

November 17, 2008

Dear Human Resources Director:

You have this question related to the update of the City Code?

I will handle this question by chapters in Title 4.

#### **Title 4, Chapter 1 (Social Security)**

This question turned out to be far more complicated than I anticipated. Apparently this chapter is a product of Tennessee Code Annotated, ' 8-38-101 et seq., which authorizes the state and its subdivisions to establish social security retirement programs. That statute is itself a product of Public Acts 1951, Chapter 90, as amended. Under Tennessee Code Annotated, ' 8-38-108, the political subdivisions of the state are authorized to establish social security retirement programs, that met the conditions of that statute. The particular political subdivision in question was required to obtain the approval of the "state agency" for its program. The term "state agency" was deleted and replaced by "State Old Age and Survivors Insurance Agency," by Public Acts 1985, Chapter 66. I assume, but have been unable to determine, that the ordinance in Title 4, Chapter 1, of your municipal code (or one similar to it) was drafted by the agency. Title 4, Chapter 1, of your municipal code says that the mayor is authorized to sign all the necessary agreements pertaining to the program with "the state executive director of old age insurance..." However, I have been unable to find any history of the State Old Age and Survivors Insurance Agency in Tennessee, except some statutory references considered below.

In addition to the amendment to Tennessee Code Annotated, ' 38-8-101 et seq., by Public Acts 1985, Chapter 66, mentioned above, that Act did three other significant things to that statutory scheme:

- Provided that political subdivision that was in the social security system when it was amended in 1983, could not get out of the system;

- Provided that political subdivisions that participate in the Tennessee Consolidated Retirement System (TCRS) were required to be in the social security system.

- Repealed the contents of Tennessee Code Annotated, ' 38-3-109, which provided that:

The state agency shall not finally refuse to approve a plan submitted by a political subdivision under ' 3-38-108 and shall not

November 17, 2008

Page 2

terminate an approved plan without reasonable notice and opportunity for hearing to the political subdivision thereby.

Tennessee Code Annotated, ' 4-3-2403, creates a division of retirement in the department of the treasury, and among the retirement programs attached to the division of retirement, is "The old age and survivor's insurance agency." But a compiler's note at the end of that section says that

The retirement systems specified in (b), have been repealed or superceded, but remain effective to define and protect existing rights. See the Appendix ("Superceded Retirements System") in Title 8 in Volume 3.

But I scanned the Appendix of Volume 3 several times. While it contains a number of retirement programs that have been repealed, and there are no provisions that pertain to the State Old Age and Survivor's Insurance Agency. Tennessee Attorney General's Opinion 78-363 speaks of the requirement in Tennessee Code Annotated, ' 8-3808 (now 8-38-108) that local governments obtain approval for their social security programs from the "state agency" in terms of the approval by the "Old Age and Survivor Insurance Agency (OASI)," but cites no statute or state regulation that establishes such an agency.

I will attempt further in the future to determine what happened to the State Old Age and Survivors Insurance Agency, and to determine whether that agency, or some other state agency, was the author of the ordinance in Title 4, Chapter 1, of your municipal code. But it does not seem to me necessary to answer those questions to conclude that probably, after the 1983 amendments to the Social Security Act, and the amendments to Tennessee Code Annotated, ' 38-8-101 et seq., that the ordinance serves no further purpose in the City's Municipal Code. The pertinent 1983 amendment to the Social Security Act, found at 42 U.S.C.A. ' 418(f), provides that "No agreement under this section may be terminated, either in its entirety or with respect to any coverage group on or after April 20, 1983." In addition, an amendment to Tennessee Code Annotated, ' 38-8-108 in 1985 provided that social security coverage is required for all political subdivisions of the state that participate in the TCRS. Unless I am mistaken, the City was in the social security system in 1983. Even if that is not true, I think it is in the TCRS.

As a matter of historical record, you may consider passing the social security ordinance as a resolution, then repealing the ordinance to remove it from your municipal code.

#### **Title 4, Chapter 2 (Municipal Personnel)**

Cities adopt personnel policies by ordinance or by resolution. In either case, the policies

are binding on the city and on the city's personnel. There is no reason the city could not delete this chapter and adopt its personnel policies by resolution. If the city wants to give notice to readers of the code that the personnel policies are reflected in a resolution, it could do so by noting that fact on the first page of this title.

### **Title 4, Chapter 3 (Occupational Safety and Health Program)**

#### **Application to municipal governments**

Under the Federal Occupational Safety and Health Act of 1970, the term "employer" is defined as "...a person engaged in a business affecting commerce who has employees, but *does not include the United States or any State or political subdivision of a state.*" For that reason, Tennessee municipalities are not directly subject to OSHA and OSHA standards. However, Tennessee Code Annotated, section 50-3-101 et seq., reflects Tennessee's Occupational Safety and Health Act of 1972 (TOSHA), which *does* apply to municipal governments. A provision of TOSHA authorizes the Tennessee commissioner of labor to adopt occupational safety and health standards. Many of such regulations the commission has adopted are the various OSHA standards.

#### **Definition of employee and employer**

TOSHA's definition of "employee," includes "county, metropolitan and municipal government employees," and its definition of "employer" includes "county, metropolitan and municipal governments." [Tennessee Code Annotated, ' 50-3-104(8)]

#### **Local government option to be treated as "public" or "private" employer**

On or before July 1, 2006 (or in the case of local governments created after July 1, 2006, within two years after their creation) each local government had/has the right to be treated as a private employer or to develop their own program of compliance. [Tennessee Code Annotated, ' 50-3-910] Many municipalities have adopted ordinances creating their own programs of compliance. But I know of no reason why the city could not establish its own program in a city-wide safety manual, but due to the requirements contained in Tennessee Code Annotated, ' 50-3-901 for the "writing" that reflects the city's intent to run its own TOSHA program, which must obtain the approval of the state, it appears to me that the city-wide safety manual would need to be approved by the city's governing body, and receive state approval, before the city repeals the TOSHA ordinance in this chapter.

The distinction between "public" and "private" employer is contained in Tennessee Code Annotated, ' 50-3-911:

No action shall be taken with reference to an employer which is a local government, other than the performance of inspections under " 50-3-101B50-3-306 performed for the purpose of determining the effectiveness of programs developed and registered by such employers under ' 50-3-910, and other than investigation and enforcement actions under ' 50-3-409, unless the local government has elected to be treated as a private employer.

The major distinction between public sector and private employees is that while both are subject to inspections and citations by the commissioner of labor for the violation of safety and health standards issued by the commissioner of labor, the monetary penalties that apply to private employers under TOSHA do not apply to public sector employers.

#### **Commissioner of labor authorized to issue regulations**

The Commissioner of Labor under TOSHA is authorized to “develop and promulgate regulations which adopt occupational safety and health standards,” including the federal standard related to the same issue. [Tennessee Code Annotated, ' 50-3-201]

The Commissioner of Labor has adopted extensive occupational safety and health standards, which are contained in the Rules and Regulations of the State of Tennessee, Department of Labor, Chapter 0800. The Safety and Health Provisions for the Public Sector are found in Chapter 0800-1-5, and apply to those municipalities that have elected to be treated as public sector employees.

#### **Duty of local governments**

Local governments have the duty to their employees Ato provide their employees with conditions of employment consistent with the objectives of this chapter [TOSHA] and to comply with the standards developed under ' 50-3-201 [the regulations issued by the commissioner of labor.] [Tennessee Code Annotated, ' 50-3-910]

#### **Violations of TOSHA**

There are civil and criminal penalties for TOSHA violations. I have done research on the application of those penalties on municipalities if anyone is interested in them. But none of those penalties are invoked by the municipal court. For that reason, the TOSHA ordinance is not useful for that purpose, and nothing in the TOSHA statutes require the TOSHA program be adopted by ordinance.

November 17, 2008

Page 5

#### **Title 4, Chapter 4 (Workers Compensation)**

Under Tennessee Code Annotated, ' 50-6-106, among the classes of employees *not* covered by the Workers Compensation Law, are employees of municipalities, unless the municipality in question takes some action:

(6) The state, counties of the state, and municipal corporations; provided that the state, any county or municipal corporation may accept this chapter by filing written notice of the acceptance with the division under the administrator, at least thirty (30) days before the happening of any accident or death, and may at any time withdraw the acceptance by giving like notice of the withdrawal...

That statute is still in force (which came as a surprise to me). [See Finister v. Humboldt General Hospital, Inc., 970 S.W.2d 435 (Tenn. 1998); Crawley v. Hamilton County, 193 S.W.3d 453 (Tenn. 2006).] But neither it nor Tennessee's Workers Compensation Law of which it is a part, prescribe any particular form of action to opt into or out of the coverage of that law. Obviously, an ordinance is one form of action, which is what Title 4, Chapter 4, reflects, but presumably the city could have opted into the law by a resolution, and can still do so by resolution, then repeal the ordinance.

#### **Title 4, Chapter 5 (Infectious Disease Policy)**

As far as I can determine, this policy derives from 29 C.F.R. ' 1910.1030, which requires all employers to have a written "exposure control plan," protecting their employees from bloodborne pathogens. This version of that regulation became effective April 3, 2006. However that regulation does not prescribe the form of the exposure control plan, although for municipal governments, it is logical that the plan be adopted by the governing body by ordinance or resolution. There appears to be no reason the city could not adopt its infectious disease policy by resolution, then repeal this ordinance.

**General:** From what you said in your e-mail it may be that the city's safety handbook repeats the contents of some of the above ordinances, may reflect even more current polices than do the ones contained in the above ordinances, and may have already been adopted by resolution of the city's governing body. In that case, the city could repeal the ordinances at issue without first adopting counterpart resolutions

I have been called about a current drug policy that meets certain standards, too. I am

November 17, 2008  
Page 6

working on that, and hope to have one located in a day or so.

Let me know if you have any questions on the above material, or anything else.

Sincerely,

Sidney D. Hemsley  
Senior Law Consultant

SDH/