

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

Summer 2013



### **Does a Lower Unemployment Rate Mean the Economy is Improving?** **By David Zin, Chief Economist**

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Every month, agencies at the state and Federal levels release statistics regarding the condition of the labor market. Among the released statistics, the one that tends to attract the most media attention is the unemployment rate. Both policymakers and members of the public tend to seize on the changes in the rate, with the assumption that if the unemployment rate is rising, then the economy is worsening; and if the unemployment rate is falling, then the economy is improving. The unemployment rate, however, is only one window through which to view the economy and it reflects changes in many different underlying factors. This paper will discuss how the unemployment rate is calculated, what it can reveal about the economy, and the importance of some alternative indicators that are also regularly published.

#### **How the Unemployed Rate is Calculated**

The unemployment rate is derived from a survey of approximately 60,000 households (translating into approximately 110,000 individuals) encompassing rural and urban areas from every state and the District of Columbia. Every month, one-fourth of the households in the survey are changed. The sample households are interviewed about a variety of demographic factors as well as any labor force activities, although respondents are not asked specifically if they are unemployed, nor do the interviewers determine the labor force classifications for respondents. Other controls are employed to ensure that truthful data have been obtained and responses are weighted to ensure a statistically accurate reflection of the total population. The unemployment rate is *not* determined by counting every single unemployed person each month nor is it based on the number of individuals filing unemployment insurance benefit claims.

Based on their responses to the survey, individuals are classified in one of three categories: 1) not in the labor force, 2) in the labor force and unemployed, and 3) in the labor force and employed. The number of individuals in each category is used to compute a variety of ratios, including the unemployment rate. Total population is, by definition, equal to the sum of the three groups and the labor force is defined as the sum of those fitting in the second and third categories. As a result, the labor force consists of those who are employed combined with those who are not employed but who are seeking work.

Many types of situations can result in an individual being counted as employed. Generally, people are considered employed if they did any work at all for pay or profit during the survey week, whether part-time or full-time. However, individuals are also counted as employed if they are on vacation, ill, on maternity or paternity leave, or experiencing child-care problems, personal problems, or other family obligations that kept them from working; they could not work due to the weather; or they are in a variety of other situations. Such individuals are counted as employed "with a job but not at work" because they have a specific job to which they will return.

Individuals are classified as unemployed if they do not have a job, were actively looking for work in the prior four weeks, and are currently available for work. The definition of "actively looking for work" includes sending out résumés or filling out applications, placing or answering an advertisement, checking employment registers, contacting employers or employment agencies, having a job interview, contacting friends or family about employment opportunities, or taking other measures to actively search for a job. Reading about job openings in a newspaper or on a web site, and engaging in job training are examples of activities that do not count as actively seeking work. As a result of this definition, the unemployed category includes more individuals than just those who have lost their jobs. It can also include individuals who have quit a job and are seeking another, who had temporary positions that have ended, who are returning to the labor force after attending school or having a child, or who are looking for their first job.

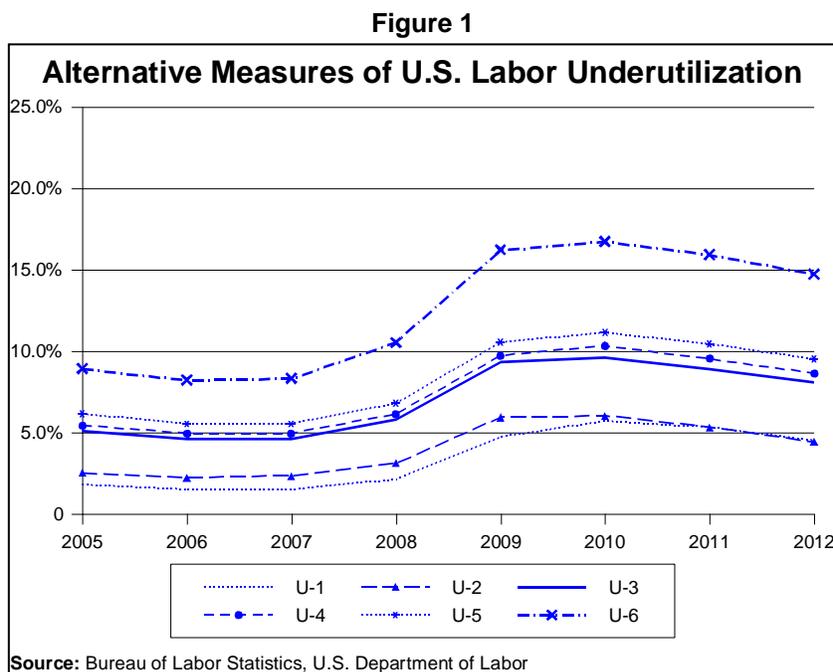


From these groupings, several statistics are computed. The "official" unemployment rate is determined by dividing the number of unemployed individuals by the number of individuals in the labor force. The labor force participation rate is calculated by first adding the number of people who are unemployed but seeking work to the number employed, and then dividing that sum by the total population. The groupings also have subsets, such as individuals who are "marginally attached to the labor force" and "discouraged workers". These subsets are measured to provide a richer picture of the employment situation, and evaluate such issues as long-term unemployment, those who lost their job as a percentage of the labor force, individuals who desire full-time work but are employed part-time for economic reasons, and individuals who are not looking for work for a job-market-related reason. These alternative concepts add another five "types" of unemployment rates to the "official" unemployment rate.

As a result, when monthly labor statistics are released there are actually six "unemployment rates" presented, although they are termed "alternative measures of labor underutilization". They are defined as:

- U-1: Persons unemployed 15 weeks or longer, as a percentage of the civilian labor force
- U-2: Job losers, and persons who completed temporary jobs, as a percentage of the civilian labor force
- U-3: Total unemployed, as a percentage of the civilian labor force
- U-4: Total unemployed plus discouraged workers, as a percentage of the civilian labor force
- U-5: Total unemployed, plus discouraged workers, plus all other persons marginally attached to the labor force, as a percentage of the civilian labor force
- U-6: Total unemployed, plus all persons marginally attached to the labor force, plus total employed part time for economic reasons, as a percentage of the civilian labor force

The official unemployment is represented by the U-3 measure, but the differences between the rates can be substantial. Figure 1 illustrates the difference between the six alternative measures for the United States from 2005 through 2012.



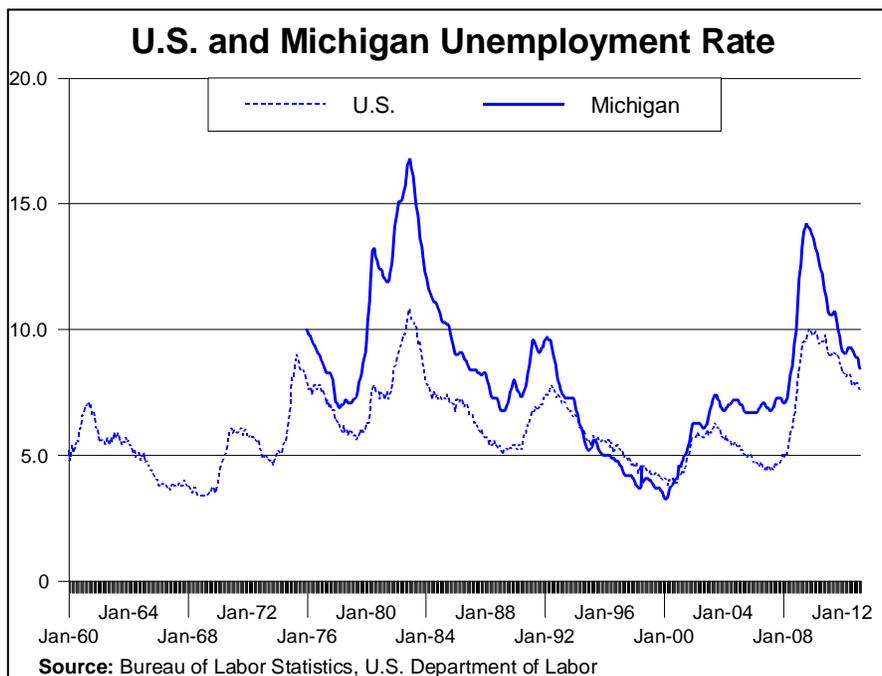


### The Michigan Unemployment Rate

The Bureau of Labor Statistics, in the U.S. Department of Labor, works with states to develop local unemployment measures for various areas, including census regions, states, a variety of metropolitan areas, small labor market areas, counties, and cities with a population of 25,000 or more. The same definitions are used to measure concepts such as the labor force, employment, and unemployment; when the data are adjusted for seasonal variation, however, the adjustments differ from those used in the national data. Furthermore, the statistics draw on a wider array of data sources than the national data, but are calibrated to sum to the national data.

Figure 2 depicts the official seasonally adjusted monthly unemployment rates (the U-3 measure) for the U.S. and Michigan from January 1960 through April 2013. (Monthly unemployment rates for Michigan are available only back to January 1976.) In those 53-plus years, the Michigan unemployment rate was at or below the U.S. rate only during the July 1994 through August 2000 period.

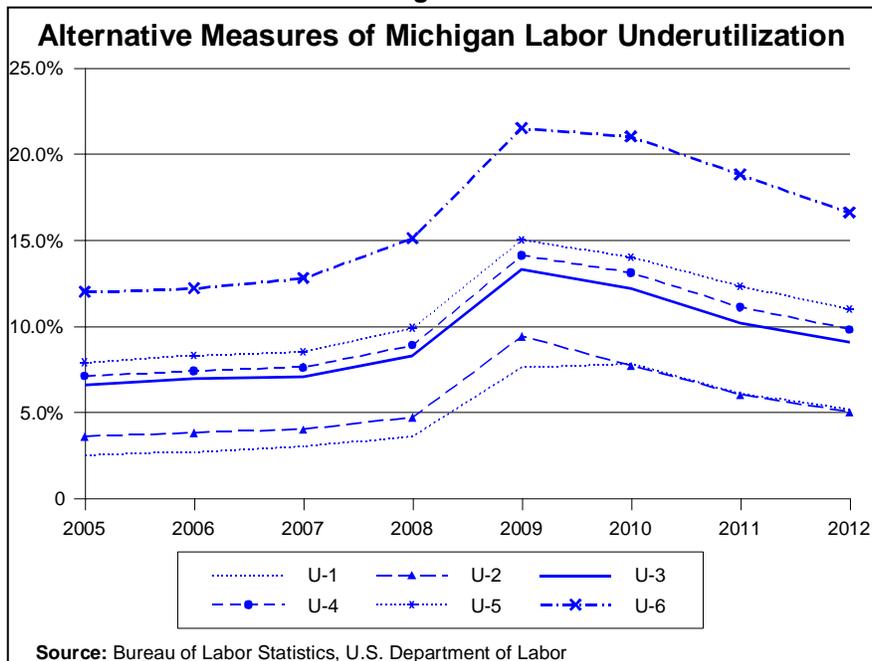
**Figure 2**



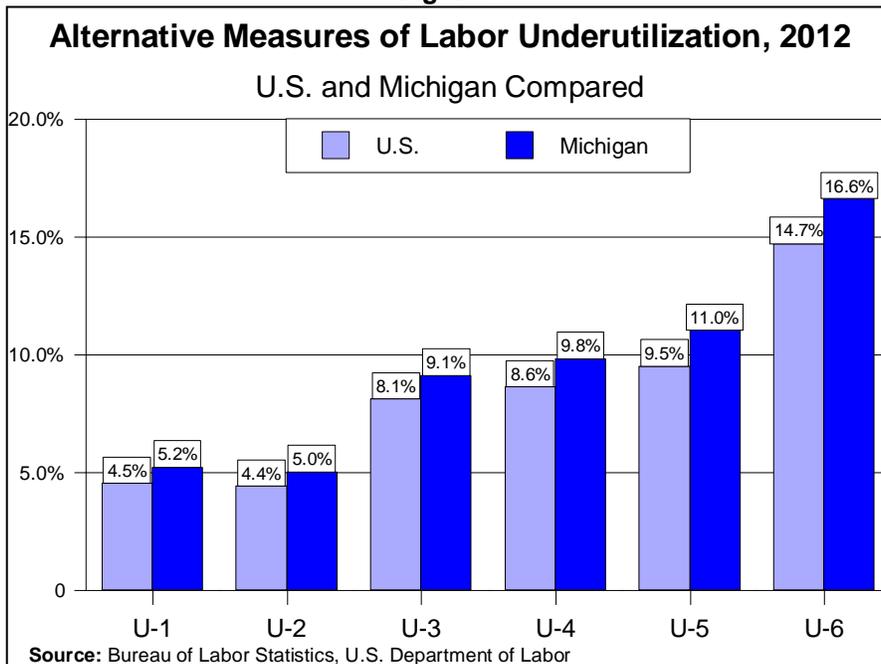
Just as there are alternative measures of labor underutilization for the United States, similar measures exist for states. Figure 3 provides the same information presented in Figure 1, but for Michigan rather than the United States. Not only is each measure higher for Michigan, but the changes were more dramatic, with the U-6 measure peaking at 21.5% in 2009, after being only 12.0% in 2005. A comparison of the U.S. and Michigan values for each underutilization measure for 2012 is presented in Figure 4.



**Figure 3**



**Figure 4**





## **What the Unemployment Rate Reveals about the Economy**

The preceding discussion focused on different ways to measure labor underutilization, but all of the measures shared a common structure: they all represented ratios of one portion of the population to another portion of the population. For example, the official unemployment rate (the U-3 measure) represents the total unemployed, as a percentage of the civilian labor force. As a result, the unemployment rate will change if either the numerator (the total unemployed) or the denominator (the size of the civilian labor force) changes. Furthermore, factors that can change either the numerator or denominator can represent either improving or deteriorating economic conditions, and some changes can affect both the numerator and the denominator at the same time. While similar issues are relevant for all six measures of labor underutilization, the discussion below focuses on the U-3 measure, the official unemployment rate.

The labor force participation rate is the most influential factor affecting whether changes in the unemployment rate reflect an improving or declining economy. By definition, those who participate in the labor force are individuals who are either currently working or actively seeking work. Labor force participation can vary for many reasons. Individuals might not participate in and/or might withdraw from the labor force due to illness or injury, retirement, pregnancy, a large lottery prize, marriage, college attendance, a belief that there are no positions that they perceive as desirable or for which they would be competitive, etc. Similarly, individuals may choose to enter the labor force for reasons that vary, and include circumstances such as high school or college graduation, improved perceptions of obtaining employment, increased maturity of children, etc. [Figure 5](#) illustrates the labor force participation rate since 1976 for both Michigan and the United States. The impact of a poor economy on individuals' perceptions of being able to obtain employment from a job search is visible, particularly in Michigan, with participation growing more slowly or declining in periods of recession. How changes in labor force participation can affect the unemployment rate can be illustrated with four examples, discussed below.

### *Case One: Both Employment and Labor Force Participation Rise, and Unemployment Falls, but Unemployment Falls More Rapidly than Labor Force Participation Rises*

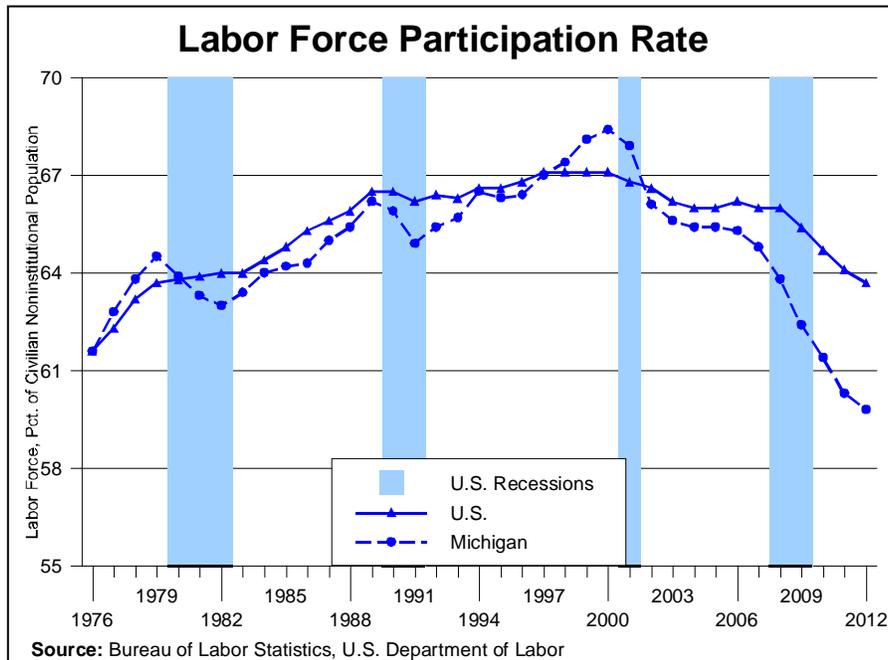
In 1998, the U.S. labor force grew 1.0%, expanding from 136.3 million to 137.7 million; while employment increased 1.5%, rising from 129.6 million to 131.5 million, and unemployment declined 7.8%, falling from 6.7 million to 6.2 million. As a result, the unemployment rate fell from 4.9% to 4.5%, and the decline reflected conditions generally associated with an improving economy: higher employment and lower unemployment.

### *Case Two: Both Employment and Labor Force Participation Rise, but Unemployment Increases*

In 1992, the U.S. labor force grew 1.4%, expanding from 126.3 million to 128.1 million; while employment increased 0.7%, rising from 117.7 million to 118.5 million. However, unemployment also increased 11.4%, growing from 8.6 million to 9.6 million. As a result, the unemployment rate rose from 6.8% to 7.5%, despite the increase in employment. In this case, as the economy improved after the 1990-1991 recession, job seekers returned to the labor market more rapidly than new jobs were being created. This phenomenon is not uncommon after recessions, and is one reason that the unemployment rate is often termed a "trailing indicator" of the economy. Because the labor force often grows more rapidly than additional jobs are added to the economy, as a result of improving job prospects, the unemployment rate will often remain high or even increase even though the economy is growing and adding jobs.



**Figure 5**



*Case Three: Employment Decreases, Unemployment Increases, and Labor Force Participation Rises (or Declines More Slowly than Employment Falls)*

In 1991, the U.S. labor force grew 0.4%, expanding from 125.8 million to 126.3 million; while employment declined 0.9%, falling from 118.8 million to 117.7 million. As suggested by the increase in the labor force, many of those who lost their jobs remained in the labor force, and unemployment increased 22.4%, rising from 7.0 million to 8.6 million and raising the unemployment rate from 5.6% to 6.8%. This combination of events represents conditions generally associated with recessions: falling employment and rising unemployment.

*Case Four: Employment Decreases, Labor Force Participation Declines, and the Unemployment Rate Declines*

In 2010, the Michigan labor force declined 2.1%, falling from 4.85 million to 4.75 million; while employment declined 1.3%, falling from 4.20 million to 4.15 million. However, unemployment also declined 7.6%, from 0.65 million to 0.60 million. As a result, the unemployment rate fell from 13.4% to 12.7%, despite the loss of nearly 54,000 jobs. In this type of case, individuals who have lost their job or are unsuccessful in their job search have left the labor force in such numbers that, despite the declines in employment, the unemployment rate falls. In such circumstances, neither the declining unemployment rate nor declining employment reflects a positive economy.

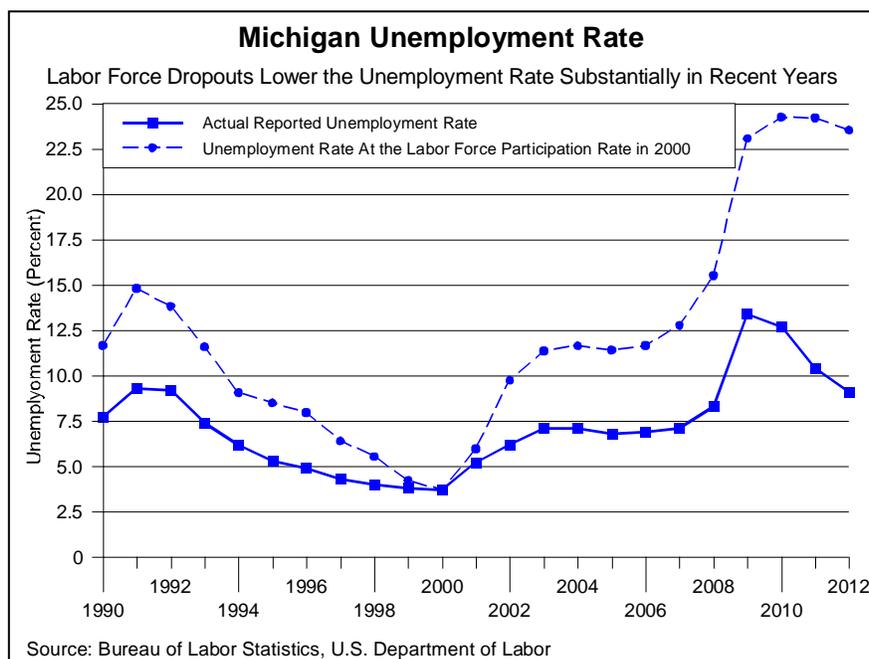
Variants on these four cases can occur. For example, in Michigan during 2011 and 2012, the lower unemployment rate was driven more by the departure of unemployed persons from the labor force than by the increase in employment. Over the 2011-2012 period, Michigan employment increased by approximately 83,600 but more than 92,400 individuals dropped out of the labor force. While the increase in employment is positive for the economy, whether the decline in unemployment and the drop in the unemployment rate reflect positively on the economy depends on the reasons for the decline in the labor



force. If individuals leave the labor force because they believe the prospects of finding work are so poor that the search is not worth pursuing or because they are leaving the State, then the declining unemployment and decline in the labor force reflect negative economic circumstances. Conversely, if the declines represent the aging and retirement of individuals, then the implications are not nearly so negative.

Figure 6 also illustrates the impact of labor force participation on the unemployment rate. As displayed in Figure 5, Michigan's labor force participation rate peaked in 2000 at 68.4%. After declining through 2003, the participation rate remained fairly stable, averaging about 65.3%, until the 2008-2009 recession. Between 2007 and 2012, the labor force participation rate declined from 64.8% to 59.8%, the lowest level since the current data series began in 1976. As seen in Figure 6, during the less-drastring decline in labor force participation in the 2001-2003 period, the unemployment rate increased; and then stabilized as labor force participation stabilized. Similarly, in the early stage of the 2008-2009 recession, labor force participation declined and the unemployment rate increased. However, since 2009, labor force participation has declined and the unemployment rate has fallen.

**Figure 6**



Over the 2009-2012 period, employment initially decreased by 53,800 jobs, and then increased by approximately 41,800 per year in each of the next two years, leaving the net employment gain between 2009 and 2012 at 29,700 jobs -- approximately 0.4% of the civilian noninstitutional population. However, the unemployment rate declined from 13.4% in 2009 to 9.1% in 2012. The decline in the unemployment rate reflects the absence of 225,500 individuals, approximately 2.9% of the population, from the ranks of the unemployed. The decline in unemployment was more than 7.5 times greater than the increase in employment. As a result, the decline in unemployment (and the unemployment rate) was being driven not by increased employment but by individuals leaving the labor force. Approximately 2.5% of the population dropped out of the labor force over the 2009-2012 period.

The individuals who left the labor force during the 2009-2012 period did not migrate to another state or seek employment elsewhere. These individuals remained in Michigan but chose not to be employed or to



seek employment. As indicated in [Figure 6](#), if the 487,500 individuals who exited the labor force between 2000 and 2012 had remained in the labor force, the unemployment rate in 2012 would have been 23.5%, not the official rate of 9.1%.

Because changes in the unemployment rate can provide a misleading or inaccurate view of the economy, economists generally incorporate a variety of additional information in their analysis. One common measure also examined is termed "payroll employment" or "wage and salary employment". Much like the statistics that survey households in determining the unemployment rate, there is a survey of business establishments to count the employees on the establishments' payroll. Payroll employment represents a majority of total employment, but is not computed as a ratio and is not self-reported, and thus often is a better indicator of what is happening in the labor market.

### **Conclusion**

The unemployment rate receives a lot of attention from the public, policymakers, and the news media. However, changes in the unemployment rate can reflect a number of different factors, many of which can result in those changes not providing an accurate view of the economy. As indicated by the decline in the unemployment rate between 2009 and 2012, unemployment rates can fall despite limited employment growth if individuals exit the labor force. The reasons these individuals have left the labor force ultimately determine whether changes in the unemployment rate should be regarded positively or negatively. To the extent these individuals have made a leisure/work choice, such as choosing to retire, one can view the decline in the unemployment rate positively. If these individuals have exited the labor force because they are sufficiently pessimistic about the labor market to perceive it is not worthwhile to seek employment, then the declines in the unemployment rate are misleading and the effective unemployment rate is much higher than the official measure. Examining alternative measures of labor underutilization, such as the U-6 rate, can provide a perspective on how much individuals' decisions are affecting the unemployment rate and to what extent a decline in the unemployment rate reflects positive economic circumstances.

# State Notes

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Summer 2013



### Indigent Criminal Defense in Michigan: A New Approach By Suzanne Lowe, Associate Director

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On July 1, 2013, Governor Rick Snyder signed into law legislation that creates a new system for the appointment of counsel for indigent criminal defendants in Michigan, and establishes a new funding mechanism. Public Acts 93 and 94 of 2013 enacted the "Michigan Indigent Defense Commission Act" and amended the Code of Criminal Procedure, respectively. The legislation follows decades of efforts to reform the system, which has been found to be constitutionally inadequate and among the most poorly funded in the nation.

Terms used to describe Michigan's system range from a "patchwork quilt"<sup>1</sup> to a "train wreck"<sup>2</sup>. Each county in Michigan has had to devise its own system for the appointment of indigent defense counsel, with no statewide standards for payment, qualifications, caseload, expectations, or procedures. Judges are often involved in selecting the attorneys who may be appointed, and each county determines the level of compensation paid to appointed attorneys. Each county also is responsible for funding its own system.

This article discusses the background of Public Acts 93 and 94; provides an overview of the legislation; and touches on issues pertaining to its implementation.<sup>3</sup> (The article refers to the system that is being replaced as the "present" system because, as discussed below, the new system is not expected to be fully implemented for several years.)

#### Background

The right to defense counsel in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution. In the 1963 landmark case *Gideon v. Wainwright*, the U.S. Supreme Court held that states are mandated to provide legal counsel to criminal defendants who are unable to afford an attorney (372 US 335). Although *Gideon* involved a felony case, the Court subsequently held that the right to counsel extends to misdemeanor cases in which imprisonment is a possibility. While an examination of the case law is well beyond the scope of this article, the constitutional right to counsel is the foundation of efforts made by the government to ensure that indigent criminal defendants have adequate legal representation.

In Michigan, the right to counsel was included in the State's first constitution, in 1835, and remains in Article I, Section 20 of the State Constitution of 1963. Although Michigan started out as a leader in defending the rights of the accused, however, the next 150 years saw a steady decline.<sup>4</sup>

Under the present system, there are several principal approaches to the appointment of counsel, and numerous variations. Some counties maintain a list of attorneys for appointment; attorneys are selected from the list for particular cases, and paid either a flat fee or an hourly rate. Appointments might be made on a rotational basis, or otherwise. Fees can vary greatly from county to county, and might be different amounts in a single county depending on the type of case or whether it goes to trial. In other counties (after a bidding process, in some places), an attorney or firm is awarded a contract to handle a certain percentage of the cases for a set payment. Depending on the county, the local judges or the chief judge may be involved in awarding contracts or selecting attorneys to appoint. Also, some counties might require

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<sup>1</sup> Report of the Michigan Advisory Committee on Indigent Defense, 6-22-12.

<sup>2</sup> Written testimony of David A. Moran, Co-Director, Michigan Innocence Clinic, University of Michigan Law School, to the Senate Judiciary Committee, 10-9-12.

<sup>3</sup> For a detailed description and a fiscal analysis of the legislation, please see the Senate Fiscal Agency's Summary as Enacted of House Bill 4529 and Senate Bill 301, dated 7-2-13: <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/Senate/pdf/2013-SFA-0301-N.pdf>

<sup>4</sup> "State Bar of Michigan Heralds Legislative Passage of Indigent Criminal Defense Reform", State Bar of Michigan News Release, 6-19-13.



appointed attorneys to have a certain level of expertise (particularly for a serious felony), while others do not. A few counties maintain a public defender office, where the attorneys are employees of the county.

In June 2008, the National Legal Aid & Defender Association issued a report following a year-long study of 10 representative sample counties, conducted in partnership with the State Bar of Michigan pursuant to a request of the Legislature.<sup>5</sup> The following is the first paragraph of the report's Executive Summary:

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county -- giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case -- NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.<sup>6</sup>

According to the report, Michigan ranked 44<sup>th</sup> among the 50 states in per capita spending on indigent defense services. The Executive Summary continued, "Unfortunately, the laws of Michigan require county governments to pay for the state's responsibilities under *Gideon* at the trial-level stage without any statewide administration to ensure adequacy of services rendered...The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs." These systems, according to the report, create a conflict between the lawyer's ethical duty to competently defend every client and the lawyer's self-interest in investing the least amount of time possible in each case, in order to maximize profit.

The report also stated, "Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to 'get out of jail' for time served prior to meeting or being approved for a publicly-financed defense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures."

The NLADA report also documented the sample counties' failure to conform to the American Bar Association's (ABA's) "Ten Principles of a Public Defense Delivery System". The "Ten Principles" are a nationally recognized set of standards for providing trial-level indigent defense services, and had been adopted and endorsed by the State Bar of Michigan in 2002.

While the developments discussed above are relatively recent, an article in the August 2012 *Michigan Bar Journal* listed almost 40 years of efforts to reform Michigan's public defense system, in which the State Bar was involved.<sup>7</sup> These began with the appointment in 1975 of a Defense Services Committee of the State Bar, by then-Michigan Supreme Court Chief Justice Thomas Kavanagh. Subsequent efforts included the State Bar's creation of a Special Task Force on Standards for Assigned Counsel in 1986, the reconstitution of that task force as the Standing Committee on Assigned Counsel Standards in 1991, and, in 2002, approval by the State Bar's Representative Assembly of 11 principles for providing legal representation to indigent criminal defendants (the ABA's Ten Principles plus one added by the State Bar).

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<sup>5</sup> Senate Concurrent Resolution 39 of 2006.

<sup>6</sup> *Evaluation of Trial-Level Indigent Defense Systems in Michigan*, Executive Summary, National Legal Aid & Defender Association, June 2008.

<sup>7</sup> Fershtman, Julie I., "Indigent Criminal Defense in Michigan: After Decades of Struggle, Meaningful Reform May be in Reach", *Michigan Bar Journal*, August 2012, p. 10.



### **Costs of Inadequate Representation**

In addition to failing to meet constitutional standards, inadequate criminal defense can result in financial costs that are ultimately borne by the taxpayers. These costs were the subject of a July 2011 report of the Justice Policy Institute, which stated, "By not fully investing in public defense systems, states and counties are frequently choosing incarceration over justice..."<sup>8</sup> According to this report, "There are five primary ways in which inadequate public defense systems can increase the number of people that are unnecessarily incarcerated:

1. more pretrial detention for people who do not need it;
2. increased pressure to plead guilty;
3. wrongful convictions and other errors;
4. excessive and inappropriate sentences that fail to take into account the unique circumstances of the case; and
5. increased barriers to successful re-entry into the community."

The report also noted that a study in Michigan attempted to measure the costs of some of the problems that lead to excessive prison sentences. "Michigan's State Appellate Defender Office (SADO) showed that between 2004 and 2007, they were able to save at least \$3,675,000 by correcting sentencing errors. This means that throughout the entire state, Michigan could have saved nearly \$70 million...over that five-year period had sentencing mistakes been avoided in the first place, not to mention the additional costs from the appeals and litigation required to correct the mistakes."<sup>9</sup>

Although not everyone agrees that appointed counsel is less effective than retained counsel<sup>10</sup>, a March 2011 report of the State Bar's Judicial Crossroads Task Force also stated, "By almost every measure, indigent criminal defense as a whole in Michigan falls far short of accepted standards, undermining the quality of justice, jeopardizing public safety, and creating large and avoidable costs..."<sup>11</sup>

### **Advisory Commission; Legislative Developments**

In October 2011, Governor Snyder signed Executive Order 2011-12, establishing the Michigan Advisory Commission on Indigent Defense. The Commission's charge was to "analyze existing data that is needed to assist policymakers in making decisions on the appropriate funding and staffing levels to ensure effective public criminal defense services", and "make recommendations to the Governor and the Legislature for improvements to the system of providing legal representation for indigent criminal defendants".

The Commission issued its report on June 22, 2012.<sup>12</sup> The report contains 23 findings, including the following:

- "The obligation to provide counsel to indigent defendants belongs to the State, not the counties. However, Michigan's history has been to leave it to the counties to meet this State obligation.

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<sup>8</sup> "System Overload: The Costs of Under-Resourcing Public Defense", Justice Policy Institute, July 2011.

<sup>9</sup> As explained in a footnote, "SADO is a statewide organization that handles about a quarter of...indigent appeals. The \$3,670,000 was saved by SADO's 2-4 person special unit of attorneys who handle appeals on guilty pleas. By correcting the errors, they reduced between 122.5 and 309 years from sentences. Assuming an annual cost of corrections of \$30,000, they saved \$3,670,000 between 2003 and 2007. If extended to a system-wide level, Michigan could have saved nearly \$70 million by avoiding these sentencing errors at the trial level."

<sup>10</sup> Testimony of 13<sup>th</sup> Circuit Court Judge Thomas G. Power, Senate Judiciary Committee, 5-7-13; and "Up North Judges Hold Noses on Indigent Defense Bills", *MIRS Capitol Capsule*, 6-24-13.

<sup>11</sup> "Report and Recommendations: Delivering Justice in the Face of Diminishing Resources", Judicial Crossroads Task Force, State Bar of Michigan, 2<sup>nd</sup> Edition, March 2011.

<sup>12</sup> See note 1.



The result has been an uncoordinated, 83-county patchwork quilt of service delivery systems, with each county's 'system' dependent on its own interpretation of what is adequate and on its own funding ability."

- "At present, there are no promulgated state-wide standards for defining and ensuring constitutionally adequate defense counsel for indigent defendants. Therefore, the counties have had no regulatory guidance as to what their service delivery systems should provide."
- "As a result of [the first two findings], the availability, quality, and funding resources of county-provided indigent defense services at the local level varies greatly across the State."
- "As a result of the many different public defense delivery systems, varying interpretations of what is adequate[,] and inconsistent funding availability, the current delivery of indigent criminal defense results in a public defense system that is too often subject to errors at the trial level, and at its worst, results in a wrongful conviction."

The Commission also pointed out the NLADA's finding that none of the counties studied met the ABA's Ten Principles of a Public Defense Delivery System. "Common examples of the ways in which these minimum standards are not met include local systems that are not independent of the judiciary, that do not control for attorney workload, and that do not match an attorney's training and experience to the nature and complexity of the case...[A] uniform complaint was that the local systems were significantly underfunded...Further, the underfunding is pervasive, meaning it impacts all aspects of the defense system...Currently, only 3 of our 57 circuit courts supports [sic] indigent criminal defense at or above the national average, and many provide only a fraction of the national average."

In its report, the Commission made 12 recommendations, including the following:

- A permanent commission on indigent defense should be created by legislation and authorized to establish and enforce minimum standards statewide for the delivery of constitutionally effective assistance of counsel to indigent criminal defendants.
- Michigan should continue to provide indigent defense through local delivery systems, which should be mandated to comply with statewide standards established by the commission.
- The commission should be an autonomous entity within the judicial branch, and the authority to appoint commission members should be balanced between the three branches of government.
- The legislation creating the commission should include procedural safeguards for local systems, which should be given an opportunity to come into compliance with the minimum standards after defects are identified.
- The commission should be empowered to provide indigent defense services directly with State resources if any local system fails to meet the minimum standards, and the State Treasurer should be authorized to withhold an amount equal to the cost of providing local defense services from any State payments to that local unit.
- Any new funding requirements should be fulfilled by the State, while each local government should be required to maintain at least the same level of funding for indigent defense services, adjusted for inflation, as the average spent annually in the three years preceding the creation of the commission.
- State funding should be made available through the annual appropriations process at times and in amounts necessary to meet the demonstrated and quantified needs of local systems to meet the minimum standards established.

The Advisory Commission also recommended that the Legislature adopt 10 guiding standards for the permanent commission and all local systems providing counsel to indigent criminal defendants. The first of these is, "The public defense function, including the selection, funding, and payment of defense counsel, is independent of the judiciary while assuring that local judges be allowed meaningful input." Another is, "Defense counsel's ability, training, and experience match the nature and complexity of the case."



Following the release of the Commission's report, Representative Tom McMillin introduced House Bill 5804 in November 2012. That bill proposed to create the Michigan Indigent Defense Commission Act. Although it was passed by the House of Representatives and was the subject of a Senate Judiciary Committee hearing, the bill was not passed by the Senate before the Legislature adjourned the 2011-2012 session.

In April 2013, Representative McMillin reintroduced the proposal as House Bill 4529, and Senator Bruce Caswell introduced the same legislation as Senate Bill 300. The two legislators also sponsored House Bill 4530 and Senate Bill 301 to bring the Code of Criminal Procedure into conformity with the proposed Act. Ultimately, House Bill 4529 was enacted as Public Act 93 of 2013 and Senate Bill 301 became Public Act 94 of 2013. Both Acts took effect on July 1, 2013.

### **Public Act 93 of 2013**

Public Act 93 enacted the Michigan Indigent Defense Commission Act to create a new system for the appointment of counsel for indigent criminal defendants, and establish a new funding mechanism.

The Act creates the Michigan Indigent Defense Commission (MIDC) as an autonomous entity in the judicial branch, and requires it to "propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state". The term "adult" includes an individual who is 17 years of age or older, as well as an individual who may be tried as an adult for a felony committed when he or she was under 17 years old. The term "indigent criminal defense services" refers to local legal defense services provided to an indigent defendant who is being prosecuted or sentenced for a crime punishable by imprisonment.

The Act requires the court to determine whether a person is indigent when he or she first appears in court. A defendant will be considered indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own. There will be a rebuttable presumption of substantial hardship if a defendant receives personal public assistance (such as food stamps); lives in public housing; earns an income less than 140% of the Federal poverty guideline; is serving a sentence in a correctional institution; or is receiving residential treatment in a mental health or substance abuse facility. If the presumption does not apply, a defendant must be subjected to a "more rigorous screening process", to determine whether he or she is indigent.

The MIDC must consist of 15 voting members plus the Chief Justice of the Michigan Supreme Court, who will serve as a nonvoting ex officio member. The voting members must be appointed by the Governor, primarily from names submitted by specific officials and associations. Not more than three judges may serve at one time, at least two members must not be attorneys, and the members may not include anyone who receives compensation from the State or an indigent criminal defense system for prosecuting or representing indigent adults in State courts. The Commission will be subject to the Open Meetings Act and, except for confidential case information, the Freedom of Information Act.

The minimum standards proposed by the MIDC must be submitted to the Michigan Supreme Court after a public hearing. A standard will not be final until it is approved by the Court. In establishing minimum standards, the MIDC must adhere to specific principles concerning defense counsel. For example, defense counsel will be given sufficient time and a space where attorney-client confidentiality will be safeguarded; defense counsel's workload will be controlled to permit effective representation; defense counsel's ability, training, and experience will match the nature and complexity of the case; and the same defense counsel will represent the defendant throughout the case.



Within 180 days after the Supreme Court approves a standard, each indigent criminal defense system must submit to the MIDC a plan for the provision of indigent criminal defense services, as well as a cost analysis. The Commission must approve or disapprove a plan and cost analysis; if disapproved, a new plan or cost analysis must be submitted. If a compromise is not reached after three submissions, the dispute must be submitted to mediation. (An indigent criminal defense system is either the local unit of government that funds a trial court combined with every trial court funded by that local unit; or the local units of government that collectively fund a trial court, combined with every trial court funded by those local units.)

Every local unit of government and every trial court that is part of an indigent criminal defense system has a duty under the Act to comply with an approved plan (contingent upon the receipt of a grant in the amount provided in the approved plan and cost analysis). If a system breaches its duty, the MIDC may proceed under the Act's provisions for dispute resolution.

The Act requires the MIDC to submit a report to the Governor, the Senate Majority Leader, the Speaker of the House, and the Senate and House Appropriations Committees, requesting the appropriation of funds necessary to implement the plan for each indigent criminal defense system approved by the Commission. A system must maintain at least its local share, which means the system's average annual expenditure for indigent criminal defense services in the three fiscal years before the creation of the MIDC. If the Commission determines that funding in excess of a system's local share is necessary for the system to comply with the minimum standards, the Act requires the State to pay the excess through a grant.

If a dispute arises between the MIDC and an indigent criminal defense system, the parties must attempt to resolve it by mediation, with a mediator appointed by the State Court Administrative Office. The time frame and requirements for mediation are based on disapproval of a system's plan and/or cost analysis, and provide for the MIDC to approve a final plan or cost analysis, or both. If a system is dissatisfied with a final plan and/or cost analysis, it may bring a court action for equitable relief. The MIDC or an indigent criminal defense system also may bring an action in the circuit court for equitable relief if the Commission determines that the system has breached its duty to comply with an approved plan.

Among other things, the court may order the State or the MIDC, in lieu of the indigent criminal defense system, to provide indigent criminal defense services if a party refuses or fails to comply with a previous court order or if the system has breached its duty to comply with an approved plan. If this occurs, the system will be required to pay 10% of the State's costs that are necessary to bring the system into compliance with the minimum standards. The amount will increase in increments of 10% until the system must pay 40% in the fourth or subsequent year, until the MIDC approves the system's plan and cost analysis.

The Act specifies that a system's failure to comply with the Act does not create a cause of action against the government or the system; statutory duties that create a higher standard than that imposed by the U.S. or State Constitution do not create a cause of action against a local unit, an indigent criminal defense system, or the State; and the Act may not be construed to override sections of the State Constitution that limit the State's imposition of new costs on local units of government.

### **Public Act 94 of 2013**

Public Act 94 amended the Code of Criminal Procedure to delete provisions that required a magistrate to notify the chief circuit court judge when a person charged with a felony stated that he could not procure counsel; required the judge to appoint or direct the magistrate to appoint counsel, upon a proper showing; and provided that the appointed attorney was entitled to receive from the county the amount the chief judge considered to be reasonable compensation.



Under the Act, when a person charged with a crime appears before a magistrate without counsel, the person must be advised of his or her right to have counsel appointed. (Previously, a similar provision referred to a person charged with a felony.) If the person states that he or she cannot procure counsel, the magistrate is required to appoint counsel if the person is eligible for appointed counsel under the Michigan Indigent Defense Commission Act.

### **Fiscal Impact**

Public Acts 93 and 94 will have an indeterminate, but potentially significant fiscal impact on State government. The primary cost will be the provision of grants to local indigent defense systems. In most cases, the only cost to local systems will be maintenance of effort consistent with the average of the most recent three years. The only exception to this will be if a court orders the MIDC, in lieu of the local system, to undertake the provision of indigent criminal defense services because of the local system's failure to comply.

Additional State costs will result from the provision of grants to cover local systems' data collection costs, the creation of the 15-member MIDC, and the hiring of an executive director and staff. Also, if the State and a local system are involved in mediation or litigation, the parties will have to share the costs equally.

As indicated above, the increased costs may be offset to some degree by a reduction in excessive and inappropriate sentencing, unnecessary and prolonged pretrial detention, the need to defend lawsuits for wrongful convictions, and appellate costs for inmates unjustly convicted or sentenced.

### **Implementation**

To a considerable extent, the Michigan Indigent Defense Commission Act reflects the recommendations made by the Michigan Advisory Commission on Indigent Defense, as well as the ABA's Ten Principles of a Public Defense Delivery System. The legislation is widely seen as a good fix to a broken system. According to a news release, "State Bar of Michigan President Bruce A. Courtade called the development 'game-changing' and 'a transformative first step' in making sure that a person's constitutional rights are no longer placed at risk simply because he or she cannot afford a lawyer."<sup>13</sup>

As the State Bar President indicated, the legislation is considered a first step. In fact, it is likely to take several years for the new system to be fully implemented. According to the State Court Administrator, "[T]he passage of this isn't going to change the system this month or this year...I think it will be two to three years before it filters down and we see [significant] changes."<sup>14</sup>

The time it will take for implementation depends on various factors. The MIDC Act does establish time frames for the submission and approval of local systems' plans and cost analyses, but this process has the potential to be protracted if there are disagreements, and will not begin until the MIDC develops and the Supreme Court approves the first minimum standard. The Act sets no deadlines for this to be accomplished, except to say that a proposed standard is not approved if the Supreme Court does not approve or disapprove it within 180 days after its submission.

In addition, the duty of a local system to comply with its plan is contingent upon the receipt of a grant in the amount contained in the plan and cost analysis approved by the MIDC. The provision of grants, of course, depends upon the appropriation of adequate funding. While the Act states that the Legislature "shall appropriate" the funds necessary to bring systems into compliance with the minimum standards, in excess of the local share, any such funding must be enacted in an appropriations bill, and it is well settled

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<sup>13</sup> See note 4.

<sup>14</sup> Gosselin, Gary, "Indigent Defense Reform is Enacted", *Michigan Lawyers Weekly*, 6-24-13. (Brackets added by *Michigan Lawyers Weekly*.)



that statutory language that purports to mandate the Legislature to appropriate funds in future years is nonbinding.<sup>15</sup>

The enacted legislation represents a delicate compromise among diverse interests, and many people will be keeping a close eye on how it is implemented. Needless to say, not all of the provisions are agreeable to all of the parties, and some of the stakeholders are more neutral than supportive. From the perspective of the counties, although the Act addresses (or, some might say, attempts to address) several issues that were considered problematic, such as the potential imposition of new costs, there remain concerns about how all of the parties will work together in implementing the legislation.<sup>16</sup>

Furthermore, not everyone believes that the new system will be an improvement at all. In some circuits, the existing system apparently has worked well, and there are strong fears that the Act will erode quality and diminish local control by excluding judges from the process of selecting attorneys.<sup>17</sup> However, although the Act does preclude judges from making direct appointments, judges still may have input and will remain involved to the extent provided for in a local system's approved plan. As the Act's supporters point out, the legislation is designed to maintain local flexibility as long as minimum standards are met.

For the time being, the counties' various methods of selecting, appointing, and compensating attorneys can be expected to continue, until minimum standards are approved by the Supreme Court, local systems' plans and cost analyses are approved by the MIDC, and funding is appropriated<sup>18</sup>. Until the MIDC Act is fully implemented, the State's new approach to indigent criminal defense will remain a work in progress.

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<sup>15</sup> Opinion of the Attorney General 1984, No. 6238.

<sup>16</sup> See note 14.

<sup>17</sup> See note 10.

<sup>18</sup> Telephone conversation with Chad Schmuker, State Court Administrator, 7-9-13.

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

Summer 2013



### **Explaining "Stranded" and "Legacy" Costs in Retirement Systems** **By Kathryn Summers, Associate Director**

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Over the past decade or so, interest in privatization, at both the State and local levels, has grown steadily. Part of the appeal of privatization stems from the option that private providers have of offering different and often scaled-back, or nonexistent, retirement options for the contracted employees, relative to the retirement plans offered by State and local government. When there are no "legacy" costs for the public employees, a comparison between the costs of public versus contracted or private employees is much simpler. However, at times like the present when significant legacy costs do exist, the analysis is somewhat more complicated. This article will explain "stranded" and "legacy" costs associated with the State Employees' Retirement System (SERS) and the Michigan Public School Employees' Retirement System (MPERS), examine what privatization means when bids are analyzed, and explain the impact of stranded costs on the State budget.

#### **What Are Stranded and Legacy Costs?**

The costs of each year's benefits are fully paid in that year. This is the *normal cost*. *Legacy costs* (or unfunded actuarial liability, UAL) result from market crashes, recessions, population loss/ privatization, unfunded benefit giveaways (e.g., early outs at the local or statewide level), and other factors that throw the actuarial assumptions off.

When assumptions are off, it is not always to the bad. Sometimes there is negative UAL (i.e., the plan is overfunded, which has happened before). More recently, there has been positive UAL, meaning the plan is currently underfunded. Therefore, *legacy costs* refer to the costs of providing benefits that were promised and earned, for which there presently is a shortfall of assets available to pay.

In somewhat simplistic terms, this can be most easily equated with the amount of unfunded accrued liability there is in a retirement system, and the shortfall must be funded regardless of whether employees remain directly hired by State or local government, or privatization occurs.

*Stranded costs* refer to the phenomenon that occurs when an employer deliberately reduces the number of employees covered by the retirement system (through privatization or downsizing, for example) for the purpose of not having to pay retirement contributions, and the legacy costs that were being partly paid for as a charge against that covered payroll are instead transferred to the remaining payroll of employees covered by the retirement system. In other words, the responsibility of the employer to pay its fair share of the legacy costs is stranded to the extent of the privatization or downsizing, and, since the same dollar amount must be generated in order to pay down the shortfall (like paying off a mortgage), the remaining employers or covered payroll must pick up the stranded cost.

With the State being one single employer managing employees in SERS, the analysis is somewhat more direct when reviewing the impact of legacy and stranded costs. However, when looking at hundreds of school district employers that are all part of one retirement system, the analysis is somewhat more complex. The next section of the article provides examples illustrating what happens to the legacy costs if they are stranded by an employer.

First, however, Table 1 shows how much funding must be collected as a percentage of payroll for fiscal year (FY) 2013-14 in order to make the annual payment toward the legacy costs, in both SERS and MPERS. The legacy costs, or the unfunded accrued liability, are on a 25-year payoff plan, such that, if sufficient payments continue to be made on a scheduled basis and actuarial assumptions (e.g., market returns or mortality tables) are met, the legacy costs will be paid off by 2038.



**Table 1**

<b>Employer Normal Costs and Legacy (UAL) Costs for FY 2013-14, as Percent of Payroll</b>				
	<b>SERS Defined Benefit (DB)</b>	<b>SERS Defined Contribution (DC)</b>	<b>MPSERS Basic/Member Investment Plan (MIP)</b>	<b>MPSERS Hybrid</b>
<b>Normal</b>				
Pension Normal.....	3.30%	7.00%	2.90%	2.67%
Health Normal .....	4.18%	4.18%	0.93%	0.93%
<b>Total Normal</b> .....	<b>7.48%</b>	<b>11.18%</b>	<b>3.83%</b>	<b>3.60%</b>
<b>Legacy (UAL)</b>				
Pension UAL .....	17.54%	17.54%	15.44%	15.44%
Health UAL.....	20.01%	20.01%	5.52%	5.52%
<b>Total UAL</b> .....	<b>37.55%</b>	<b>37.55%</b>	<b>20.96%</b>	<b>20.96%</b>
<b>Health UAL Paid by State through the School Aid Fund</b> .....	n/a	n/a	4.56%	4.56%
<b>Total Rate</b> <sup>1)</sup> .....	<b>45.03%</b>	<b>48.77%</b>	<b>29.35%</b>	<b>29.12%</b>
<sup>1)</sup> Total rate excludes FICA, reconciliation, and MPSERS Hybrid DC employer contributions				
<b>Note:</b> SERS DB does not include Corrections or Conservation Officers; their rates are slightly higher. MPSERS Basic/MIP and Hybrid were chosen as they represent the largest numbers of employees.				

Legacy costs can be thought of as similar to a mortgage: regardless of the changes or makeup of household income, the mortgage payment must be made in order for the principal and interest to be paid by its scheduled payoff date. Unlike a personal mortgage, however, where a house could be sold if household income fell below a level necessary to pay for the mortgage, the State Constitution protects pension benefits earned; therefore, the legacy costs associated with accrued pension service cannot be avoided. Legacy costs associated with earned health care benefits may be subject to change, but the courts would have to decide to what extent changes would be acceptable. Table 1 shows that for FY 2013-14, in SERS, more than 37% applied to payroll must be remitted to make the annual payment toward legacy or UAL costs. For MPSERS, nearly 21% of payroll must be levied to make the annual payment.

Table 1 also illustrates the "normal" retirement costs, which represent the cost today of providing an additional year of pension and/or health benefits accrued for the future. Looking at the table for SERS, for example, the "normal" cost to provide one more year of pension and health care benefits for a State defined benefit (DB) worker is 7.48% of pay. (Defined benefit now is a closed system: since March 31, 1997, no new employees have been eligible.) For MPSERS workers in the Basic or Member Investment Plan (also closed with no new eligible participants), the normal cost is 3.83% of pay, and for members in the Hybrid plan (for members hired on or after July 1, 2010), the normal cost is 3.60% of pay.

As of the FY 2011-12 valuation for the State Employees' Retirement System, the unfunded accrued pension liability was \$6.2 billion and the unfunded accrued health liability was \$8.4 billion. The sum of these two can be considered the legacy costs, to be paid off over 25 years, and the yearly "mortgage payment" in dollar terms must be made regardless of the size of the direct State payroll, or how many employees are laid off or privatized. In a given year, the "legacy" (UAL) cost is a fixed dollar amount



where the *method* of raising the dollars necessary to make the "mortgage payment" is to collect the dollars as a percentage of current covered payroll (again, 37.55% for SERS DB members in FY 2013-14), and the legacy costs reflect the shortfall of assets to pay for previously accrued benefits.

Turning to the Michigan Public School Employees' Retirement System, the FY 2011-12 valuation indicated an unfunded accrued pension liability of \$24.3 billion and an unfunded accrued health liability of \$21.8 billion. However, it should be noted that the accrued liabilities found in the FY 2011-12 valuation for MPSERS do not reflect the reduction in health care liability that will occur beginning in FY 2012-13 due to prefunding (rather than paying on a cash basis) other post-employment benefits (OPEB), and other changes enacted in 2012. At the time of the change to prefunding (part of Public Act 300 of 2012), it was estimated that OPEB liabilities would be reduced by roughly \$14.0 billion beginning in FY 2012-13.

### **State Employees' Retirement System**

The State of Michigan is a single employer in the State Employees' Retirement System. Therefore, the normal and legacy costs within SERS are paid entirely by the State via appropriations to all of the State departments, which then remit the required amounts to the pension system. Total State payroll is roughly \$3.1 billion; applying the total UAL of roughly 37.6% to \$3.1 billion payroll equates to a yearly payment toward legacy costs of about \$1.2 billion.

What often is misunderstood is that simply shrinking State payroll (such as by privatizing services) does not reduce the legacy costs. The \$1.2 billion annual payment actually is derived first, calculated by the independent actuaries contracted by the State to oversee the financing of the pension systems. The actuaries determine the *monetary* amount necessary to "make the mortgage payment" on the unfunded accrued liabilities, such that the "mortgage" will be paid off within a specified period of time, in this case, 25 years. Then, the State Budget Office, with the Office of Retirement Services and the actuaries, determines the percentage that must be collected on payroll in order to generate the necessary dollar contribution in any given year. In this case, \$1.2 billion is the amount necessary to be raised, and it represents 37.6% of State payroll. If one-quarter of State payroll were to be privatized, bringing total State payroll down to \$2.3 billion, then the percentage of payroll necessary to generate \$1.2 billion in the required contribution would increase from 37.6% to 52.1%. Therefore, regardless of privatization or other methods of reducing active State payroll, the legacy costs still would have to be paid; they would just be spread out among a smaller payroll base (meaning a higher percentage applied to payroll).

For the reasons stated above, when examining bids for privatizing services it is necessary to make a comparison that accounts for the fact that legacy costs associated with the past must be paid regardless of whether employees are State employees or private employees. Table 2 illustrates a comparison between a hypothetical State department and two bids from private companies. In the table, the cost to use State employees in the example totals \$14.7 million, of which \$10.9 million would be payroll and "normal" costs and another \$3.8 million would be "legacy" costs. When comparing this to private bids, the "legacy" costs must be added to the bid price, since they have to be paid regardless of whether the employer is the State or a private company. In the first bid, wages are 10% lower than the State's and the company offers no retirement benefits, for total costs of \$12.8 million, or savings of \$1.9 million (13.2%). In the second bid, wages and benefits at the private company are 20% lower than the total State cost of \$14.7 million, which, at first glance would seem to produce savings. However, when the legacy costs are added in, the total cost of the second bid exceeds the cost of retaining the employees at the State level, making privatization more costly.



**Table 2**

<b>Current Situation</b>	
Payroll paid to State employees .....	\$10,000,000
Normal pension/health costs (avg. 9.33%) .....	<u>\$933,000</u>
Subtotal of non-legacy costs.....	\$10,933,000
Legacy costs	+
UAL costs (37.59%) .....	<u>\$3,759,000</u>
Total Appropriation to Cover Compensation.....	\$14,692,000
<b>New Bid 1 - 10% Lower Wages and No Retirement Benefits Offered</b>	
Payroll plus private retirement contributions (if any) .....	\$9,000,000
<i>Plus</i>	+
Legacy costs .....	<u>\$3,759,000</u>
True total privatization cost .....	<u>\$12,759,000</u>
<b>Net Cost (Savings) Compared to Current Situation .....</b>	<b>(\$1,933,000)</b>
<b>New Bid 2 - 20% Less than Total State Cost, but Legacy Costs Added</b>	
Payroll plus private retirement contributions (if any) .....	\$11,753,600
<i>Plus</i>	+
Legacy Costs .....	<u>\$3,759,000</u>
True total privatization cost .....	<u>\$15,512,600</u>
<b>Net Cost Compared to Current Situation .....</b>	<b>\$820,600</b>

**Michigan Public School Employees' Retirement System (MPSERS)**

Legacy and stranded costs are present in the Michigan Public School Employees' Retirement System, as in SERS. The difference between MPSERS and SERS, though, is that there are hundreds of local employers within MPSERS compared with the sole employer (State of Michigan) in SERS. Before Public Act (PA) 300 of 2012 capped the unfunded accrued liability percentage paid by local employers at 20.96% of payroll, when an employer in MPSERS (school district, intermediate school district, community college, or participating library or charter) reduced its covered payroll (such as by downsizing, privatizing, or converting to a charter school), the employer would immediately shift that portion of its legacy costs to the payroll remaining in the system statewide, thereby resulting in "stranded costs" that were spread to other employers.

However, due to the MPSERS rate cap on unfunded liabilities that was enacted as part of PA 300 of 2012, any reduction in covered MPSERS payroll now will result in a cost to the School Aid Fund, until such a time when the rate contributed by local employers toward the UAL falls below 20.96%. The reason is that, again, in any given year, the money that must be raised to pay down the legacy costs is a fixed dollar amount, like a mortgage. Whether that dollar amount is spread among a larger payroll (generating a smaller percentage rate) or among a smaller payroll (generating a larger percentage rate), the same *dollar* amount must be raised. Since the enactment of PA 300, if the MPSERS payroll declines and the percentage that must be collected against payroll rises to generate the fixed UAL payment, the School Aid Fund will have to pay for any *percentage of payroll* in excess of 20.96%.



Once the "mortgage" is paid off, scheduled in 25 years, then the stranding of costs again could occur among employers in the event of shifting of payroll, if unfunded liabilities accrue in the future.

Continued expansion in the number of nonparticipating charter schools, the conversion of school districts to charter schools, and the introduction and expansion of the Education Achievement Authority schools all draw covered payroll away from providing financial structure for the system. In addition, the recent enactment of House Bills 4813 and 4815 (Public Acts 96 and 97 of 2013) provides for an expansion in the dissolution of schools, and the extent to which the dissolution of schools results in a reduction in MPERS payroll, it also will result in "stranded" costs and an increased cost to the School Aid Fund. If the covered payroll does not grow at the actuarially assumed 3.5% per year for any of these reasons, or any other reasons, there will be additional yearly costs to the School Aid Fund to meet the required payment toward legacy costs.

As shown in Table 1, the normal cost to the employer for an employee accruing a year of service in MPERS is less than 4% of payroll, and the amount the employer must contribute to pay down the "mortgage" of the historical legacy costs is just under 21% of payroll (statutorily capped by PA 300 of 2012). The legacy costs actually are higher than 21% of payroll, and Table 1 shows that the additional State support toward the employer contribution rate for FY 2013-14 is 4.56% of payroll, which equates to roughly \$403.6 million in the School Aid budget and another \$31.4 million in the Community Colleges budget. The estimated cost in FY 2014-15 to the School Aid Fund to pay for the MPERS rate cap is more than \$650.0 million. An expansion in covered payroll (such as bringing all K-12 alternatives into the retirement system) could substantially reduce the costs paid directly by the School Aid Fund in the future.

### **Conclusion**

Several items of note should be considered when reviewing retirement issues. First, legacy costs are historical costs that are tied to benefits that have already been earned and that must be paid, but for which there is currently a shortfall in system assets due to factors that have thrown actuarial assumptions off. Closing a system will not eliminate legacy costs related to pensions, and courts would have to rule on whether closing out health care benefits would be allowable. Second, in order to compare privatization to State employment, or competitive bidding, the costs attributed to legacy costs must be included in the analysis in order to compare "apples to apples". Again, this is because legacy costs from the previous system will have to be paid regardless of whether employment remains at the State level or is privatized. Third, with the enactment of PA 300 of 2012, any reduction in covered payroll in MPERS will mean an increase in State costs to the School Aid Fund due to the employer rate cap of 20.96% of payroll, at least until the rate levied to pay off the unfunded accrued liabilities falls below that level.

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

Summer 2013



**FY 2012-13 Capital Outlay Supplemental Appropriations: Public Act 102 of 2013**  
**By Bill Bowerman, Associate Director**

**Introduction**

Public Act (PA) 102 of 2013 contained supplemental appropriations for fiscal year (FY) 2012-13, including the first new capital outlay planning authorizations for community colleges and universities since PA 329 of 2010. Table 1 provides a summary of new planning and construction authorizations contained in PA 102 of 2013.

**Table 1**

<b>Planning and Construction Authorizations Public Act 102 of 2013</b>				
<b>Project</b>	<b>Total Cost</b>	<b>State Share</b>	<b>Institution Share</b>	<b>Federal Share</b>
<b>Planning Authorizations</b>				
Saginaw Valley State University - Wickes Hall Renovations	\$8,000,000	\$6,000,000	\$2,000,000	\$0
Kalamazoo Valley Community College - Culinary Institute at Arcadia Commons Campus	29,500,000	6,000,000	23,500,000	0
Macomb Community College - South Campus C Building Renovation	8,500,000	4,250,000	4,250,000	0
Muskegon Community College - Science Laboratory Center	9,293,670	4,646,835	4,646,835	0
Southwestern Michigan College - Science & Allied Health Labs, Classrooms, and Related Renovations	7,500,000	3,750,000	3,750,000	0
Marshall State Police Post	N/A	0	0	0
<b>Planning Authorizations Total</b>	<b>\$62,793,670</b>	<b>\$24,646,835</b>	<b>\$38,146,835</b>	<b>\$0</b>
<b>Construction Authorizations</b>				
Lake Superior State University School of Business Building	\$12,000,000	\$9,000,000	\$3,000,000	\$0
State Emergency Operations Center	19,024,500	17,024,500	0	2,000,000
<b>Construction Authorizations Total:</b>	<b>\$31,024,500</b>	<b>\$26,024,500</b>	<b>\$3,000,000</b>	<b>\$2,000,000</b>

Other capital outlay items contained in PA 102 of 2013 include a cost/scope increase for the Michigan State University Bio-engineering Facility and financing authorizations for previously authorized construction projects that are necessary due to 2012 capital outlay reform legislation.

An overview of PA 102 capital outlay appropriations follows. Information on community colleges and university projects was obtained from five-year capital outlay plans and the institutions.

**Background**

Section 242 of the Management and Budget Act (PA 431 of 1984) governs the capital outlay process for State-supported projects. The legislative process includes two steps, a planning authorization and a construction authorization. Both of these authorizations are implemented in the form of line item appropriations in an appropriation bill. The amount of the appropriation is \$100 and does not represent the cost of the project because the State's share of the cost will be funded by State Building Authority (SBA) bonding.<sup>1</sup> Narrative in the planning authorization line item lists the estimated total authorized cost

<sup>1</sup> These \$100 line item planning authorizations in appropriation bills are sometimes mistakenly referred to as "placeholders" when in fact they begin the capital outlay process for a State Building Authority-financed project.



of the project. The planning authorization initiates the development of program statements and schematic planning documents. The cost of planning for university and community college projects is funded entirely by the university or college. If a project is approved for construction, the State will eventually share in the planning costs. It is important to note that pursuant to the Management and Budget Act, a planning authorization is not considered a commitment on the part of the Legislature to appropriate funds for the project.

Completed program statements and schematic planning documents for a project are submitted to and reviewed by the Department of Technology, Management, and Budget (DTMB). If the DTMB approves the project, planning documents are submitted to the Joint Capital Outlay Subcommittee (JCOS). Upon review and approval by the JCOS, the Legislature may authorize the project for final design and construction, again with a \$100 line item appropriation in an appropriation bill. The construction authorization line item includes narrative stating the total authorized project cost, including the SBA share and the university or college share. The State/university share of a project cost is based on a 75/25 match. Two previous capital outlay appropriation bills have limited the State share of a university project's cost (\$40 million in PA 278 of 2008 and \$30 million in PA 329 of 2010). Community college projects are funded based on 50/50 State/college match. Any change to the authorized cost of a project must be provided for by specific reference in an appropriation act. The cost and scope change for the Michigan State University Bio-engineering Facility project contained in Section 301 of PA 102 of 2013 is an example of a cost/scope adjustment. Cost increases are historically funded entirely by the educational institution.

### **Construction Authorizations**

The following describes the construction authorizations contained in Public Act 102 of 2013.

#### Lake Superior State University (LSSU) - School of Business Building

DTMB Letter Date: 2/7/13

Total Authorized Cost: \$12,000,000

State Share: \$9,000,000

University Share: \$3,000,000

The planning authorization for this project was contained in PA 329 of 2010. The renovations and additions to South Hall for the LSSU School of Business will consist of smart classrooms and seminar rooms, project labs for business, industry and community collaborations; student study, breakout, and collaboration spaces; community presentation space; a café and commons; and faculty offices. The project includes the renovation of 32,526 square feet in South Hall, and the addition of 12,600 square feet that connects the original two building wings to support the learning environment for business education programs. Pursuant to recent changes to the Management and Budget Act, PA 102 of 2013 includes a \$900,000 appropriation for SBA rent payments (appropriated in the DTMB section of the Act) to reflect annual debt service costs. The construction authorization for this project was approved by the JCOS on March 20, 2013.

#### State Emergency Operations Center (SEOC)

DTMB Letter Date: 2/7/13

Total Authorized Cost: \$19,024,500

Federal Share: \$2,000,000

State Share: \$17,024,500

The State Emergency Operations Center received \$80,000 GF/GP for planning in PA 89 of 2012. The SEOC is currently located in leased space on Collins Road in the City of Lansing. The proposed project would house the SEOC and related support functions in a new facility at the Secondary Complex in Dimondale. Other Michigan State Police functions that would move to the new facility include the



Emergency Management and Homeland Security Division, the Business Emergency Operations Center, the Michigan Cyber Command Center, and the Michigan Intelligence Operations Center. The DTMB Michigan Public Safety Communications System also would be located at the Secondary Complex. The new facility will connect to the General Office Building. The project includes a 27,200-square-foot new facility and renovations to 51,800 square feet of the General Office Building. Security measures and perimeter fencing around the structure are included in the total estimated cost.

The Department of Technology, Management, and Budget recommended a construction authorization for this project in the DTMB section of the FY 2013-14 General Government appropriation bill, total authorized cost \$20,200,000, Federal \$3,000,000, SBA \$17,119,900, and General Fund \$80,100. The project was included in the FY 2012-13 supplemental appropriation instead of the FY 2013-14 budget due to timing issues for Federal funds. The total authorized cost was reduced to \$19,024,500 to reflect current estimates and availability of Federal funds.

### **Planning Authorizations**

The following describes planning authorizations contained in Public Act 102 of 2013.

#### Marshall State Police Post - \$100,000 GF/GP Planning Grant (appropriated in DTMB section of Act)

DTMB Letter: 2/7/13

Total Estimated Authorized Cost: Not Determined

In 2010, the State began discussions with the City of Marshall regarding a new joint law enforcement facility. The Marshall Regional Law Enforcement Center would include a State Police Post and the Marshall Police Department, with the State entering into a long-term lease for its portion of the assigned and common space. Negotiations regarding the lease are currently in progress with the City of Marshall. The Calhoun County Sheriff's Department was initially involved in plans for the joint facility, but is not part of the current proposal. In FY 2011-12, the City of Marshall received a \$674,254 grant from the Competitive Grant Assistance Program to fund the design, planning, and construction of the Marshall Regional Law Enforcement Center. In 2012, the Michigan State Police (MSP) closed the Battle Creek Post by consolidating it with the Coldwater Post. If the Marshall Regional Law Enforcement Center is constructed, the MSP will relocate from the Coldwater Post. The DTMB recommended \$100,000 in the FY 2012-13 supplemental for the planning of a new State-owned post as a secondary option if the preferred lease for the Marshall Regional Law Enforcement Center project does not progress as anticipated. There is no current estimated cost for the project.

#### Macomb Community College South Campus C-Building Renovations

DTMB Letter: None

Estimated Total Authorized Cost: \$8,500,000

State Share: \$4,250,000

College Share: \$4,250,000

Macomb Community College received a planning authorization for Phase II of a new Health Science and Technology Building with a total cost of \$14.5 million (State share \$7.25 million). After the legislative planning authorization was approved, Macomb Community College decided to change its request and not proceed with the Health Science and Technology Building. Instead, the college requested funding for renovations to its South Campus. The original buildings on that campus were constructed between 1964 and 1969. The planning authorization for Macomb Community College will fund the renovation of South Campus C-Building. Improvements include plumbing, electrical, and mechanical system replacements; site improvements; ADA compliance; energy improvements; and a redesign to improve learning spaces. The renovation involves 52,661 square feet. A limited addition at the west entrance will bring the total square footage of the building to 55,800 square feet.



Muskegon Community College - Science Laboratory Center

DTMB Letter: None

Estimated Total Authorized Cost: \$9,293,670

State Share: \$4,646,835

College Share: \$4,646,835

The Science Laboratory Center project includes renovating and updating the life and physical sciences facilities (a 20,400-square-foot wing of the Main Campus Building) and the construction of a 25,000-square-foot addition. The building addition will include two biology labs, two chemistry labs, two science labs, six classrooms, and preparation rooms for the labs. The renovated and new space will provide classrooms and labs for the disciplines of astronomy, biology, chemistry, physics, physical science, and geology.

Southwestern Michigan College - Science & Allied Health Labs, Classrooms, & Related Renovations

DTMB Letter: None

Estimated Total Authorized Cost: \$7,500,000

State Share: \$3,750,000

College Share: \$3,750,000

The project includes renovation/conversion of the William P.D. O'Leary Academic Building to a new science and allied health building (18,500 square feet); and the renovation of a current science building into a general purpose classroom building (18,500 square feet). Renovations to both buildings will include replacement of electrical service, plumbing, HVAC, upgrades in technology, and ADA compliance.

Kalamazoo Valley Community College (KVCC) - Healthy Living Campus

DTMB Letter: None

Estimated Total Authorized Cost: \$29,500,000

State Share: \$8,000,000 (\$6.0 million capital outlay and \$2.0 million Michigan Strategic Fund)

College Share: \$21,500,000

The project consists of the construction of a 75,000-square-foot Culinary and Allied Health Building/Culinary Center for Health Promotion with an estimated cost of \$25.3 million, and a 21,500-square-foot Food Production and Distribution Building/Center for Food Sustainability and Innovation with an estimated cost of \$4.2 million. The college is expected to locate the new project in downtown Kalamazoo; however, a site has not been formally announced by KVCC. The college received a \$2.0 million appropriation in the FY 2013-14 Department of Treasury budget (Michigan Strategic Fund) for this project. The college plans to work with Bronson Healthcare Group and Kalamazoo Community Mental Health and Substance Abuse Services on this new initiative. The college also will move its Allied Health programs to the new campus.

Saginaw Valley State University - Wickes Hall Renovations

DTMB Letter: None

Estimated Total Authorized Cost: \$8,000,000

State Share: \$6,000,000

University Share: \$2,000,000

The project consists of the renovation of Wickes Hall, the university's main student service and administration facility. Although the building was constructed in 1968 and renovated in 1987 to accommodate a substantial change in use, much of the mechanical system and most of the electrical and plumbing systems date back to the year of construction. Asbestos was used to fireproof the building's steel structure. The project will replace inefficient and heavily worn portions of the building.



## **Capital Outlay Boilerplate**

The following describes capital outlay boilerplate language contained in Public Act 102 of 2013.

### Cost/Scope Increase for Michigan State University (MSU) - Bio-engineering Facility (Section 301) DTMB Letter Date: 10/25/12

As provided for in the construction authorization (PA 192 of 2012), the MSU Bio-engineering Facility project consisted of a new 67,505-square-foot facility focused on multidisciplinary research in bio-engineering and engineering health sciences with a total authorized cost of \$40,340,200 (State share \$30.0 million/university share \$10,340,200). The completion date was projected to be January 2015 and annual operating costs were estimated at \$409,000. Michigan State University has requested that the scope of the project be increased by 61,045 gross square feet and \$17,359,800, with the increase funded entirely by MSU. The revised total authorized cost would be \$57.7 million (State share \$30.0 million/university share \$27.7 million). The revised project would consist of 128,550 square feet and include four floors instead of the three floors included in the planning documents. The university is requesting the change due to the "favorable construction climate" and projected future space needs for research and instructional activities. The top two floors will be unfinished space available for future build-out. The projected completion date is revised to January 2016 and annual operating costs are estimated at \$779,201 (when the facility is fully built-out). The DTMB supported MSU's request. The cost/scope change was approved by the Joint Capital Outlay Subcommittee on March 20, 2013.

### Capital Outlay Reform Legislation - SBA Financing Approval (Section 302 and Section 303)

There are SBA projects that have been authorized for construction, but have not received legislative approval for SBA financing. Recently enacted capital outlay reforms consolidated the SBA lease approval with the construction authorization. In order to authorize SBA financing for construction projects "caught between" the capital outlay reforms and the former process, language was included in Public Act 102 of 2013 to authorize SBA financing.

## **Conclusion**

Public Act 102 of 2013 includes two construction authorizations, six planning authorizations, a cost/scope adjustment for the MSU Bio-engineering Facility project, and two technical boilerplate sections related to the 2012 capital outlay reform legislation. Construction authorizations for the State Emergency Operations Center and the Lake Superior State University School of Business result in SBA costs of \$25.9 million (\$16.9 million and \$9.0 million, respectively). Annual rental payments to the SBA to fund the debt service cost will range from \$1.8 million to \$2.3 million until the bonds are retired (after approximately 15 to 17 years).

Public Act 102 of 2013 also includes the first new planning authorizations for State-financed capital outlay projects since PA 329 of 2010. There are no immediate costs to the State because the costs of community college and university planning documents are initially funded by the college or university. However, if all of the projects eventually receive construction authorization, State costs will total \$24.6 million.<sup>2</sup> The State cost will be funded through SBA bonding. Annual rental payments to the SBA to fund the debt service cost will range from \$1.7 million to \$2.2 million until the bonds are retired (after approximately 15 to 17 years).

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<sup>2</sup> This estimate does not include the proposed Marshall State Police Post.

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

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### **The Voting Rights Act Ruling, Preclearance, and Michigan** **By Glenn Steffens, Legislative Analyst**

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The U.S. Supreme Court recently made a landmark ruling in *Shelby County v Holder*<sup>1</sup>, striking down a key section of the Voting Rights Act (VRA)<sup>2</sup>. Section 4b, at issue in the case, was part of a measure that was aimed only at the worst-offending states and local governments with regard to voter discrimination. If a state or local government qualified under a formula spelled out in Section 4b, that government had to get preclearance through the Federal government before it could change any voting policies. In *Shelby County*, the Court found that the formula was so severely outdated that it had become unconstitutional.

It is important to note that the Court did not address Section 2 of the VRA, which provides for a nationwide ban on any discriminatory voting practices based on race or color. These practices are still illegal under the VRA.

Under Section 5, states and local governments that qualified under the preclearance formula had to apply for any voting policy changes through the U.S. Department of Justice. The application had to prove that the proposed changes would not deny the right to vote on the basis of race, color, or language-minority group status. Although the Court struck down the Section 4b preclearance formula, it did not invalidate the preclearance requirements that are in Section 5. However, with the Section 4b trigger removed, the Section 5 preclearance requirements do not apply to any area. In *Shelby County*, the Court was clear that it had left Section 5 intact, and Congress could develop a new formula for preclearance mandates.

In the 1970s, the Section 4b formula was updated, and it brought two Michigan townships under the Federal mandate: Clyde and Buena Vista. As a result of *Shelby County*, and after nearly 40 years of being covered by VRA preclearance requirements, the rules for any local or State election policies that cover these two areas have changed.

From a purely economic and administrative standpoint, the effects of *Shelby County* will be positive for State and local government. The ruling will have very limited immediate effects, if any, for the governments of Clyde and Buena Vista Townships. It will have a minor impact on Allegan and Saginaw Counties, the counties that contain these townships, and the greatest effects will be felt at the State level.

### **The VRA: A Brief History**

#### Enactment: 1965

As a result of the civil rights movement, the Voting Rights Act was enacted in 1965. Problems with minority voter registration and turnout were serious in some states, primarily in the Deep South. For example, in Alabama in 1965, only 19.3% of eligible black residents were registered to vote, while 69.2% of eligible white residents were registered to vote.<sup>3</sup> The worst-offending states often ignored Federal voting laws, required various voter registration tests that were specifically designed to exclude black voters, moved minority-dominant polling places without notice in order to make voting burdensome or impossible, and crafted other illegal methods to keep minorities away from the polls.

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<sup>1</sup> *Shelby County v Holder*, U.S. Supreme Court (2013 Slip Opinion, retrieved from [http://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf)).

<sup>2</sup> 42 U.S.C. 1973 to 1973aa.

<sup>3</sup> *Shelby County* at 15.



Case-by-case litigation had proven slow to respond to the problems facing minorities, and made it difficult to stop illegal election practices until after an election had taken place. If a state was stopped from one illegal practice, it simply started another, resulting in "whack-a-mole" litigation. The Federal government could not keep up.

Congress responded with the VRA, using its power under the 15<sup>th</sup> Amendment to the U.S. Constitution, which guarantees that the right to vote must not be denied to citizens on account of race or color, and grants Congress the authority to enforce this right through "appropriate legislation". In an exercise of power that was without precedent, Congress included the preclearance provisions within the VRA. These were originally scheduled to expire in 1970.

The Section 4b formula enacted in 1965 included two factors to determine whether a state or political subdivision qualified for preclearance. The first was whether the state or political subdivision required a literacy test, which was a practice commonly used in the 1960s to prevent minorities from voting. The second was whether less than 50% of an area's eligible voters were registered, or had actually voted, in the 1964 presidential election. If an area qualified under this formula, the Federal government had the final say over any changes to any voting policies.

#### Supreme Court Challenge: *Katzenbach*, 1966

In mandating preclearance for only some states, Congress had set rules to treat states differently, and regulate local elections, potentially in violation of state sovereignty principles. Under the U.S. Constitution, the states must be treated equally, and have the power to regulate their own elections. Nonetheless, in the 1966 landmark decision *South Carolina v Katzenbach*, 383 U.S. 301, the U.S. Supreme Court upheld the VRA. The Court held that temporarily singling out repeat-offender states was reasonable given the circumstances of the times.

#### Preclearance Amendments: Extensions, Updates, the Inclusion of Michigan Townships

In 1970, Congress extended preclearance for five years, and updated the Section 4b formula to reflect levels of voter registration and participation in the 1968 presidential election. In 1975, Congress extended the VRA for seven years, and updated the formula to reflect the 1972 presidential election. In both 1982 and 2006, Congress extended the preclearance provisions for 25 years. Neither of these extensions modified or updated the formula; voter statistics in the 1972 presidential election have remained the basis for the preclearance formula since 1975.

The 1975 formula took into account discrimination against language-minority citizens. This brought the Michigan townships of Clyde and Buena Vista under the preclearance mandate. Both townships had high Spanish-speaking populations.

#### ***Shelby County*: VRA Challenge and Holding**

In *Shelby County*, the Supreme Court indicated that the preclearance formula had failed to keep up with modern times, and was no longer reasonable. The Court focused on the following key facts in reaching this conclusion: 1) the difference between voter registration and turnout in preclearance areas has dramatically declined over the past several decades; 2) preclearance application denials have dropped significantly; 3) there has been a significant increase in the number of minorities who hold elected office in preclearance areas; and 4) discriminatory voter tests, the first factor in the formula, have been illegal for about the last half century.



The Court also took issue with Congress's recent 25-year extension of the preclearance provision. If the Court had upheld the Section 4b formula, statistics from the 1970s would determine voting policies in 2030, which the Court found unacceptable. What started out as a short-term remedy justified by clear and current problems facing minority voters, according to the Court, had become a long-term remedy based on decades-old facts.

#### *Shelby County Sets the Bar: The Future Prospects of Preclearance*

The Court emphasized the need for the Section 4b formula to reflect current political conditions. Although the Court made clear that Congress can still update the formula to require preclearance in the future, the Court offered some telling criteria that suggested preclearance may be a thing of the past.

*Shelby County* emphasized the differences between the U.S. in the 1960s, and the nation as it exists today. For example, the opinion referred to the infamously violent and oppressive 1965 "Bloody Sunday" in Selma, Alabama, before observing that the Selma of today has a black mayor. The Court reflected, "In 1965, the States could be divided into two groups: *those with a recent history* of voting tests and low voter registration and turnout, *and those without* those characteristics...[T]he Nation is no longer divided along these lines, yet the Voting Rights Act continues to treat it as if it were."<sup>4</sup>

The takeaway is that Congress has to look at today's world to prove that a problem exists. Current registration and poll data do not demonstrate a problem similar to that of the 1960s, and literacy tests have been abolished for decades, so Congress will have to find another indicator if it chooses to enact a new preclearance formula. Finding an acceptable indicator will likely be very difficult. In deciding the original 1966 VRA challenge, the *Katzenbach* Court held the following (which the *Shelby County* decision directly quoted):

Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread discrimination must inevitably affect the number of actual voters.<sup>5</sup>

If widespread discrimination *must* result in lower voter registration or turnout, and voting rates are not low, there is little potential for a new and acceptable preclearance formula. Current voting rates do not mirror past rates that showed racial disparity. As noted above, in 1965 Alabama, only 19.3% of eligible black residents were registered to vote. In contrast, in 2004, 72.9% of eligible black residents were registered to vote (compared to 73.8% of white residents).<sup>6</sup>

Further, the terms used throughout the *Shelby County* opinion shed some light on the scrutiny that a new formula likely would face from the Court. Regarding voter discrimination in the 1960s, the Court referred to it as a "blight", an "extraordinary problem", "entrenched", "flagrant", "rampant", "widespread", and an "insidious and pervasive evil", and said that it presented "exceptional and unique conditions". When considering the preclearance formula, the Court referred to it as an "unusual" and "stringent" remedy, and "extraordinary legislation otherwise unfamiliar to our federal system", distinguishing preclearance from virtually every other law on the books. The Supreme Court's use of this language raises a red flag that future legislation will be held to a high bar.

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<sup>4</sup> *Shelby County* at 18 (emphasis added).

<sup>5</sup> *Shelby County* at 19.

<sup>6</sup> *Shelby County* at 15.



Perhaps this statement by the Court is the most telling: "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula."<sup>7</sup> Since the Court did not find an entrenched blight of voter discrimination that was based on current data, and any Congressional attempts to make a new formula must start from scratch, it is difficult to imagine an acceptable basis for a future preclearance formula.

### **Going Forward: *Shelby County's* Effects in Michigan**

The immediate effect in Michigan as a result of the *Shelby County* ruling is that Buena Vista and Clyde Townships, Saginaw County (home to Buena Vista), Allegan County (home to Clyde), any related school districts, and the State no longer must submit for preclearance voting policy changes that affect Buena Vista or Clyde Township.

With regard to the Clyde and Buena Vista Township government, there will be little immediate effect. Most voting changes take place at the county or State level. For example, according to the Allegan County Clerk, Clyde Township has not attempted changes that have needed preclearance, but some changes at the county level have necessitated it. The Clyde Township Clerk's office indicated that no proposed changes to election policies have been stalled or discarded because of preclearance concerns.

At the county level, the effects will be more pronounced. Previously, in Allegan or Saginaw County, any county-wide election policy change was subject to preclearance, since the change would affect Clyde or Buena Vista Township. According to the Allegan County Clerk, the process created additional costs and administrative burdens, and was complex and cumbersome. Allegan County staff had to prepare materials to satisfy the Federal government's application requirements, which resulted in opportunity cost. Significant applications were required, for example, when the county merged the offices of the Register of Deeds and the County Clerk, modified apportionment, and modified judgeships. The county even hired an attorney to ensure that the applications were proper. This reflected the inexperience that many Michigan officials had with preclearance procedures; since only two townships qualified, an official who was uncertain of the rules could not call a neighboring jurisdiction for guidance. Preclearance compliance cost Allegan County an estimated \$1,000 to \$2,000 a year.

There also was a culture gap. Nationwide, because other covered jurisdictions had been excused from the preclearance requirements, Buena Vista and Clyde Townships remained the only non-state and non-county areas covered by preclearance. The U.S. Department of Justice was unfamiliar with Michigan's structure of government and power distribution, which is unusual in comparison to many other states. According to the Allegan County Clerk, this was a significant barrier for some applications.

Michigan will see the most changes at the State level, but any positive effects will likely be limited to less opportunity cost and faster implementation of new plans. Any statewide electoral changes had to have preclearance and, according to the Department of State, Michigan saw an increase in preclearance applications over the last several years, likely due to shifts in political dynamics. The number of applications per year also varied based on how many changes the State made to voting policies. As at the county level, personnel and other resources that were spent on preclearance compliance can now be shifted to other areas.

Since preclearance was a potential barrier to certain State policy decisions, *Shelby County* may have somewhat cleared the path for future initiatives. However, while the State no longer has to prove that

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<sup>7</sup> *Shelby County* at 23.

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changes will not harm minority voters' rights before enacting new statewide election or redistricting laws, Section 2 of the VRA still outlaws intentionally discriminatory voting practices.

Nevertheless, there are significant differences between preclearance and a Section 2 challenge. Under preclearance, the state or local government had the burden to prove to the U.S. Department of Justice, usually the Attorney General, that a policy would not have a discriminatory impact, regardless of its intent. Section 2 challenges, on the other hand, are reviewed in Federal court. The burden of proof is on the person challenging the state or local policy, and requires that person to prove that the policy was intended to discriminate on the basis of race or color. Proving discriminatory intent can be very difficult.

An example of the difference is what occurred in 2007 when Michigan's Secretary of State pursued plans to close a branch office in Buena Vista Township. The Department of Justice denied the request, finding that the State did not prove that closure would not have discriminatory impact. The branch provided a significant number of voter registrations, and the closest office was 90 minutes away. Post-*Shelby County*, the State can close the branch without preclearance, and any challenge under Section 2 would have to prove that the branch closure was intended to disenfranchise minority voters.

Shifting to more current policy initiatives, the Buena Vista School District is experiencing financial distress and has had a number of problems. Some have suggested dissolution of the school district, or emergency manager control. Proposed expansions of the Educational Achievement Authority also could apply to Buena Vista Schools. Under preclearance, any of these actions could have required Federal approval, resulted in complex litigation, or both. Without the preclearance requirement – unless Congress updates the Section 4b formula, and it applies to Michigan – these actions can be taken without the need for Justice Department approval.