And it was that consent election. When that happens — **when there's a consent election, there never is an independent determination to — by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this [home-based day care providers] case.** Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission. (Emphasis added.)[63]

As noted above, the MQC3 and SEIU indicated in their petition that they "consented" to MERC's jurisdiction. One of the foundations of the law, however, is that a court or administrative agency does not have jurisdiction over a matter simply because the parties consent to it. The Michigan Supreme Court recently restated: "It is a recognized doctrine that parties cannot confer jurisdiction over a subject-matter by their consent, upon courts from which the law has withheld it."[64] Hence, MERC lacked authority to approve the unionization in the first place.

The Relationship Between the MQC3 and the SEIU

Like the original unionization, the current relationship between the MQC3 and the SEIU is questionable. As described earlier, the Michigan Legislature responded to public attention on the unionization of in-home caregivers by ending state funding of the MQC3.

This did not shut down the MQC3, however. Instead, the MQC3 began to receive funding from nongovernmental sources. Notably, in January 2012, the MQC3 had approximately $22,000 in the bank, of which the SEIU had provided $12,000 — the majority of the MQC3's funding.[65]

In other words, the union was now funding the ostensible employer. The union was bargaining with an entity that it was now funding. With this relationship between the SEIU and the MQC3, the MQC3 and SEIU entered into a contract extension on April 9, 2012 — one day before the effective date of Public Act 76, the second law clarifying that in-home caregivers were not public employees. Because of the federal court ruling, the contract extension therefore made the dues collection arguably legal, despite the new state law, until Feb. 28, 2013 — a date after Proposal 4 would take effect if it were approved by Michigan voters.

This contract extension, however, has all the appearance of a conflict of interest.† The SEIU needed the MQC3 to keep the dues flowing. The MQC3 needed the SEIU to provide operating monies to continue its existence. Under such circumstances, with money changing hands, the ability of the MQC3 to bargain effectively on behalf of taxpayers and the SEIU's ability to bargain effectively on behalf of in-home caregivers is in doubt.

Thus, the unionization of in-home caregivers has proved problematic on several fronts — in the creation of the putative public employer through a questionable interlocal

* As noted previously, the Michigan Legislature amended PERA twice more in 2012 to clearly exclude situations like that presented by the MQC3 and SEIU.

† The Mackinac Center Legal Foundation has alleged that this contract extension was in fact a conflict of interest and is seeking a MERC ruling granting compensatory damages for in-home caregivers of $3 million in back dues and agency fees. Michigan Employment Relations Commission Case No. C12 I-183 & CU12 I-042 (Patricia Haynes) and C12 I-184 & CU12 I-043 (Steven Glossop).

agreement, in the doubtful jurisdiction MERC claimed to certify the union, and in the subsequent relationship between the putative public employer and the union.

The Effect of Proposal 4 on the Unionization of In-Home Caregivers

Proposal 4, however, would enshrine in the state constitution collective bargaining power for the SEIU or any subsequent union representing in-home caregivers. The many legal objections to, and laws against, the previous unionization would be removed, at least prospectively. The provisions of Public Acts 45 and 76 of 2012 would be circumvented for in-home caregivers, who would not otherwise be considered public employees.

The New Public Employer-Employee Relationship Under Proposal 4

Proposal 4's new Article 5, Section 31(5) and Article 11, Section 5, would place the in-home caregivers under the authority of PERA — that is, the labor law governing local government employees — rather than under the Civil Service Commission, which regulates state government employees. This provision would place collective bargaining for in-home caregivers under MERC.*

Proposal 4, having made in-home caregivers public employees of the new MQHCC, also stipulates that they would not be public employees for any other purpose than collective bargaining. This provision means that Proposal 4 would not grant in-home caregivers other conditions and benefits of public employment absent further action by the Legislature. Proposal 4 continues to permit Medicaid care recipients to "select, supervise, train and direct, or terminate, an individual provider."[66] The proposal also reaffirms that in-home caregivers, like other public employees, "shall not have the right to strike."[67]

No Provisions for Higher Pay or Improved Work Conditions

The 100-word summary of Proposal 4 that will appear on the ballot states that the newly created MQHCC would "set minimum compensation standards and terms of employment." The language of the actual constitutional amendment, however, states that the MQHCC's power of "setting compensation standards … and other terms and conditions for the employment of individual providers by program participants" is "subject to appropriations by the Legislature."†, [68]

In other words, any pay increases or improvements in benefits would be dependent on decisions by the Legislature, just as they currently are. Nothing would change. The Legislature would still determine, as it does now, how much the caregivers would be paid. The "collective bargaining agreement" between the MQHCC and any union representing in-home caregivers would be a nonbinding list of desired appropriations and provisions. Proposal 4 does not require the Legislature to make the appropriations necessary to provide the requests in the collective bargaining agreement.‡

The Medicaid money paid to the caregivers comes from the federal government, passes through the state government and is sent to the care recipient. The MQC3 does not handle this money, and neither would the new MQHCC. The union would effectively serve as a lobbyist of the MQHCC and presumably the Legislature.§ The union would receive dues and agency fees withheld from care providers' paychecks, however, meaning that

* The proposed Article 5, Section 31(5), states in-home caregivers "shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency." The proposed Article 11, Section 5 inserts new language stating that the "classified state civil service shall consist of all position in the state service except those filled by popular election, heads of principal departments, … in-home personal care providers subject to the authority of the Michigan Quality Home Care Council. …"

† The 100-word summary and the complete language of Proposal 4 appear in the Appendix. Even though the phrase "subject to appropriation" is left off the ballot that the voters will see, the complete language of Proposal 4 is what the voters would add to the Michigan Constitution.

‡ Note that Proposal 4 does not grant the MQHCC powers to authorize "increases in rates of compensation" as the Michigan Constitution does the Civil Service Commission. Proposal 4 contains none of the elaborate apparatus for the MQHCC that is described in Article 11, Section 5, for coordinating the CSC's authorized compensation increases with the governor and the Legislature and the state budget process. Nor is the MQHCC elevated to the same level as the CSC, which regulates collective bargaining for state employees; rather, the MQHCC is subordinate to the collective bargaining regulation of MERC.

§ If Proposal 4 were approved, the SEIU would remain the home help providers' certified union if a collective bargaining agreement between the MQC3 and the SEIU were in force at the time Proposal 4 was adopted. (See Proposal 4 of 2012, Article 5, Section 31(4).) The existence of a collective bargaining agreement would depend, in turn, on the April 9, 2012, contract extension's validity, which is in doubt. If that extension were found to be invalid, Public Act 76 would render the home help providers private employees until Proposal 4 took effect. Hence, a new union certification election for home help providers as public employees would be necessary.

caregivers could actually receive less take-home pay than they would without union representation.

Requirement That Caregivers Pay Union Agency Fees

Proponents of Proposal 4 maintain that the caregivers could withdraw from the union if they don't want to be a member. While this is technically true, the collective bargaining agreement can — and with virtual certainty would, as it does now* — still require care providers to pay so-called "agency fees" to the union as compensation for the union's collective bargaining and administrative work.

Other Provisions of Proposal 4

No New Options for Care Recipients

The proposal specifies, "State programs to assist elderly persons and persons with disabilities … shall afford to program participants who are able to do so the option to hire and direct individual providers of such services."[69] The care recipient's ability to maintain supervisory control over the care provider is reiterated elsewhere in the proposal.[70]

This ability, however, is already vouchsafed in the current Home Help Program, and various materials available to care recipients and providers acknowledge this.[71] There's no movement to reverse this provision, which is ingrained in the program.

No New Program for In-Home Care Recipients

As discussed previously, Michigan has had a program to subsidize, certify and monitor in-home caregivers since 1981 — the Home Help Program. This program will continue whether or not Proposal 4 passes. Proposal 4 does not mandate a state program for disabled adults or the elderly.†

No Provisions for Taxpayer Savings

Proponents of Proposal 4 maintain that it will save the taxpayers money. However, even the proponents acknowledge that these savings arise from providing home care rather than institutionalizing the care recipients in nursing homes or assisted care facilities.

Nothing in the proposal makes a shift of Medicaid recipients out of nursing homes more likely than it is now. The Home Help Program to assist with home care has been underway for more than three decades. No provision in Proposal 4 would increase the payments made to the recipients for their care or for paying caregivers, so there would be no new economic incentive to provide new in-home services.

Nor does Proposal 4's establishment of the MQHCC seem likely to increase outreach to in-home care candidates who might otherwise be relegated to institutional care. A DCH audit of the Home Help Program found that in fiscal years 2002, 2003 and 2004 — the period just prior to and including the early months of the MQC3 — the Home Help Program had 51,372, 53,812 and 55,382 care recipients, respectively.[72] A 2011 report by Anderson Economic Group indicated, however, "In 2010, the average monthly number of Home Help consumers was 53,516" — if anything, a slight decline.[73] The MQHCC is a successor to the MQC3 in mission and scope, so it appears no more likely than the MQC3 to affect the ratio of institutionalized and home-based care recipients.

No Provisions for Improved Care

The proposed Article 5, Section 31(2) describes duties and functions of the proposed MQHCC. Proponents of Proposal 4 contend that the MQHCC would improve the quality of in-home care.

There appears to be no basis for this claim. The proposal provides for a registry of caregivers.[74] However, such a registry has been provided in the past, and nothing prevents Michigan from continuing to provide such a registry in the future.[75] Similarly, the MQC3 required providers hoping to place their names on the registry to undergo a background check, and the DCH appears to be continuing the practice.[76] It is also worth noting that because most caregivers are family members, no referral — and no registry — is necessary in most cases.

Other provisions would require the MQHCC to provide financial management services to care recipients "to facilitate their ability to employ providers, to ensure

* The 2009-2012 collective bargaining agreement — putatively extended to 2013 — states, "Providers may elect instead [of joining the union] to decline membership in SEIU HCMI and instead pay to SEIU HCMI a uniformly assessed agency fee." See "Collective Bargaining Agreement Between Michigan Quality Community Care Council and Service Employees International Union, Healthcare Michigan," (Mackinac Center for Public Policy (Michigan Quality Community Care Council), 2009), 5, http://goo.gl/YFq97 (accessed Oct. 4, 2012).

† The proposed Article 5, Section 31(1), requires state programs for the elderly and disabled to give recipients control over hiring and supervision of the providers, but it does not require that such programs exist.

compliance with applicable laws, and to make appropriate employment-related payroll deductions."[77] This service would include helping care recipients file W-2s acknowledging payments to care providers and complying with other state and federal employment laws. Amending the constitution and creating a new government agency is not necessary to provide this service, however; the service is already provided by the DCH.[78]

Proposal 4 states the MQHCC would furnish "training opportunities for providers, to improve provider skills."[79] Backers of the measure allege that this would improve the available care. Notably, however, these training opportunities would not be mandatory. Moreover, such programs have been provided in the past; a constitutional amendment is not required to continue them.[80]

The Principles of Unionization at Issue in Proposal 4

The unionization of in-home workers, such as the in-home caregivers discussed here, has been a goal of labor unions. But in addition to the difficulties of reaching and persuading home-based workers to join a union, there are numerous statutory obstacles.

As noted at the outset of this Policy Brief, the National Labor Relations Act does not allow the unionization of such private in-home care workers. The NRLA specifically excludes those employed "in the domestic service of any family or person at his home." The NRLA likewise excludes independent contractors and any employee of a "State or political subdivision thereof."[81] State laws have not specifically allowed someone to be classified as a public employee simply because he or she is paid money by a government program for providing services.

A New Model of Public-Sector Union Organization

The push to unionize home health care workers as public employees was a campaign that originated in the 1980s in California under the direction of the SEIU. Many organizers credit Craig Becker, then a law professor at the University of California-Los Angeles, for orchestrating the new strategy of categorizing employment status by looking at the source of funding of the employee. A co-founder of the controversial community-organizing group Acorn, Wade Rathke, has stated: "For my money, Craig's signal contribution has been his work in crafting and executing the legal strategies and protections which have allowed the effective organization of informal workers, and by this I mean home health-care workers."[82]

The first successful unionization of this kind involved the SEIU organizing in-home caregivers in Los Angeles County in 1999, though the attempt originally failed when the union tried to organize against the county government. A California court ruled that the county was neither an employer nor a joint employer of the in-home care providers because the county did not control the employment.[83]

The California Legislature subsequently enacted a statute that allowed counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services."[84] This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to [the home help care] recipients," although the recipients would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them."[85] An organizing drive against one of these entities in Los Angeles County netted organized labor 74,000 additional members and was hailed as "[o]ne of the most significant gains in union membership in fifty years."[86]

Similar organizing efforts spread on the West Coast, seeking to duplicate the success of the Californian organizing drive. The next state to allow the organization of in-home caregivers was Oregon, which did so through a 2000 ballot initiative to amend the state constitution.[87] Washington followed in 2001 after organizers implemented a voter-initiated ballot measure.[88] Illinois was the next state to enact such a policy, which it did on March 4, 2003, via an executive order signed by then-Gov. Rod Blagojevich.

In 2009, Illinois attempted to expand the range of in-home caregivers who would be unionized as government employees. However, a majority of participating caregivers rejected both the SEIU and AFSCME affiliate, and these caregivers were never unionized.

This new model of what constitutes a "public employee" was summarized by the National Women's Law Center: "Notwithstanding the absence of a traditional employer-employee relationship, this model used the provider's relationship with the state — receipt of payment from the state under a program administered by the state — as the nexus to find or fashion an 'employer of record' with whom to bargain."[89]

This nontraditional approach has led to uncertain results for workers. In Michigan, the experimental nature of

such unionization was acknowledged by a union official involved in organizing home-based day care providers (a unionization that was later ended by the Legislature). Nick Ciaramitaro, director of legislation and public policy for American Federation of State, County and Municipal Employees Council 25, wrote in an email: "Much of the [collective bargaining contract] however is dependent on legislative or administrative action by the state of Michigan. In many ways, this [day care provider unionization] is an experiment with little guidance from statute and virtually no administrative or judicial precedent to follow."[90]

Practical and Political Aspects of the New Model

Practically speaking, unionizations of in-home service providers as public employees can yield large sums of money, even though the individual care providers are typically not highly paid. The collection of union dues and agency fees by the SEIU in the unionization of in-home caregivers in Michigan has provided an estimated $32 million in income to the union since 2005. This money was withheld from the Medicaid payments sent to care recipients for the payment of in-home caregivers.

Given unions' expenditures generally, it is likely that a significant portion of this money was not spent on collective bargaining.[91] In part, this is because the incentives for public-sector collective bargaining are different from those for private-sector collective bargaining. In the private sector, although the two sides in theory have a common goal of keeping the business profitable, the two sides both bargain in the distinct best interests of their own side. The same does not necessarily hold true in public-sector bargaining. In the public sector, government-employee unions have a bargaining advantage that the private sector employees do not: The government-employee unions can work to elect their employers — i.e., the elected officials who sit on the other side of bargaining table (or have authority over those who do).

There is evidence that this dynamic is at work in the unionization of in-home workers as public employees. In 2008, following the 2006 unionization of home-based day care providers in Michigan, then-Gov. Jennifer Granholm told an international AFSCME convention, "In Michigan, because of the partnership between AFSCME and the governor's office, this means that 45,000 new AFSCME members — quality child care providers — will be on the ground providing care to children."*

A similar relationship may have occurred in the case of the Illinois unionization of in-home caregivers (discussed above). Then-Gov. Rod Blagojevich signed the executive order enabling the unionization in 2003. In 2006, the SEIU was reportedly the biggest contributor to Gov. Blagojevich's re-election campaign.[92]

The SEIU has asserted that political expenditures are part of the union's current use of the dues collected from in-home caregivers in Michigan. In the SEIU's federal lawsuit against the state for discontinuing the dues collection, the SEIU's attorney cited political concerns to argue that the union would suffer irreparable harm if the collection of money from caregivers' paychecks did not continue:

> Any delay in receiving those funds will be ruinous for the Union, which will have to lay off a significant portion of its staff and will be unable to represent the providers and to protect their interests, whether in collective bargaining, in upcoming legislative matters, during the impending general election, or otherwise. ...
>
> ... The Union is an advocacy organization, and the inability of the Union to advocate vigorously on behalf of its members *now* could no more be remedied after the fact than if a political candidate's campaign treasury were placed into escrow and released to the candidate after the election is over.[93] (Emphasis in original.)

Related Principles at Issue in the New Model

There is one other very important aspect of union law that is affected by what occurred here with the SEIU and MQC3, and by what Proposal 4 seeks to set in stone. This goes to the very heart of the purpose which has justified collective bargaining.

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* Kathy Hoekstra, "The Granholm-AFSCME Partnership," (The Mackinac Center for Public Policy, 2010), http://goo.gl/hh23y (accessed Oct. 7, 2012).The same may have been true in the case of Michigan's temporary unionization of home-based day care providers. In the same email cited above, AFSCME official Nick Ciaramitaro suggests that the interlocal agreement involved creating a government "employer" in the home-based day care unionization — an interlocal agreement similar to the one employed with in-home caregivers — was not initiated by caregivers or even the government agencies involved, but rather by the unions themselves: "The Interlocal Agreement came about at the recommendation of Michigan AFSCME and the UAW with the support of the Executive Office." Tom Gantert, "E-mails Reveal Child Care Union All About the Money," (Mackinac Center for Public Policy, 2009), http://goo.gl/S8FxL (accessed Oct. 7, 2012).

Under collective bargaining, the representative union almost invariably becomes the exclusive representative of the employees. The union then speaks for all the employees in the bargaining unit regarding matters of employment, and the individual employees no longer have the right to negotitate on their own behalf on employment matters.

The courts recognize this restriction as an infringement on a dissenting employee's First Amendment right to free speech and association. The U.S. Supreme Court has held this infringement to be justified because of the government's compelling interest in "industrial peace and stabilized labor-management."[94] In short, the U.S. Congress, in enacting the National Labor Relations Act, put forth a policy of sufficient importance — maintaining "industrial peace" and preventing stoppages to commerce — to legally override First Amendment rights to freedom of association and speech.

While this view may have been plausible in the first half of the 20th century, when labor relations were often marked by work stoppages and industrial sabotage,[95] is there a legitimate concern over "industrial peace" when in-home caregivers are caring for family members? These caregivers were not unionized prior to the novel theories implemented in the 1990s, yet there is no record of in-home caregivers disrupting commerce or resorting to widespread violence with their care recipients. The idea seems largely fanciful.

In fact, a First Amendment constitutional challenge on behalf of in-home caregivers has been brought in Illinois, and it appears to be headed to the U.S. Supreme Court.[96] If Proposal 4 passes, however, this is the new model of public-sector unionization that would be enshrined in Michigan's constitution.

This model holds that the indirect receipt of public money in performing a service renders the recipient a public employee subject to unionization. If someone can be considered a public employee merely because he or she receives public money, then doctors who participate in Medicare can be deemed "public employees" and unionized. So too can landlords who accept payment from housing programs for low-income tenants or grocers who accept food stamps.

This model would therefore unionize a large number of business owners and workers against state and local government, just as it already has unionized home-based day care providers and foster care parents in other states.[97] While the potential for such a large number of unionized employees might be a natural goal of national labor unions, it could have significant consequences for the operation of government and for the potential union members themselves.

Conclusion

The benefits for disabled adults and the elderly that are included in Proposal 4 are either already being provided or can easily be provided without amending the constitution. The proposal contains no new options for care recipients, no new programs for care recipients, no new avenues for taxpayer savings and no new provisions for improved care for recipients.

There has been no threat to the Medicaid-financed in-home care program. Moreover, there has been only one threat to the ancillary programs for training, registry and background checks: the dubious unionization of in-home caregivers and the collection of more than $30 million in union dues from Medicaid money meant for those caregivers. The subsequent public outcry and legislative backlash against the SEIU and the MQC3 for this arrangement led to the defunding of the MQC3. Advocates serious about these programs should consider severing them from unionization, rather than chaining them together, as Proposal 4 does.

Proposal 4, in truth, would serve primarily to validate the unorthodox and illegal unionization of in-home caregivers that has already occurred. It would grant legitimacy to the model of public-sector unionization in which anyone who receives money indirectly from a government program is a government employee subject to collective bargaining and union dues and agency fees.

Appendix

The 100-Word Proposal 4 Summary Appearing on the Ballot

PROPOSAL 12-4

A PROPOSAL TO AMEND THE STATE CONSTITUTION TO ESTABLISH THE MICHIGAN QUALITY HOME CARE COUNCIL AND PROVIDE COLLECTIVE BARGAINING FOR IN-HOME CARE WORKERS

This proposal would:

- Allow in-home care workers to bargain collectively with the Michigan Quality Home Care Council (MQHCC). Continue the current exclusive representative of in-home care workers until modified in accordance with labor laws.
- Require MQHCC to provide training for in-home care workers, create a registry of workers who pass background checks, and provide financial services to patients to manage the cost of in-home care.
- Preserve patients' rights to hire in-home care workers who are not referred from the MQHCC registry who are bargaining unit members.
- Authorize the MQHCC to set minimum compensation standards and terms and conditions of employment.

Should this proposal be approved?

The Complete Language of Proposal 4

The language of the proposal as it would be included in the Michigan Constitution appears below.

The following new Section 31 would be added to Article V of the Michigan Constitution:

§ 31: Michigan Quality Home Care Council

1. State programs to assist elderly persons and persons with disabilities by financing, in whole or in part, in-home personal care services, shall afford to program participants who are able to do so the option to hire and direct individual providers of such services.

2. There is hereby established a Michigan Quality Home Care Council whose purpose shall be to facilitate participants' ability to more effectively exercise that option, including by improving the availability, reliability and skills of the individual provider workforce. Council duties and functions shall include:

a. Providing training opportunities for providers, to improve provider skills, and for participants, to facilitate their ability to hire and manage providers;

b. Providing for a registry that may refer qualified providers who have had appropriate background checks for employment, however participants shall retain the right to hire providers not referred from the registry;

c. Ensuring that financial management services are available to participants to facilitate their ability to employ providers, to ensure compliance with applicable laws, and to make appropriate employment-related payroll deductions;

d. Setting compensation standards, subject to appropriations by the Legislature, and other terms and conditions for the employment of individual providers by program participants; and

e. Other related duties and functions, not inconsistent with the foregoing, as assigned to the Council by law or as necessary or convenient to implement the purposes of this Section.

3. The Council shall be governed by a board of eleven (11) members, including:

a. Nine individuals appointed by the Governor with expertise regarding participant needs, no fewer

than seven of whom shall be current or former program participants, participant representatives, or participant advocates; however such positions shall initially be filled by those similarly qualified members of the Michigan Quality Community Care Council board who last filled those positions prior to the passage of this Section. Upon expiration of each such initial member's term of appointment, the position to be filled under this paragraph shall have a term of four years;

b. Serving as Chair, the Director of the Department of Community Health, or of the successor executive department principally responsible for administering State medical assistance programs providing services governed by this Section, or his designee; and

c. The Director of the Department of Human Services, or of such successor executive department, as the Governor determines has responsibilities relating to State programs providing services governed by this Section, or his designee.

4. The Council shall be a public body within the Executive Branch, with the normal powers, duties, rights and responsibilities, including regarding contracting, acquiring and disposing of property, and adopting rules. The Council may accept gifts, grants, bequests, or assets from any source, expend such funds, and accept assistance from other governmental agencies, to effectuate its purposes. The Council shall assume and succeed to the authorities, duties and obligations of the Michigan Quality Community Care Council to the extent consistent with this Section, including any obligations to recognize provider representatives and to honor any unexpired agreements (to the extent of a term not to exceed 3 years) with such representatives, as last incurred or entered into by that Council prior to the adoption of this Section.

5. Consistent with this Section, participant-employed providers governed by this Section shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency. But such providers shall not, as a consequence of this Section, be considered public or State employees for any other purpose, nor be entitled to any other legal benefit reserved to such employees. Collective bargaining under this Section shall not deprive participants of their right to select, supervise, train and direct, or terminate, an individual provider. Such providers shall not have the right to strike.

6. Nothing in this Section shall be construed in a manner that conflicts with a state's obligations under Medicaid. The Department of Community Health or other responsible agency shall cooperate with the Council, including by providing assistance as necessary or convenient to implement the provisions of this Section.

The proposal would amend Article XI, Section 5 of the Michigan Constitution, as follows (new language capitalized):

The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, IN-HOME PERSONAL CARE PROVIDERS SUBJECT TO THE AUTHORITY OF THE MICHIGAN QUALITY HOME CARE COUNCIL, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering

all personnel transactions, and regulate all conditions of employment in the classified service.

State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Endnotes

1 Proposal 4 of 2012, Article 5, Section 31(5).

2 Proposal 4 of 2012, Article 5, Section 31(4).

3 Ibid.

4 Proposal 4 of 2012, Article 5, Section 31(2)(a).

5 Proposal 4 of 2012, Article 5, Section 31(2)(b).

6 Proposal 4 of 2012, Article 5, Section 31(2)(c).

7 Proposal 4 of 2012, Article 5, Section 31(4).

8 Proposal 4 of 2012, Article 5, Section 31(2)(d).

9 Proposal 4 of 2012, Article 5, Section 31(4).

10 Proposal 4 of 2012, Article 5, Section 31(3).

11 Proposal 4 of 2012, Article 5, Section 31(3)(a).

12 Proposal 4 of 2012, Article 5, Section 31(3)(a).

13 Proposal 4 of 2012, Article 5, Section 31(3)(b)-(c).

14 Ibid.

15 Proposal 4 of 2012, Article 5, Section 31(4).

16 Caroline M. Sallee, "The Role of MQC3 and Home Help: Serving Michigan's Long-Term Care Population," (Anderson Economic Group, 2011), 10, http://goo.gl/1dD5b (accessed Oct. 7, 2012).

17 Olmstead v L.C., 527 US 581 (1999).

18 Olmstead v L.C., 527 US 581, 601 (1999).

19 Director James B. Hennessey, Michigan Department of Community Health Office of Audit, "Department of Community Health Audit of the Medicaid Home Help Program," (Michigan Department of Community Health, 2005), 1, http://goo.gl/Fn808 (accessed Oct. 4, 2012).

20 Bradley Geller, "Medicaid and Long Term Care," (Michigan State Long Term Care Ombudsman Program, undated), 11, http://goo.gl/jas4J (accessed Oct. 7, 2012).

21 Ibid.

22 "Meeting of the Board of State Canvassers, August 27, 2012," (Michigan Department of State, 2012), 5, http://goo.gl/V03yQ (accessed Oct. 4, 2012).

23 Proposal 4 of 2012, Article 5, Section 31(5).

24 2012 Public Act 45 and 2012 Public Act 76. See also Patrick J. Wright, "Haynes and Glossop v SEIU and MQC3, Brief in Support of Charge of Unfair Labor Practice," (Mackinac Center for Public Policy, 2012), 10-12, 30-36, http://goo.gl/z4fH7 (accessed Oct. 4, 2012).

25 SEIU Healthcare Michigan v Snyder, Case No. 12-cv-12332 (ED Mich.) Order of June 22, 2012.

26 "National Labor Relations Board: Jurisdictional Standards," (National Labor Relations Board), http://goo.gl/nFbbh (accessed Oct. 4, 2012).

27 USCA § 152(2). Ibid.; Director Stephen Fitton, Medical Services Administration, Department of Community Health, "Taxability of Adult Home Help/Adult Foster Care Payments," (Mackinac Center for Public Policy (Michigan Department of Community Health), 2011), 1, http://goo.gl/6CQlt (accessed Oct. 7, 2012).

28 Const 1963, Article 11, Section 5.

29 "Tabulation of Election Results, Michigan Quality Community Care Council (MQCCC) and Service Employees International Union, AFL-CIO," (Mackinac Center for Public Policy (Michigan Bureau of Employment Relations, Labor Relations Division), 2005), 2, http://goo.gl/YCCkb (accessed Oct. 4, 2012).

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