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Human Resources and Elected Officials

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Elected Officials: What responsibilities do they have to comply with or enforce employment laws and standards? Do personnel policies apply, and if so, which ones? What authority do elected department heads have over employees? This presentation will delve into these and other complex issues involving elected officials.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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I. ELECTED OFFICIALS ARE NOT EMPLOYEES

A. Elected officials are County Officers who serve four-year terms. Minn. Stat. § 382.01. These positions include a county auditor, county treasurer, sheriff, county recorder, and county attorney. *Id.* Under the Public Employment Labor Relations Act (PELRA), an elected official is not an employee. Minn. Stat. § 179A.03, subd. 14.

B. This means elected officials:

1. Cannot be hired or fired

Elected officials may only be removed from office in accordance with the procedures established in Minn. Stat. §§ 351.14 to 351.23. Minn. Stat. § 351.15.

A registered voter may petition the county auditor with signatures of 25% of the number of persons who voted in the election. Minn. Stat. § 351.16, subd. 1. The county auditor then presents the petition to the chief justice of the Minnesota Supreme Court, who examines the petition to determine whether it “properly alleges facts which, if proven, constitute malfeasance or nonfeasance in the performance of official duties.” Minn. Stat. § 351.17. Then, the chief justice assigns the case to a special master (active or retired judge) for a public hearing. *Id.* If the special master finds that the county official committed malfeasance or nonfeasance, then the county auditor certifies a removal election that requires a majority vote to remove the official from office. Minn. Stat. §§ 351.20, 351.22.

2. Cannot receive a pay suspension or deduction

a. *County Board* – Compensation is set by the county board and not effective until January 1 of the next year. Minn. Stat. § 375.055, subd. 1. A county board may reduce its members’ salary at any time. *Id.* at subd. 1(b).

b. *Other Elected Officials* – Salary set by county board and cannot be reduced during an official’s term. Minn. Stat. §§ 384.151, subd. 1a (county auditor); 385.373, subd. 1a (county treasurer); 386.015, subd. 2 (county recorder); 387.20, subd. 2 (Sheriff); 388.18, subd. 2 (county attorney).

3. Cannot be paid severance

Spaulding v. Bd. of Comm’rs of Kandiyohi Cty., 238 N.W.2d 602 (Minn. 1978).

Retired sheriff sued the county for severance payment of his accrued sick leave at 75% pursuant to county policy that applied to “all regular employees.” *Id.* at 603. Supreme court noted that “where an officer performs duties imposed by law he is entitled to the compensation therefor fixed by law and no other.” *Id.* at 604. Minnesota statutes provide authority for severance payments to public employees but are silent regarding severance pay in the form of sick leave for elected officials. *Id.* The court concluded, “Absent such authorization, the county could not have included [the sheriff] in its sick leave policy.” *Id.*

4. Do not accrue vacation or sick leave

“The compensation plan for an elected official of a . . . county . . . may not include a provision for vacation or sick leave.” Minn. Stat. § 43A.17, subd. 10.

5. Cannot sue for employment discrimination

In *Farrington v. City of Richfield*, an applicant not appointed to the vacant city council seat brought a lawsuit against the city alleging age and sex discrimination in violation of the Fourteenth Amendment and Minnesota Human Rights Act. 488 N.W.2d 13, 14 (Minn. App. 1992). The district court granted summary judgment in favor of the city because a city council member is not an “employee” under state or federal law. *Id.* at 15. The court of appeals affirmed. *Id.* at 16.

6. Cannot claim FLSA protection

Similarly, elected officials cannot claim protection under the Fair Labor Standards Act or the Minnesota Fair Labors Standards Act. Both Acts provide employees with general wage and hour protections, such as establishing overtime compensation standards and the minimum wage. Under both the federal and state FLSA, an elected official is not considered an “employee.” 29 U.S.C. § 203(e)(2)(C)(ii)(I); Minn. Stat. § 177.23, subd. 7(8).

7. Do not need to comply with general personnel policies

Because elected officials are not considered employees of the county, they are not covered by the county’s personnel policy. Counties can include language like “unless otherwise noted, this personnel policy does not apply to elected officials.” This allows the county to make certain provisions that relate to elected officials, like discrimination and data practices, apply to elected officials without having all provisions of the personnel policy apply.

C. However, elected officials are still:

1. Covered by certain OSHA provisions

County workers are not covered by OSHA but have OSH Act protections because Minnesota has an OSHA-approved state plan. See Minn. Stat. § 182.652, subd. 1. Minnesota’s Occupational Safety and Health Act broadly defines “employee” as “any person suffered or permitted to work by an employer, including any person acting directly or indirectly in the interest of or as a representative of, an employer, and shall include state, county, town, city, school district, or governmental subdivision.” Minn. Stat. § 182.651, subd. 9.

2. May take time off

While an elected official's compensation plan may not include a provision for vacation or sick leave, an elected official's salary "may not be diminished because of the official's absence from official duties because of vacation or sickness." Minn. Stat. § 43A.17, subd. 10.

D. Office Declared Vacant

1. If a County Commissioner does not attend for 90 days or is unable to serve. Minn. Stat. 375.101;
2. Death;
3. Ceasing to be a resident of the County;
4. Conviction of an "infamous crime";
5. Refusal to take the oath of office; and
6. Resignation. Minn. Stat. 351.02

II. ELECTED OFFICIALS AS EMPLOYERS

A. County Board as Employer

While elected officials are not considered "employers" in all situations (See Minn. Stat. § 179A.03, subd. 15(a)(6)), they are often responsible for hiring, firing, and managing employees.

1. Responsible for filling vacancies in county offices. Minn. Stat. § 375.08.
2. Responsible for approving county hires. Op.Atty.Gen., 270-G-1, March 24, 1952 (stating that county board has power to contract for such employees as necessary to carry business of county).
3. Authority to remove the employees that it appoints subject to the collective bargaining agreement and other applicable laws. See *State ex rel. Verbon v. St. Louis Cty.*, 12 N.W.2d 193, 196 (Minn. 1943) (stating county board had authority to remove employee it appointed unless Civil Service Act stated otherwise).
4. County Personnel Act
 - a. A county may elect to adopt a resolution creating a personnel department and appointing a personnel appeals board. Minn. Stat. § 375.56. Under this system, the personnel department has jurisdiction over every county employee except for statutorily excluded positions—including elected officials—and those positions the county boards chooses to exclude. Minn. Stat. § 375.58. The personnel department is run by a director, and its responsibilities listed in Minnesota Statutes section 375.60, subdivision 2, include:

- i. appointing, supervising, and directing the work of the employees of the personnel department;
- ii. Scheduling and conducting hearings;
- iii. Determining qualifications of county job applicants;
- iv. Investigating the administration and effect or rules made under this section and report findings and recommendations to county board;
- v. Establishing training and continuing education for county employees;
- vi. Preparing compensation plan and recommend a schedule of salary or wage rates for adoption by county board.

B. Sheriffs

1. Right to appoint deputies – The county board determines the number of permanent full-time deputies and other employees as well as the compensation for each position. Then, “The sheriff shall appoint in writing the deputies and other employees, for whose acts the sheriff shall be responsible and whom the sheriff may remove at pleasure.” Minn. Stat. § 387.1 The sheriff may also appoint a chief deputy with the approval of the county board. Minn. Stat. § 387.145. However, a deputy cannot be removed after one year of service except for cause and after an investigation and hearing by the Sheriff’s Civil Service Commission. Minn. Stat. § 387.37.

C. County Attorney

- A. Right to appoint assistants – “The county attorney of any county in this state who has no assistant is hereby authorized to appoint, with the consent of the county board of the county, one or more attorneys for assistance in the performance of duties.” Minn. Stat. § 388.10.

D. Auditor

“Any county auditor may by certificate in writing appoint deputies who, before entering upon their duties, shall record with the county recorder such certificates, with their oaths of office endorsed thereon. Such deputies may sign all papers and do all other things which county auditors may do. Auditors shall require bonds of their deputies in such amount and with such sureties as they deem proper, shall be responsible for their acts, and may revoke their appointment at pleasure.” Minn. Stat. § 384.08

E. Treasurer

“County treasurers may by certificate in writing appoint one or more deputies, who, before entering upon their duties, shall record with the county recorder such certificates, with their oaths of office endorsed thereon. Such deputies may sign all papers and do all other things which county treasurers may themselves do. County treasurers are responsible for the acts of their deputies and may revoke their appointments at pleasure.” Minn. Stat. § 385.02

G. Recorder

“Any county recorder may appoint one or more deputies in writing whose oath of office shall be endorsed on the appointment and recorded therewith in the office. County recorders shall be responsible for the acts of their deputies and may revoke their appointment at pleasure.”
Minn. Stat. § 386.33

H. In this capacity, elected officials must:

1. Comply with county employees’ collective bargaining agreement

In the consolidated case *General Drivers, Local No. 346 v. Aitkin County Board*, the union argued, among other things, that the CBAs negotiated between the counties and deputies prohibiting terminations except for cause trumped a former contrary statutory provision. 320 N.W.2d 695, 698 (Minn. 1982). In all three of the consolidated cases, the sheriff was not a party to the CBA. *Id.* at 697-98. The supreme court determined that the county board was the sole employer for the purpose of the CBA, and that the PELRA predecessor and the CBA prevailed over the contrary statute. *Id.* at 700; *See Minn. Judicial Branch v. Teamsters Local 320*, 971 N.W.2d 82, 92 (Minn. App. 2022) (Interpreting *General Drivers*).

2. Enforce and abide by anti-harassment and discrimination laws

a. Veteran’s Preference Act (VPA)

The VPA was enacted to provide certain protections and benefits to military veterans. For example, the VPA provides certain preferences in hiring and states that veterans may only be “removed” from a position in public employment for incompetency or misconduct. Minn. Stat. § 197.46. Caselaw has created a third basis for removal, authorizing the abolishment of a position held by a veteran if the public employer acts in “good faith.” *Gorecki v. Ramsey Cty.*, 437 N.W.2d 646 (Minn. 1989).

“All officers, boards, commissions, and employees shall conform to, comply with, and aid in all proper ways in carrying into effect the provisions of section 197.455 and this section notwithstanding any laws, charter provisions, ordinances or rules to the contrary. Any willful violation of such sections by officers, officials, or employees is a misdemeanor.” Minn. Stat. § 197.46(f).

b. Family Medical Leave Act (FMLA)

FMLA provides employees of more than 12 months working for a county with 50 or more employees within 75 miles of the employee’s worksite the right to take leave under the following situations:

29 CFR § 825.112.

FMLA applies to elected officials because the employees working for them are protected employees, and elected officials fall under the definition of “employer.” See 29 CFR §§ 825.102, 110.

c. Americans With Disabilities Act (ADA)

The ADA prohibits discrimination against employees or job applicants who have disabilities. In order to be deemed as having a disability, an individual must have a physical or mental impairment that substantially limits one or more of the major life activities; they must have a record of such an impairment; or they must be regarded as having such an impairment. 42 U.S.C. § 12102(1).

State and local governments are required prohibited from denying qualified individuals with a disability the benefits and programs of the state. 42.U.S.C. § 12132.

d. Equal Employment Opportunity/Human Rights Non-Discrimination

42 U.S.C. § 2000e-16b. Elected officials are prohibited from violating this provision “with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—(1) to be a member of the elected official’s personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.” 42 U.S.C. § 2000e-16c.

ii. Age Discrimination in Employment Act (ADEA).

The ADEA makes it unlawful for an employer to fail or refuse to hire or discharge any individual or otherwise discriminate or harass any individual with respect to the individual’s compensation, terms, conditions, or privileges of employment, because of such individual’s age. 29 U.S.C. § 621. In 2018, the Supreme Court confirmed that the ADEA applies to state and local governments. *Mount Lemmon Fire Dist. V. Guido*, 139 S.Ct. 22, 27 (2018).

iii. Minnesota Human Rights Act (MHRA).

In addition to the categories covered by Title VII and the ADEA, the MHRA prohibits discrimination in employment based on marital status, sexual orientation, status with respect to public assistance, and familial status. Minn. Stat. § 363A.02. The statute broadly defines “employer” as “a person who has one or more employees.” Minn. Stat. § 363A.03, subd. 16.

Elected officials may be sued separately under the ‘aiding and abetting’ provision of the MHRA.

3. Conflicts of Interest

“Except as authorized in section ... 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor.” Minn. Stat. § 471.87.