



## **A GUIDE TO THE IMPLEMENTATION OF THE MODEL ETHICS ORDINANCE**

### **Introduction:**

In late 2003, the Illinois General Assembly passed sweeping ethics reform legislation. The **State Officials and Employees Ethics Act** was enacted by Public Act 93-615, effective November 19, 2003. Significant amendments were made to the Act by Public Act 93-617, effective December 9, 2003. The Act, as amended, is a comprehensive revision of State statutes regulating ethical conduct, political activities and the making and acceptance of gifts. The Act also creates an enforcement structure to ensure compliance with the ethics laws. The provisions of the Act are applicable only to officers and employees of the Executive and Legislative branches of State government; however, the Act requires all units of local government and school districts (collectively referred to as "Governmental Entities" in the Act) to adopt ordinances or resolutions regulating political activities and the making and accepting of gifts "in a manner no less restrictive" than the provisions of the Act. Such ordinances or resolutions are to be adopted within six months of the effective date of Public Act 93-615, or by May 19, 2004. The Act also provides that the Attorney General shall develop model ordinances and resolutions to assist Governmental Entities in complying with the requirements of the new law. This Model Ordinance, drafted with significant input from local governmental organizations, is designed to assist these entities in providing clear, comprehensive and enforceable ethics regulations.

The process of drafting a universal ordinance in Illinois is complicated by the significant differences in the powers delegated to Governmental Entities. General purpose units of local government, such as counties and municipalities (and particularly home rule units), exercise relatively extensive powers with respect to their government and affairs, while the powers of single purpose special districts are much more limited. With respect to the implementation of the provisions of the State Officials and Employees Ethics Act, however, no distinction has been made between general and special purpose units. The Act clearly requires all units of local government and school districts to adopt and enforce equivalent restrictions on the ethical conduct of their officers and employees. The differences in the extent of the powers delegated to Governmental Entities is particularly significant with respect to enforcement issues, which will be discussed below.

### **Overview of the Act as it relates to local government and school districts:**

Although the Act covers a wide variety of conduct relative to State officers and employees, the affirmative requirements of the Act are more limited with respect to Governmental Entities. Specifically, section 70-5 of the Act (to be codified at 5 ILCS 430/70-5) provides that:

Within 6 months after the effective date of this Act, each governmental entity shall adopt an ordinance or resolution that regulates, in a manner no less restrictive than Section 5-15 [entitled "prohibited political activities"] and Article 10 [entitled "gift ban"] of this Act, (i) the political activities of officers and employees of the governmental entity and (ii) the soliciting and accepting of gifts by and the offering and making of gifts to officers and employees of the governmental entity.

The scope of the ordinance or resolution implementing these provisions, therefore, is specifically required to address these aspects of the Act. As a result, this Model Ordinance is drafted to assist Governmental Entities in meeting the requirements mandated by the Act. Any Governmental Entity, may, of course, adopt additional ethics regulations suitable to its purposes that are otherwise within the power of the entity to enact. We recommend that all governing bodies review the entire text of the Act to determine whether any of its other provisions may be suitable for adoption by the entity.

Although section 70-5 of the Act refers to adoption by ordinance or resolution, it appears that an ordinance is the only appropriate means to implement these regulations. Ordinarily, an ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special or temporary nature. *People v. Kapp*, 355 Ill. 596, 600 (1934). Because the Act requires adoption of permanent regulations governing conduct, they should be embodied in an ordinance.

**Article 1 of the Model Ordinance** contains definitions applicable to its provisions. These definitions are essentially those contained in the Act, with modifications, as necessary, to reflect local governmental structure.

**Article 5 of the Model Ordinance**, which is adapted from section 5-15 of the Act (to be codified at 5 ILCS 430/15-5), sets out prohibitions upon political activities by officers and employees of Governmental Entities.

**Article 10 of the Model Ordinance** implements article 10 of the Act (to be codified at 5 ILCS 430/10-10 *et seq.*) and regulates the offering, soliciting, making or accepting of gifts by officers and employees of, and persons whose interests are or may be affected by, Governmental Entities.

**Article 15 of the Model Ordinance** provides for the designation of an Ethics Advisor for each Governmental Entity. The designation of an Ethics Advisor is not required by the Act, but is strongly recommended for the effective administration of the Ordinance's provisions.

**Article 20 of the Model Ordinance** provides for the creation of an Ethics Commission to aid in enforcing the Ordinance. Although the creation of an Ethics Commission is not expressly required by the Act, it is strongly recommended to provide an efficient and effective procedure for addressing certain ethics complaints without the need for judicial proceedings. Although the Ordinance provides for a three-person commission, the size of the commission may

be increased to meet the needs of the entity.

**Article 25 of the Model Ordinance** sets out the penalties for violations of the provisions of the Ordinance. It may be noted that the severity of these penalties exceeds that which units of local government are ordinarily authorized to impose for ordinance violations. The Act, however, expressly requires that a Governmental Entity's regulations be "no less restrictive" than those of the Act. To provide a lesser penalty for comparable conduct would clearly result in the provisions of the Ordinance being less restrictive than those of the Act.

### **Who is included?**

The provisions of the Model Ordinance are applicable to all officers and employees of the Governmental Entity, including the members of the governing body. It is not applicable to independent contractors, who are a class distinct from employees. Whether the Model Ordinance will be applicable to members of advisory bodies of the Governmental Entity will depend upon whether their positions are public offices. *See* Ill. Att'y Gen. Op. No. 03-006, issued August 18, 2003.

With respect to counties, neither the State's Attorney nor the Circuit Clerk will be subject to the provisions of the Model Ordinance. These officers are State, not county, officers. The exemption of those officers will generally extend to their staffs, as well.

### **Application to officers and employees without defined hours:**

In general, both the Act and the Model Ordinance prohibit officers and employees from engaging in political activities on "compensated time." It is fairly simple to determine what constitutes compensated time for an employee with fixed working hours. It is more problematic for an officer or employee who is salaried and does not have obligatory hours of attendance. For such officers and employees, the Model Ordinance defines "compensated time" to include both time when he or she is physically present on premises under the control of the Governmental Entity and any other time and place when engaged in his or her official duties.

### **Suggestions for implementation of the Ordinance:**

A Governmental Entity can comply with the basic requirements of the Act by adopting Articles 1, 5, 10 and 25 of the Model Ordinance. These include the substantive provisions of the Act that are specifically required to be incorporated, together with necessary definitions and penalties. The Act does not, however, specify how the provisions of local ordinances are to be enforced. It is strongly recommended, therefore, that Governmental Entities also adopt Articles 15 and 20 of the Model Ordinance, which, although not expressly required by the Act, provide an enforcement mechanism that will otherwise be lacking. The enforcement procedures specified by the Act for State officers and employees are not required to be incorporated into local ordinances, but they are critical to ensuring compliance with the ethics laws. may not be

particularly well suited for the operations of many smaller units of local government. The alternative to creating an administrative procedure for handling at least some complaints will be to litigate all complaints through judicial proceedings, a costly and time consuming process.

Because it is vital that officers and employees understand the ethics laws, Article 15 of the Model Ordinance provides for the designation of an Ethics Advisor to whom officers and employees can address questions or concerns regarding compliance with its provisions, as well as other ethics matters, such as filing Statements of Economic Interest, where required. The duties of the Ethics Advisor may be assigned to an existing officer or employee, or a position may be created for that purpose. Article 15 specifically provides, however, that the Ethics Advisor is not an officer of the Governmental Entity unless the position is created as an office. Although the designation of an Ethics Advisor is not required by the Act, it is critical that officers and employees have a resource to whom they can turn when ethics questions arise.

Article 20 of the Model Ordinance provides for the creation of an Ethics Commission with the power to review and adjudicate, or refer for adjudication, complaints that allege violations of the Ordinance. Many units of local government created such a commission in conjunction with the implementation of the now-repealed State Gift Ban Act. But a common concern expressed by units of local government was that such commissions were too large and unwieldy for most Governmental Entities. Accordingly, Article 20 provides for a relatively small (3 person) commission with the authority to review and act upon complaints arising under Article 10 of the Model Ordinance [Gift Ban], and also to review and forward for prosecution complaints arising under Article 5 of the Ordinance [Prohibited Political Activities]. The Commission may impose fines and recommend discipline for violations of Article 10, or may refer complaints to the designated attorney for judicial proceedings. Because violations of Article 5 of the Model Ordinance carry the possibility of incarceration, they must be adjudicated judicially, although the Commission may review complaints alleging violations of Article 5 to determine whether probable cause exists to warrant prosecution.

In the absence of an Ethics Commission, all complaints for violations of Articles 5 and 10 of the Model Ordinance must be referred to an attorney representing the entity for review and prosecution. Under the Act, a violation of the Prohibited Political Activities sections is defined as a Class A misdemeanor, which carries a jail sentence of up to one year in a penal institution other than a penitentiary, and a fine of up to \$2,500. A violation of the Gift Ban provisions is classified as a business offense for which a fine of not less than \$1,001 and not more than \$5,000 may be imposed. Significantly, the Act does not provide that a violation of a local ethics ordinance is a misdemeanor; rather, the Act provides only that the local regulations must be "no less restrictive" than the provisions of the Act. Thus, the local ordinance must impose equivalent penalties for violations of equivalent prohibitions; a lesser penalty would clearly be "less restrictive" than the provisions of the Act.

The power to adopt penal ordinances and the penalties that may be imposed are generally dependent upon a grant of authority from the General Assembly. (Home rule units do have power under the Constitution to adopt penal ordinances, but the maximum punishment that may

be imposed is six months imprisonment, except to the extent that the General Assembly may otherwise authorize.) Although the Act does not specifically state that its provisions constitute a grant of authority from the General Assembly to units of local government and school districts to impose penalties in the amounts set out by law, it must necessarily be interpreted as just that. A Governmental Entity which does not have the power to enact penal ordinances or to impose fines consistent with those of the Act could not adopt regulations "no less restrictive" than those of the Act. Consequently, it is clear that the Act is intended to provide Governmental Entities with all of the power necessary to effectuate the General Assembly's purposes. *See* Opinion No. 99-007, issued June 30, 1999, at pp. 15-18, which interpreted similar provisions of the former State Gift Ban Act.

Because the Act does not provide that a violation of a local ethics ordinance is a misdemeanor or business offense, violations must be treated as ordinance violations and handled accordingly. It will be the responsibility of the Ethics Commission (if established) or the attorney designated by the Governmental Entity to represent it in such matters to prosecute the matter administratively or judicially, as may be appropriate. Except with respect to county ordinances, the State's Attorney will not be obligated to prosecute local ordinance violations unless pursuant to an agreement between the entity and the State's Attorney. *See* Opinion No. 99-007, at p. 23.

### **Enforcement Issues:**

Ordinance violations are generally prosecuted as quasi-criminal proceedings, which means that many of the protections of the criminal justice system are not applicable. Where no jail sentence may be imposed, an administrative or quasi-criminal procedure that affords due process will ordinarily be acceptable. In the case of a violation that carries a sentence of incarceration, however, the safeguards of the criminal justice system must be observed. Accordingly, the Model Ordinance provides that a violation of Article 10 may be adjudicated either by the Ethics Commission (if established) or by a quasi-criminal prosecution in the circuit court. Because a jail sentence may be imposed, a violation of Article 5 of the Model Ordinance must be prosecuted in the circuit court under the rules of criminal procedure.

The Model Ordinance also provides that discipline up to discharge may be imposed upon a person who violates its provisions, and that discipline is in addition to any other penalty imposed. With respect to employees, procedures will usually be in place which will govern disciplinary matters. With respect to officers, however, there may be no person or entity with authority to impose discipline. For example, elected county officers, such as the sheriff or county clerk, are not subordinate to any other officer. The same is true of many other elected officers of various Governmental Entities. The Act does not set out procedures for discipline; it only provides that discipline may be imposed. Therefore, each Governmental Entity must look to its own structure and internal procedures to determine whether and when the imposition of discipline is authorized. The Act does not constitute a grant of authority to impose discipline except where discipline is otherwise authorized.

## **Conclusion:**

Comprehensive and clear ethics laws are vital to protecting public funds and ensuring public confidence in government. The State Officials and Employees Ethics Act sets forth definitive ethics rules for State officers and employees and requires that local governments and school districts also enact strong regulations. The manner in which each unit of local government and school district elects to implement the requirements of the State Officials and Employees Ethics Act is ultimately a matter for its governing body to determine. This Model Ordinance has been developed to assist local governments in implementing effective ethics regulations and enforcement provisions suitable to their needs, while incorporating those aspects of the Act that are clearly mandatory.

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## **For further information:**

If you have questions with respect to the provisions of the Model Ordinance or their implementation, you may contact:

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