

Legal Compliance Update

Office of the State Auditor

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Independent contractor/employee issues



- ▶ Independent contractor status depends on a number of criteria adopted by the Internal Revenue Service, the U.S. Department of Labor, the Social Security Administration, the Minnesota Department of Employment and Economic Development (unemployment insurance), the Minnesota Department of Labor and Industry (workers' compensation), and the Public Employees Retirement Association (PERA).

Independent contractor/employee issues

- ▶ The misclassification of employees as independent contractors can result in employer liability for pension contributions to PERA, employer, and un-withheld employee state and federal taxes, Social Security, Medicare; as well as exposure to additional taxes, penalties and interest, additional wage and overtime obligations under the Fair Labor Standards Act, workers' compensation and unemployment liabilities, and the possibility of wrongful termination suits.

Independent contractor/employee issues (cont'd)

- ▶ Further, Minnesota legislature in 2019 enacted “wage theft” laws. See 2019 Minn. Laws 1st Special Session, ch. 7. Pursuant to this legislation, the Minnesota Attorney General has created a new department to enforce these laws called the Wage Theft Unit.

Independent contractor/employee issues (cont'd)

- ▶ Applying various criteria our conclusion the offices of city clerk and treasurer are not independent contractors
- ▶ Also conclusion of League of Minnesota Cities (LMC), See “Employee or Independent Contractor: Legal Implications and Ramifications,” LMC Information Memo (July 25, 2017),
- ▶ For PERA purposes clerk and treasurer are employees and are not independent contractors or the employees of independent contractors. See Minn. Stat. § 353.01, subd. 2a(a)(3)(i) and 2b(b).



Retention/electronic storage of receipts

- ▶ Two issues have arisen:
- ▶ 1. If the P-card Company retains the transaction receipt digitally, do our employees need to retain and turn in the paper receipt?
- ▶ We favor retention of the paper receipt as part of the claim process.
- ▶ The paper receipt is a government record and can only be disposed of pursuant to Minn. Stat. Section 15.17 which permits destruction of records only pursuant to Minn. Stat 138.17 (Records Disposition Panel)

Retention/electronic storage of receipts (cont'd)

- ▶ 2.) Can we destroy paper receipts once they are copied or digitalized?
- ▶ We favor the retention of original paper documents because they can provide more evidentiary information than electronic copies and are not as easily altered as electronic copies. We ask clients to retain for one year after audit.
- ▶ Minn. Stat. Section 15.17 permits the substitution of a copy that “clearly and accurately reproduces” the original for that original. However, destruction of the originals must be made pursuant to Minn. Stat Section 138.17.

Retention/electronic storage of receipts (cont'd)

- ▶ Minn. Stat Section 138.17:
- ▶ Creates the Records Disposition Panel (Panel) which includes the State Auditor for local government records.
- ▶ Provides that records can only be destroyed:
 - ▶ pursuant to an adopted Records Retention Schedule approved by the Panel, or
 - ▶ Upon approval by the Panel of application to destroy specific records.

Retention/electronic storage of receipts (cont'd)

- ▶ Optimum:
- ▶ Provide in Record Retention Schedule two time period for receipts:
 - ▶ 1) a shorter time period for the original paper receipt, and
 - ▶ 2) a longer time for the electronic copy

FDIC Coverage

- ▶ FDIC coverage based on the public entity's
- ▶ “official custodian”
- ▶ Each “official custodian” receives \$250,000 of FDIC coverage
 - ▶ [\$250,000 for all demand accounts and \$250,000 for all time accounts if depository is in state]
- ▶ The “official custodian” is the person that has “plenary” control over the public entity's funds.
- ▶ FDIC: “Control of public funds includes possession, as well as the authority to establish accounts for such funds in insured depository institutions and to make deposits, withdrawals, and disbursements of such funds.”



FDIC
Federal Deposit Insurance

FDIC Coverage (cont'd)

- ▶ Counties: The county treasurer is the officer that receives county funds (Minn. Stat. Section 385.05) and deposits county funds (Minn. Stat. Section 385.07).
- ▶ Minn. Stat. Section 384.13 states:
- ▶ “No money shall be disbursed by the county board, or any member thereof, but only by the county treasurer upon the warrant of the chair of the county board, attested by the auditor...”

FDIC Coverage (cont'd)

- ▶ Cities. Minn. Stat. Section 412.141 indicates that for standard plan and Plan A cities, the treasurer is to receive and “safely keep” all moneys belonging to the city. Minnesota Statutes Section 427.03 states that the treasurer “shall keep the funds of the city as far as possible” in designated depositories. Further the treasurer is to pay out city funds only on order of the mayor and clerk.
- ▶ School districts. Minn. Stat. Section 123B.96 says that the district treasurer is to “receive”, “be responsible for” and “disburse” district funds. Further it provides that the treasurer is to deposit funds in district’s depository.

FDIC Coverage (cont'd)

- ▶ Towns. Minn. Stat. Section 367.16 states that the town treasurer is to: “to receive and take charge of all money belonging to the town, or which is required to be paid into its treasury, and to pay it out only upon the lawful order of the town or its officers;”
- ▶ Conclusion: For counties, cities, school districts and towns the treasurer, and only treasurer, is the official custodian.
- ▶ Being a signer on the public entity’s checks does not make you an “official custodian”

Salary Cap Issue (cont'd)

- ▶ Minn. Stat. 43A.17 limits the compensation of most state and local employees to 110 percent of the salary of the governor
- ▶ Compensation includes salary and the value of all other forms of compensation
- ▶ “Other forms of compensation” does not include:
- ▶ ”employee benefits that are also provided for the majority of all other full-time employees of the political subdivision, vacation and sick leave allowances, health and dental insurance, disability insurance, term life insurance, and pension benefits or like benefits the cost of which is borne by the employee or which is not subject to tax as income under the Internal Revenue Code of 1986”

Salary Cap Issue (cont'd)

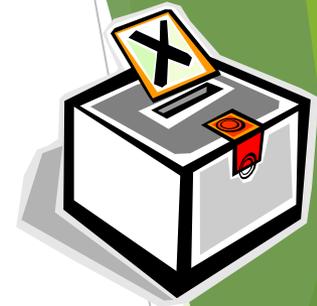
- ▶ Certain public entities subtracted vacation from salary for purposes of compensation limit calculation.
- ▶ Question: Should vacation be subtracted from salary for purposes of calculating salary under Minn. Stat. 43A.17?
- ▶ Answer: No
- ▶ 1. Vacation *taken* is a component of salary.
- ▶ 2. Vacation *accrued and carried forward* (if provided to a majority of employees) is excluded by statute from “the value of all other forms compensation”

Salary Cap Issue (cont'd)

- ▶ Therefore, vacation accrued or taken has no effect on the compensation limit calculation and should not be added or subtracted.
- ▶ However, if employer allows accrued vacation to be “cashed out” prior to employment termination, that amount should be added to the compensation calculation for Minn. Stat. Section 43A.17.



Ballot Issue Advocacy



1966 Attorney General Opinion/Letter

Op. Atty. Gen, No 159a-3 (May 24, 1966). May a school district pay to print and mail literature that urges the passage of a bond issue?

- “We feel that if these questions were presented to our courts” their decisions would be in conformance with [a cited New Jersey case that said “no.”]
- Individual members of the board, however, are free to appear before citizens’ groups to support their decision and advocate approval of a bond issue.

Ballot Issue Advocacy

2006 Attorney General Letter (Cont'd)

June 30, 2006 A.G. Letter to Legislators (Advocacy regarding the 2006 Motor Vehicle Sales Tax proposed constitutional amendment).

- ▶ “While a local government unit may arguably be justified in expending resources to support or oppose a constitutional amendment that would affect it directly, previous opinions have concluded that resources may not be expended for such purposes where the effect upon the unit would be only indirect and in common with the public at large.”

Ballot Issue Advocacy

Unfair Campaign Finance Case:
Abrahamson v. St. Louis County Sch. Dist.

- ▶ December 2009 school district referendum approved a \$78.8 million capital bond.
- ▶ Unfair campaign finance complaint alleged (in part) that school district publications advocated a “yes” vote (by presenting biased, exaggerated, and false information) and that the school district failed to file required campaign financial reports under Minn. Stat. ch. 211A.

Ballot Issue Advocacy

Abrahamson v. St. Louis County Sch. Dist. (Cont'd)
Minnesota Supreme Court - 819 N.W.2d 129 (Minn. 2012)

The Supreme Court *Declined* to answer whether public funds can be spent to advocate for passage of a ballot question.

- ▶ The Supreme Court decided an **evidentiary hearing** [at the Office of Administrative Hearings] was needed to determine whether
 - ▶ the challenged statements promoted the ballot question, and
 - ▶ whether campaign financial reports were required.

Ballot Issue Advocacy

Abrahamson v. St. Louis County Sch. Dist. (Cont'd)

Office of Administrative Hearings, Findings, Conclusions and Order (May 30, 2014)

An evidentiary hearing was held before a panel of three administrative law judges (ALJs).

On the issue of **authority** for promotion, the ALJ Panel in 2014, said:

- ▶ “There is nothing improper about a school district supporting the passage of a bonding question Minnesota’s campaign finance and reporting laws do not prohibit a school district from promoting a ballot question or urging the adoption thereof. When read together, Minn. Stat. §§ 211A.01 and 211A.02 simply require that if a school district does promote a ballot question, it must report contributions or disbursements of more than \$750.”

Ballot Issue Advocacy

New Development - Attorney General Opinion - October 27, 2020.

- ▶ 54 years have passed since the 1966 AG Opinion on the subject.
- ▶ A city attorney asked the AG: During the pandemic (and after) can city officials use written communication like email and social media to advocate for one side of a ballot question?
- ▶ If so, can a city-issued device or account be used as long as financial cost to the City is *de minimis*?

Ballot Issue Advocacy

- ▶ The AG responded: “If the written communications you describe would involve the expenditure of public funds, then a Minnesota court would likely find them to be unlawful and against public policy.”
- ▶ “We are not aware of any Minnesota case or statute recognizing an exception for *de minimis* expenditures of taxpayer money. Until the Legislature says otherwise, we believe that Minnesota courts would find that all unauthorized expenditures are prohibited, no matter how small.”

Ballot Issue Advocacy

- ▶ The AG added, “[t]he answer turns on whether the [city] is expending public funds to create, maintain, and use its email and social media accounts, which is a factual determination.”
- ▶ In many instances, another factual determination will remain -- whether the communication promotes passage in the first place.
 - ▶ Local governments and citizens who oppose passage may disagree about whether questioned communications are factual or whether they advocate passage.

Ballot Issue Advocacy

Conclusions

- ▶ In 2020, the Minnesota Attorney General's Office reiterated and updated its 1966 position that local government public funds cannot be used to advocate for one side of a ballot question.
- ▶ So, local governments should refrain from such expenditures.
- ▶ However, remember that the issue of legal authority to promote has still not been decided by a court.
- ▶ Complaints alleging a local government has advocated passage without proper reporting or has disseminated false campaign material are still filed with the Office of Administrative Hearings pursuant to Minn. Stat. § 211B.32.

Coach Charged with Embezzlement and Theft of Public Funds



- ▶ In 2019, a high school wrestling coach was charged with Embezzlement and Theft by Swindle totaling over \$13,900.
- ▶ It appears that 6 of the original 16 counts are still pending, and trial has apparently not yet been held.

Coach Charged with Embezzlement and Theft of Public Funds

- ▶ The criminal complaint alleged the coach used school district funds to purchase
 - ▶ college football game tickets and
 - ▶ related expenses for car rentals,
 - ▶ hotel rooms,
 - ▶ gas,
 - ▶ food and other expensesfor groups of people said to be attending wrestling coach clinics.

Internal control lesson - For event expenses, get information on the event/receipt for registration and give requests meaningful review.

Superintendent charged - Theft by Swindle and Embezzlement



2020 Criminal complaint:

- ▶ Superintendent used District-issued credit card to purchase two Apple Watches, home security equipment, a vehicle dash camera and other items.
- ▶ Over \$42,000 in purchases which did not appear to be business related or authorized by law.
- ▶ Also, over \$3,000 in fuel purchased in addition despite receipt of a \$650/month stipend for vehicle usage.

Internal control lesson: Governing boards consider procedures to confirm top administrators act in accordance with policies and procedures.

Thank You

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