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Minnesota House of Representatives

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TO: Interested Members

FROM: Anita Neumann (651-296-5056)

RE: Home-based child care/AFSCME and SEIU organizing activities

In response to requests for information on the issue, this memo provides preliminary information and answers to basic questions regarding the potential organization of home-based child care providers in Minnesota.

Basic Questions:

1. *What is the status of home-based child care providers under the Public Employment Labor Relations Act (PELRA)?*
 - *Answer:* Minnesota Statutes Chapter 179A defines a public employer as the state of Minnesota or other local political subdivisions. The law also defines public employees as those appointed or employed by a public employer. Under current law, a self-employed, home-based child care provider would not be a public employer or a public employee. Here is the link to the law; the relevant definitions are in subdivisions 14 and 15: <https://www.revisor.mn.gov/statutes/?id=179A.03>
2. *What is the status of home-based child care providers under Minnesota child care assistance laws?*
 - *Answer:* A second and separate provision of state law that deals specifically with public child care assistance subsidies, Minnesota Statutes Section 119B.09, subdivision 8, states that receipt of federal, state, or local funds by a child care provider ***does not*** establish an employee-employer relationship between the provider and the county or the state. Here is the link to the statute: <https://www.revisor.mn.gov/statutes/?id=119B.09>

3. *Would the organization of home-based child care providers fall under the jurisdiction of the State Bureau of Mediation Services (BMS)?*
 - *Answer:* The opinion of the BMS, based on a preliminary assessment without actually having an action or process with facts on which to base a decision, is that private, self-employed home-based child care providers would most likely not fall under their jurisdiction because the providers are neither public employees nor employees of any single employer. State law, in section 179.10, already authorizes both private employees and employers to self-organize or associate together for the purpose of collective bargaining. For those under the jurisdiction of the BMS, Minnesota law, in chapters 179 and 179A, provide a process for employees to gather signatures for the purpose of designating an exclusive representative for the purposes of collective bargaining. The normal procedure on the BMS is that a group of employees would fill out a petition for representation and file that petition with the BMS. Authorization cards—signed and dated within six months of the petition being filed—from at least 30 percent of the employees requesting representation must also be submitted. The BMS would then issue an order covering the employees until the BMS investigated the petition and signature and an election was held. If the employees voted in the exclusive representative, then that's the group that would represent them. This is the link to Minnesota Statutes, section 179.10 providing self-organization rights to private sector employees and employers: <https://www.revisor.mn.gov/statutes/?id=179.10> The process for selecting a representative is contained in Minnesota Statutes Section 179.16 linked here: <https://www.revisor.mn.gov/statutes/?id=179.16> These links are for information only, since the BMS does not believe it has jurisdiction over the child care providers in question.

4. *Would activities to organize home-based child care providers be covered under the National Labor Relations Act (NLRA)?*
 - *Answer:* The NLRA has a very specific process for collecting signatures, verifying those signatures, and holding elections to determine representation. The NLRA applies broadly to private employees and private employers but specifically exempts public employees, independent contractors, and some private entities that don't operate in interstate commerce. The question over whether home-based child care providers are covered or exempt under the NLRA is somewhat open depending upon whether they are classified as independent contractors and/or how and to what extent their business operates in interstate commerce. Given the small size and limited operation of most self-employed home-based child care providers, it is questionable whether they would be covered because their interstate commerce activities would be very limited. The question of whether they are independent contractors would depend on how they have organized their business and how they operate it. The following is a link to an information brief I did on private sector labor relations awhile ago, but the basic facts are still up to date.
<http://www.house.leg.state.mn.us/hrd/pubs/prvlabor.pdf>

5. *What are the federal anti-trust issues?*

- *Answer:* A preliminary review of available information on the issue of organizing home-based child care providers, suggests that there is an issue in the discussion that involves federal anti trust laws. The issue surrounds the prohibition of independent contractors from organizing or negotiating collectively unless there is a specific state provision that effectively creates an exemption from the anti trust provisions to accomplish a public policy goal of the state.

6. *What are the implications of executive orders?*

Answer: Many of the “executive orders” issued in other states include very specific language specifying that the child care providers are not public employees. This gives rise to the question that if the providers were not public employees, what would the “representation” mean in Minnesota, and more specifically, what would be the source of the health care coverage or potential pension benefits that organizers are discussing. See the note below based on a conversation with the AFSCME representative regarding possible sources of health care benefits.

Based on much of the material written and blogged regarding activities in other states, and the understanding of the issue by Cyndi Cunningham and other Minnesota child care providers, the “exclusive representative” is generally more of an advocacy, lobbying role on issues like higher child care assistance subsidies, expedited payments to providers and enhanced training opportunities—than a traditional wage and hour collective bargaining role. There have been limited instances where the providers were deemed “quasi” public employees for certain purposes, but they generally did not extend to insurance coverage, public pension benefits, workers compensation coverage, unemployment benefits and the like. One of the main concerns expressed by some of the providers in Minnesota is assuming that they would be assessed for dues or fees, what would they be getting in return?

7. *What are the issues surrounding union dues and public child care subsidies?*

- *Answer:* Among the day care providers with whom I’ve made contact, the two main concerns center upon the process under which they were convinced to sign a card of support and the potential dues or fees that they would be asked to pay. Some states, including Michigan initially, set up a system under which the dues/fees were deducted from the public child care subsidies paid to day care providers. That practice has been stopped in Michigan, and, according to Danyell Punelli (the child care subsidy person in House Research), federal law prohibits union dues or other fees from being deducted from federal child care development fund resources (CCDF) and there is no authority in Minnesota’s state law that would authorize those deductions. The only information that I was able to get regarding the process was anecdotal information from opponents and proponents of organizing. Depending on which side the person was on, the process was either very bad, or just fine.

8. *What are the unions saying?*

- *Answer:* I spoke with Eric Lehto, the AFSCME official in charge of organizing who told me that their activity was not a “card check” campaign. Since these are

all independent employers, there would be no employer to present the card to. Instead, he characterized the cards as indicators of support for an organization. When I asked if and how they contemplated collecting dues or fees from potential members, the response was that they did not know how that would occur. I also asked how AFSCME believed that health care benefits or pension benefits could be obtained for in home providers since they were clearly not public employees or public employers and the response was that as a large group, there could be the potential for negotiating a group rate with a private insurer. I have contacted SEUI, but have not heard back from them as of this writing.

9. *What questions remain?*

- *Answer:* There are clearly more questions surrounding this issue than answers at this time. I was unable to verify either affirmatively or negatively whether the governor would issue an executive order on this issue. The biggest question is if there were to be an executive order on this issue, what would it mean? Given the current law provisions under PELRA and the child care subsidy law, without a legislative change, it seems unlikely that private, home-based child care providers could be public employers or public employees. And, given the information from the child care subsidy experts, since federal law does not allow payment of union dues or other fees from federal child care money and since state law lacks an authorization to do so, that the deduction of dues or fees from subsidy checks would be problematic.

10. *What are some possible next steps?*

- *Answer:* There are a number of things that may be considered going forward, including:
 - Amending PELRA to specifically exclude in-home child care providers is a possible approach but carries some potential consequences. The biggest concern would be that a court would conclude that because child care providers had a specific exemption, then anyone without a specific exemption would be included.
 - Language could be added to chapter 119B (the child care assistance law) to specifically prohibit the deduction of union dues or other similar fees from state or local child care subsidy payments.
 - Language could be added to the child care program law to prohibit the state or counties from contracting with non-public entities for a certain child care related activities. This would require carefully crafted language to ensure that it applied only to the types of organizations desired and not to existing non-profits and others who provide contracted child care training and assistance services for example.
 - As mentioned above, more research needs to be done into the anti-trust issue since that appears to be an emerging issue/argument across the country.