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To: Local Government Clients
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IS AN ELECTED OFFICIAL AN EMPLOYEE?

An IRS investigator recently walked into the clerk's office of a village of 800 people and demanded to see the U.S. Citizenship and Immigration Service ("Immigration Service") I-9 form on file for the village president and trustees.

The clerk knew that I-9 forms are required for municipal employees, to document that each employee is authorized to work in the United States. 8 C.F.R. §274a.2 But the regulations and the instructions for completing Form I-9 all refer to "employers" as those who are required to submit the form for people who are "hired." The clerk wondered whether the president and trustees, as elected officials, are employees of the village. And if they are, what are the implications in contexts other than Immigration Service "authorized to work" regulations? As it turns out, the answer to both questions is, "It depends."

1. Immigration Service I-9 Employment Rules. The Immigration rules are intended to bar "unauthorized aliens" from employment in the United States. Employers are required to obtain from each employee hired after 1986, certain documents verifying U.S. citizenship or other employment authorization. Of course, because local elected officials must prove citizenship in order to be eligible to hold public office, one might think that the mere fact that a person *is* an elected official would satisfy Immigration Service. But one would be wrong.

One might also think that, as the governing body of their unit of government, elected officials cannot be employees, and so are not subject to the Form I-9 rules. Immigration Service apparently thinks otherwise. Unfortunately, Immigration Service's rationale for its opinion is a fabulous example of governmental doublespeak and regulatory obfuscation. The Immigration Service "Handbook for Employers; Instructions for Completing Form I-9, <http://www.uscis.gov/files/form/m-274.pdf>, says that Form I-9 must be completed "every time you hire any person to perform labor or services in return for wages or other remuneration." Elected officials are not hired, they are elected. Is this a distinction without a difference? Immigration Service gives no guidance as to how, or if, the rules apply to elected officials; it simply assumes that they do.

Since all elected officials are necessarily citizens of the United States and therefore authorized to work here, it would make sense for each of them to simply fill out Form I-9 and be done with it. But some elected officials don't see things that way. Some of them, in the personal experience of the author, feel that they should not have to submit a federal form which logically does not apply to them, and the purpose of which is satisfied merely by the fact that they are *de jure* elected officials. In response to the inevitable question, "Why should I have to do this?" legal counsel can only answer that failure to obtain Form I-9 subjects the public body to civil and criminal penalties-unless, of course, the public body is not the employer of the elected officials. Q.E.D. (The failure of the elected official to submit Form I-9 also, under Federal law, authorizes the "employer" to discharge the "employee." But it seems unlikely that Federal immigration law could empower a public body to

terminate an elected official—a power the public body does not have under Illinois law.)

2. IRS Rules Regarding Elected Officials. IRS regulations require an employer to withhold income taxes, social security, and medicare taxes and issue a W-2 form to employees. IRS rules, <http://www.irs.gov/govt/fslg/article/0,,id=110343,00.html>, state that "Generally any individual who serves as a public officer is an employee of the government for whom he or she serves." The rules do not cite any authority for this generalization. They go on to explain in great detail who is a "public officer" but do not elaborate on the generalization that a public officer is an employee.

3. FLSA and the Illinois Wage Act. In contrast to Immigration Service and IRS, the Department of Labor is clear that elected officials are NOT employees of the public body they serve. Section 203(e)(2) of FLSA says that "employee" does not include any individual who holds public elective office of the state or any subdivision thereof. Similarly, the Illinois Wage Law, 820 ILCS 105/1, exempts from the definition of "employee" anyone who is excluded by the definition in the FLSA.

4. IPLRA. The Illinois Public Labor Relations Act, 5 ILCS 315/3(n), expressly excludes elected officials from the definition of "employee."

5. Civil Rights Act. Title VII of the Civil Rights Act of 1964, 400 U.S.C. §2000e(f), provides that the term "employee" does not include a person elected to a public office of a state or political subdivision thereof.

6. ADEA and IHRA. The Age Discrimination in Employment Act, 29 U.S.C. §630(f), expressly excludes elected officials from the definition of "employee," as does the Illinois Human Rights Act, 775 ILCS 5/2-101(A)(2)(c). See, however, Section 10 below, "Elected Officials as Employers."

7. Unemployment Compensation. The Illinois Unemployment Insurance Act, 820 ILCS 405/ at §220, provides that the term "employment" does not include service as an elected official.

8. IMRF. The Illinois Municipal Retirement System avoids the "employee" issue by giving elected officials the option of participating in IMRF.

9. Tort Immunity Act. The term "employee" in the Illinois Local Governmental and Local Governmental Employee Tort Immunity Act, 745 ILCS 10/1-202, includes "a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated." The TIA uses the term "officer" rather than "elected official" but it is clear that elected officials are officers for purposes of the Tort Immunity Act. See, e.g., *Kevin's Towing v. Thomas*, 351 Ill.App.3d 540, 814 N.E.2d 1003 (2d Dist. 2004), app. den., 212 Ill.2d 533, 824 N.E.2d 284.

10. Elected Officials as Employers. In most employer-employee cases, a public body in its corporate capacity is the "employer." However, in a few cases involving primarily county officials, the elected head of the public body is considered the employer. This is true as to a county sheriff, county clerk, coroner, auditor, state's attorney and recorder. In one case, a federal court found that individual elected city officials are "employers" under ADEA and are not entitled to legislative immunity for alleged age discrimination. To add to the confusion, in *Orenic v. ISLRB*, 127 Ill.2d 453, 537 N.E.2d 784 (1989), the Supreme Court held that non-judicial personnel working in county courts are employees of the State of Illinois, "personified by the chief judge of each circuit," despite the fact they are paid by the county and subject to county personnel policies.

Conclusion. Is an elected local government official an employee of the public body he or she serves? It depends. Does it matter? Of course.

A public employer is subject to civil and criminal penalties for non-compliance with, for example,

Immigration Service and IRS laws and regulations regarding employees. An individual elected official is not an employee for purposes of FLSA, IPLRA, Title VII of the Civil Rights Act, ADEA, the Illinois Human Rights Act, and the Unemployment Insurance Act, but may opt into IMRF, and is an employee for purposes of the Tort Immunity Act. There is no "one-size-fits-all" answer to the question of elected official as employee. Counsel to public bodies must consider the legal context in which the issue arises before giving an opinion.

If you have any questions about this memorandum, please contact [Paul Keller](#), [Don Anderson](#), or your primary Ancel Glink attorney.

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