

Snow, Snow and More Snow—Who is Responsible?

By David Wesner, Corporation Counsel, Danville, Illinois

I don't know about anyone else. But, I have determined that Old Man Winter is a crotchety old bird. I am finally thawing out and recovering from the "polar vortex" (as I've come to learn the event has been called). As I thaw, I am reminded of an issue that is raised most times when we have any kind of snow accumulation. After a snow event, many citizens will call City Hall to inquire (read complain) about sidewalks. They want to know why the City is not shoveling or plowing the sidewalks. Some citizens who call understand that the City does not, and cannot, clear snow from the sidewalks. But, they will ask whether the City can force a business (and to some extent homeowners) to clear their sidewalks to make it safer for their customers.

The issue of an ordinance regulating snow removal has involved a few aspects in my municipality. Currently, the only ordinance we have prohibits shoveling or plowing snow in to the right-of-way. We do not have any other ordinances dealing with snow removal. The administration has discussed the possibility of other regulations. One of the ordinances would be to license and regulate private snow plow operators. The issue with the private plow jockeys is how they perform snow removal. While they may abide by the ordinance not to place it in the right-of-way, they may not take much care in how they place the snow. They can create hazards, whether it is a business parking lot or a private residence in a neighborhood. If we were to establish an ordinance, the ordinance would provide for a business license and then provide regulations governing operations to avoid creating hazards for citizens.

The other ordinance would be providing requirements for businesses to remove snow from their parking areas and sidewalks. Many communities, such as our neighboring communities of Urbana and Champaign, provide such regulations. The debate begins with whether a community should provide such a regulation in the first place. In my mind, the debate involves the question of whether a government should legislate good business practices (similar to the debate concerning legislating good parenting). Big brother knows best how to take care of customers (and kids). As we all know, government does have to step in at times and provide regulations to try and help their citizens. So, while my community does not have such an ordinance, I will not suggest that one should never be put in place. And, personally, I would even consider extending it into residential areas. I live two blocks from the school my son attends. I am the only one who shovels the sidewalk between my house and the school. So, what I see every day is kids being forced to walk in the street because homeowners don't feel it necessary to do anything other than shovel between their front door and their car. Sorry. I'll get off my soapbox now. Champaign and Urbana have established certain areas of their communities in which their ordinances apply—those being their downtowns and around the University of Illinois campus. Champaign also covers properties with a building containing four or more dwelling units. The ordinances provide that if a snowfall results in more than two inches of accumulation, subject properties must remove snow and ice from their sidewalks and any sidewalk ramps.

The provisions of the ordinance are enacted upon a declaration by the Public Works Director. The declaration is to coincide with the ending of the snow event and substantial completion by the City of clearing the arterial streets in the areas subject to the ordinance. The ordinance provides that enforcement would take place between 6:00 a.m. and 5:00 p.m. Monday through Friday. The two ordinances vary on the next points as they relate to the property owner: Champaign's ordinance provides that non-compliance results in an implied contract with the City whereby the City may remove the snow and charge its costs to the property owner. The Champaign ordinance does not provide for any fines for non-compliance. In contrast, Urbana's ordinance provides that the City will provide one notice of non-compliance with a 24-hour abatement requirement. If non-compliance continues, the City can impose both a fine and assert an implied contract whereby the City removes the snow and charges its costs to the property owner.

Both ordinances provide a solid framework for the regulation. I somewhat prefer Urbana's over Champaign's. I like the notice requirement that provides one additional 24-hour period to get the property owner to comply. If it becomes necessary to pursue any remedies or penalties, the City can show that they made additional efforts to obtain compliance before pursuing a fine or abating it themselves and charging the costs. I don't fault Champaign for only providing for summary abatement through the implied contract because it achieves the desired result as quickly as possible. The only concern I would have is whether City funding would always be available for doing the cleanup itself and then pursuing the costs against the property owner. So, I prefer the broader range of available remedies. Charging the removal costs plus imposing a fine could provide the inducement where the owner will comply in the

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gated a "Model Salary Basis Policy" under which an employer may be permitted to avoid the more drastic consequences that may arise from improper pay deductions for salaried employees. That sample policy reads as follows (taken from http://www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm).

Model Salary Basis Policy

Overtime Security for the 21st Century Workforce

The information below is designed to provide an example of what constitutes compliance for purposes of §541.603(d) (addressing "Effect of improper deductions from salary") and is for illustrative purposes only. Other policies may comply with §541.603(d) which contain more or less information.

The Model Policy:

The FLSA is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section (a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section (a)(1) and Section (a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week . . .. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour. Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance; or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do If An Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [*insert alternative complaint mechanism(s)*]. Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made. ML

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future rather than face that expense.

However your municipality deals with snow, I will offer one final thought. I would recommend not dealing with it like one mayor did. His response to not plowing snow was "God put it there and God will take it away." Such a response is not what a community and its citizens need in a time of crisis. Needless to say, that mayor was not re-elected. ML

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exclusionary rule, the Department of Justice would face a difficult hurdle, because by law the relators must submit to DOJ a "written disclosure of substantially all material evidence and information the person possesses, 31 U.S.C. § 3730(b)(2), before the qui tam complaint is unsealed to enable DOJ to decide whether it wants to take over the litigation from the relator. 31 U.S.C. § 3730(b)(4). The Department would likely have to use an entirely new team of lawyers and investigators, and demonstrate that the new team had no access to information from the relator, if the courts imposed an exclusionary rule.

Could the *Quest Diagnostics* deference to state law potentially insulate local governments from qui tam suits brought by its professionals other than lawyers; perhaps by their auditors?

Auditors do not have a confidentiality duty under most states' laws, even if they have the right, and sometimes the duty, to keep their working papers confidential absent subpoena. *See generally,* Annot., Ownership of, and literary property in, working papers and data of accountant, 90 A.L.R.2d 784 (Originally published in 1963 and accessed on WestlawNext, Nov. 2, 2013).

However, auditors do have a professional and ethical duty of independence. *See* Comptroller General of the United States, Government Auditing Standards 3.02-.06 (July 2007), online at Government Auditing Standards--Chapter 3: General Standards, http://www.gao.gov/govaud/govaudhtml/d07731g-5.html (last visited Nov. 2,

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