



# **Employment Law Manual for Texas Cities**

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The following questions and answers provide a layperson's explanation of state and federal employment laws as they apply to Texas municipal officials and are intended to provide general guidance on the issues. The Texas Municipal League Legal Department is always available to answer questions from city officials. You can contact us at (512) 231-7400 or email us at [legalinfo@tml.org](mailto:legalinfo@tml.org). While many people worked on this document, two attorneys contributed greatly to the substance of this handbook. Kathryn Hoang, who is now a municipal judge in Dallas, Texas, and Evelyn (Njuguna) Kimeu, both originally prepared much of the material in this book. Cori (Eggeling) Webb, former TML law clerk, contributed the Affordable Health Care Act. Heather Ford, TML Legal and Legislative Assistant, helped update, edit, and format this document for 2018.

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## **CHAPTER 1—Hiring and Termination**

### ***Who is responsible for hiring city employees?***

The type of city will determine who is responsible for hiring city employees. Generally, in a general law city, the city council is the final hiring authority.<sup>1</sup> In a Type A general law city, most city employees are appointed or hired by the city council.<sup>2</sup> However, for employees who are not city “officers,” as listed in Section 22.071 of the Local Government Code, the city council is authorized to delegate initial hiring authority to the mayor or the city manager or any other city official. For city employees in Type A cities that are also city officers, such as the city secretary or city treasurer, the city council is the hiring authority.<sup>3</sup> (The mayor appoints only when there is a vacancy in the “office,” subject to the city council’s confirmation under Section 22.010 of the Local Government Code). For nepotism purposes, a Type A city council has final hiring authority for all officers and employees, even if the city has delegated initial hiring authority to an individual under Chapter 22 of the Local Government Code.

In a Type B general law city, Section 23.051 of the Local Government Code states that the board of aldermen, sometimes called the city council, appoints city officers. The commission (governing body) of a Type C general law city appoints or hires all city officers and employees under Section 24.051 of the Local Government Code.

If a general law city has adopted the Chapter 25 city manager form of government through petition and election, the city council or commission is required to hire a city manager.<sup>4</sup> A general law city council or commission must adopt a hiring policy by ordinance for each office and employee as required by Section 25.051 of the Local Government Code. This policy could include granting primary hiring authority to the city manager.

The hiring authority in a home rule city is normally determined by the city charter. Section 26.041 of the Local Government Code gives a home rule city the authority to create offices and to hire individuals to fill the created positions. If the city charter does not state how a city officer or employee is appointed or hired, then the city may adopt an ordinance or hiring policy that is consistent with the charter stating how employees and officers will be hired. The charter, ordinance, or policy may give the city council hiring authority, or may delegate it to a city manager, department head, or whichever officer or employee the charter or policy states.

### ***Do I have to post notice of or advertise a city job opening?***

No state or federal law requires a city to post or advertise a job opening, but most attorneys recommend posting job openings for most positions. An applicant, or potential applicant, who is not hired may bring a charge of discrimination or a lawsuit against the city based on a claim of discrimination. Illegal discrimination in hiring includes not hiring someone on the basis of race, religion, gender, and other factors outlined in Title VII of the federal Civil Rights Act and the Texas Commission on Human Rights Act (TCHRA) found in Chapter 21

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<sup>1</sup> TEX. LOC. GOV’T CODE chs. 22, 23, & 24.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

of the Labor Code.<sup>5</sup> Under both Title VII and TCHRA, actions by a city that are not purposely discriminatory can be an issue if their impact on the hiring process means that persons of a certain race, gender, religion or other protected class are kept out of the hiring process.<sup>6</sup> Not posting a job or posting it in a limited area can be evidence of discrimination if the applicant can show that only certain applicants were interviewed and that the applicants are not the protected class.<sup>7</sup> Failing to post a job is not enough for a discrimination claim by itself, but posting a job may be evidence in a city's argument that its hiring practices are nondiscriminatory.

A city's hiring practice of merely advertising an opening to a certain geographic area, or merely by word of mouth, for example, may be used as evidence of discriminatory intent if a claim is filed against the city. To avoid a discrimination claim, an employer should advertise a job opening so that it reaches a large cross-section of the population. Advertising in a general circulation newspaper and on the internet are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper as long as it is pursuant to a consistent policy of doing so. If a city does not have a hiring policy, including a policy regarding the advertisement of a job opening, the city should seriously consider adopting one. Before advertising a job vacancy, an employer should ensure it contains a written job description that provides objective qualifications and responsibilities necessary to perform the job.

Any job posting or notice should be devoid of any reference to sex, race, national origin, age or any other protected class. It should also include those qualifications that are required by the position or, if qualifications are preferred but not required, the job posting should make that clear. The Equal Employment Opportunity Commission (EEOC), the federal agency that investigates and enforces employment discrimination, has assisted in litigation where an employer had included qualifications that it later did not require the employed applicant to meet thereby denying a job to a minority applicant that did meet the qualifications.<sup>8</sup> Also, state law makes it an unlawful employment practice to include discriminatory preferences in job postings where the preference is based on race, color, disability, religion, sex, national origin, or age.<sup>9</sup>

If a city chooses to advertise a position, advertising in a general circulation newspaper or internet classifieds are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper so long as it is pursuant to a consistent policy of doing so. The Texas Municipal League offers a free job posting site for city members which can be found at <http://www.tml.org/careercenter>. The State of Texas also has a job posting site at [www.workintexas.com](http://www.workintexas.com).

By taking the time to adopt a hiring policy and to advertise a job opening to a wide range of people, an employer increases its chance of hiring the best qualified person for the job. In addition, an employer may avoid a discrimination claim or lawsuit.

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<sup>5</sup> See 42 U.S.C. § 2000e et seq.; TEX. LAB. CODE Ch. 21.

<sup>6</sup> See *id.* § 2000e-2(a); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

<sup>7</sup> *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5<sup>th</sup> Cir. (Tex.) 1982)

<sup>8</sup> *Autry v. Fort Bend Independent School District*, 704 F.3d 344 (5<sup>th</sup> Cir. (Tex.) 2013).

<sup>9</sup> TEX. LAB. CODE § 21.059.



### ***What is discrimination in hiring?***

Federal and state laws, and sometimes local ordinances, prohibit hiring practices that discriminate on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship, union activity, military service, or national origin<sup>10</sup> (a thorough description of anti-discrimination laws that can be implicated in hiring, including Americans with Disabilities Act, Age Discrimination in Employment Act, Pregnancy Discrimination Act, Title VII, and more can be found in other chapters of this manual). State and federal enforcement agencies, such as the Texas Workforce Commission's Civil Rights Division and the federal Equal Employment Opportunity Commission (EEOC) investigate whether an employer's recruitment is wide enough to attract a diverse group of candidates.<sup>11</sup> The EEOC provides educational materials for employers to help them comply with federal law, but also has the authority to investigate any claim made against an employer and enforce these laws against an employer, including a city, if it finds a violation. Because the EEOC is an integral part of the discrimination claim process and has authority over each city as an employer, following the EEOC's guidance is helpful for a city as employer to avoid discrimination claims. EEOC describes its view on discrimination in hiring on its website at <http://www.eeoc.gov/laws/practices/index.cfm>.

The Texas Workforce Commission, the Texas counterpart to the EEOC, also provides guidance on hiring and other employment issues based on state and federal law and cases that may be useful to cities. More information about discrimination can be found at both [www.eeoc.gov](http://www.eeoc.gov) and [www.twc.state.tx.us](http://www.twc.state.tx.us).

### ***Should a city adopt a hiring policy?***

A hiring policy is not required by state or federal law, but adopting a valid, nondiscriminatory hiring policy can provide evidence of nondiscriminatory hiring practices if a charge of discrimination is filed by an unsuccessful applicant. These policies are helpful because they can regulate the process that each hiring authority within the city goes through to hire employees. If the process is followed by the city council or hiring authority and the policy is nondiscriminatory, then the city can present the process as evidence that it did not discriminate on the basis of race, religion, gender, or other protected class as prohibited by federal law.

### ***Can a city require an applicant for employment take a drug test before hiring the applicant?***

The Supreme Court has upheld the random drug testing of employees in safety sensitive positions and the drug testing of employees upon adequate individualized suspicion of wrongdoing. A federal appellate court has found that a city policy on drug testing as a condition of a job offer was unconstitutional as applied to a candidate for a library page position because the city did not demonstrate a special need to screen the prospective page for drugs.<sup>12</sup> No similar cases have been brought in the Fifth Circuit, which governs Texas, however based on the Supreme Court cases that require a safety sensitive position before drug testing protects applicants as well as employees. As such, the best practice is to drug test only applicants for

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<sup>10</sup> See, e.g., 41 U.S.C. §2000e; TEX. LAB. CODE Ch. 21.

<sup>11</sup> <http://www.eeoc.gov/eeoc/enforcement/index.cfm>; <http://www.twc.state.tx.us/crd/how-submit-employment-discrimination-complaint.html>.

<sup>12</sup> 42 U.S.C.A. § 12114; *Lanier v. City of Woodburn*, 518 F. 3d 1147 (9<sup>th</sup> Cir. 2008).

safety or security sensitive positions after a job offer is made but before the applicant takes the position.<sup>13</sup> City personnel should consult with their city attorney if considering any pre-employment drug testing of applicants for employment.

***What can a city ask about prior criminal activity on a job application or in an interview?***

At most, a city may ask about convictions, but should not ask about arrests. Discrimination charges based on asking about arrest rather than conviction has been upheld by the Equal Employment Opportunity Commission who investigates and enforces such claims as having a disparate impact on minority applicants.<sup>14</sup> The analysis is that arrests should not be used to show guilt of certain crimes or activities that could affect one's ability to perform a particular position, and that there may be larger effect on minority applicants if arrests are taken into account.

Many municipalities have adopted ordinances restricting the requirement of information about a potential employee's criminal background and an employer's ability to act on the information. The City of Austin adopted a Fair Chance Hiring Ordinance in March of 2016 that states that an employer with fifteen or more employees in the City of Austin may not: 1) publish or cause to be published information about a job that states or implies that an individual's criminal history automatically disqualifies the individual from consideration for the job; 2) solicit or otherwise inquire about the criminal history of an individual in an application for a job; 3) solicit criminal history information about an individual or consider an individual's criminal history unless the employer has first made a conditional employment offer to the individual; 4) refuse to consider employing an individual who submits an application for a job because the individual did not provide criminal history information before the individual received a conditional employment offer; and 5) refuse to hire, promote or revoke an offer of employment or promotion because of the individual's criminal history unless the employer has a good faith belief that the individual is unsuitable for the job based on an individualized assessment of the individual's criminal history.<sup>15</sup>

Under the ordinance, an employer who uses an individual's criminal history to deny employment or a promotion must inform the individual in writing that the decision to deny employment or a promotion was based on the individual's criminal history. Consequently, questions about an applicant's criminal history may only be asked after a conditional job offer is extended.

If a city believes a conviction could be useful in determining whether an individual can perform job duties well, a city should ask about not only convictions but also should ask about guilty or no contest pleas to get a more complete picture. The Texas Workforce Commission has provided an example question for criminal history inquiries: "During the past (fill in the number) years, have you ever been convicted of, or have you pled guilty or no contest to, a felony offense? If yes, please explain in the space below. (Answering "yes" to this question will not automatically bar you from employment unless applicable law requires such action.)" To avoid a discrimination-in-hiring claim, the city that uses conviction information to make hiring decisions should ensure that any information used to make a

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<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

<sup>15</sup> City of Austin, Texas: Code of Ordinances §4-15-1

hiring decision is related to the job duties.

### ***Can a person related to a councilmember or mayor be hired by the city?***

State nepotism law states that a city may not hire an individual who is related within a prohibited degree to the city's final hiring authority.<sup>16</sup> The final hiring authority is the city council in general law cities, but could be the city council, city manager, or a department head in a home rule city. Also, in a Chapter 25 city manager city, the safest course of action is to treat the city manager and the city council both as final hiring authorities for purposes of nepotism. This difference in hiring authority exists because a general law city could always change any delegation of hiring authority, making it always the final hiring authority. In contrast, a hiring authority appointed by charter could only be changed by election under Chapter 9 of the Local Government Code.

The prohibited degree is within three degrees by blood or two degrees by marriage.<sup>17</sup> Hiring someone who is related to a councilmember within the prohibited degree is not allowed, even if the related councilmember abstains from voting on their employment or appointment.<sup>18</sup>

It is permissible to have an employee related to a member of the city council if the individual has been working for the city a certain amount of time (six months or a year depending on the situation) before the related councilmember is appointed or elected to office.<sup>19</sup> A home rule charter, city ordinance, or other city policy can be more restrictive than state law.

### ***Can an employee work more than one job within the city?***

Your personnel policy will ultimately determine if an employee is allowed to hold more than one paid position within the city. There is no law that prevents an employee from holding two distinct positions, each at a different rate of pay, excluding those restricted due to nepotism or conflict of interest concerns. It is also possible for an employee to work for the city and hold another job for which the city would be considered a joint employer, such as a job worked through a subcontractor or temp staffing agency. Be aware that all hours worked in either scenario count toward the 40-hour per week limit for non-exempt employees, and the city must pay overtime for any additional hours. A city and employee can reach an agreement in advance as to how both the regular rate of pay and overtime are calculated.

### ***Can I terminate this employee?***

Cities often struggle with the question of when and how to fire a poor performing employee. Even though Texas is an "at-will" employment state, where anyone can be fired for any nondiscriminatory reason, many federal and state laws protect employees. These laws often prohibit a city from firing an employee for fear of litigation for discrimination. Sometimes it seems that there are some people you just can't fire, no matter what their failings are. Many times supervisors hold back on firing an employee in fear of a lawsuit. They ask themselves, "How can I safely fire a poor performer who's pregnant, or on medical leave, or who just filed a worker's compensation claim?" The reality is that any time someone is terminated the individual can sue the city for discrimination or the violation of some right. However, there are a number

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<sup>16</sup> Tex. Gov't Code ch. 573.

<sup>17</sup> TEX. GOV'T CODE § 573.002.

<sup>18</sup> *Id.* § 573.041.

<sup>19</sup> *Id.* § 573.062.

of steps you can take to minimize the risks associated with terminating an employee. The following provides some basic information to consider prior to terminating an employee:

(a) Employment-at-will: First, determine whether the employee is “at-will” or whether the employee has a contract, a collective bargaining agreement, or is subject to civil service. Cities should also review ordinances, resolutions, charters and other documents as these have been found to sometimes create an employment contract as well. Also, the Local Government Code puts some limitations on Type A cities on how they can terminate certain employees who are also officers. If one of these issues arises then the procedure outlined by these items should be followed.

(b) Documentation: Make a paper trail. This is one of the most important items involved in terminating an individual. Usually employees are not terminated for a one-time offense, but for poor performance based on violations of personnel policies. Ideally, there will be objective documentation detailing what performance measures the employee has not met or personnel policies she has violated. Written documentation that shows that the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discrimination claim based on some characteristic of the employee, this kind of documentation is good evidence if sued. Also, if an employee is aware of problems he may be less likely to take action against the city when he is disciplined or terminated because it will be less of a surprise. Finally, keep in mind that there are special documentation requirements for police officers.

(c) Consistency: Ensure that similarly-situated employees are treated the same. If one person in the city library is late everyday and is never disciplined and another person is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure that your personnel policies and discipline procedures lend themselves to objectivity and consistency. However, there could be a rational basis for treating some employees differently if they are in different departments or have different duties.

(d) Discrimination and Retaliation: Are there any legitimate claims that the employee or applicant could make? Could an injured employee make a claim under the Family Medical Leave Act, the Americans with Disabilities Act, or Workers’ Compensation? Are they part of another protected class? Look at the above acts plus USERRA, the Texas Whistleblowers Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action. Also, keep in mind that the Equal Employment Opportunity Commission, who is the first handler of discrimination charges in most cases, has started sending discrimination charges to cities and other employers by electronic mail.

A bill from the 2013 legislative session changed the process that a city can use to terminate individuals who are contractual employees. This process affects all contractual employees, but can have a special effect on city managers. House Bill 483 by Representative Aycock prohibits a city from paying more than the contracted amount to a current employee or a terminated employee unless the city has an open public meeting regarding the matter and states at the hearing why the payment is being made, the exact amount, and the source of the payment.

In addition, if a city is a member of the TML Intergovernmental Risk Pool, it is recommended that it contact the “Call before You Fire” program at (800) 537-6655 before taking any major action.



***Can we terminate an employee if the employee is on workers compensation leave or other injury leave?***

When an employee is injured on the job, the city would have three main legal concerns: workers' compensation, the Americans with Disabilities Act (ADA), and the Family Medical Leave Act (FMLA). First, if the employee qualifies for FMLA and has a serious medical condition that warrants time off, the city needs to give the individual these benefits.<sup>20</sup> However, a city policy could require that FMLA and workers' compensation be taken concurrently.<sup>21</sup> The next issue involves when the employee wants to return to work or is released by his doctor with some limitations. If the doctor's note indicates some limitations, the city must determine if the individual can perform the essential functions of the job. If the individual cannot perform the essential functions of the job, the city must then determine if there is a reasonable accommodation under the ADA that would enable the employee to perform her job without being an undue burden on the city.<sup>22</sup> If the city decides that no reasonable accommodation can be provided and the individual must be let go, then the city needs to ensure that it has appropriate documentation of this fact since the individual could have a claim under workers' compensation or under the ADA. For more information see the FMLA and ADA sections of this manual.

Rights under the ADA, FMLA, and state workers compensation law could be a factor in litigation if an employee is terminated after exercising these rights. This type of disciplinary action should be discussed with local counsel before taking place.

***Can a city terminate an employee who applies for public office or otherwise participates in political matters?***

An employee cannot be disciplined for running for public office under state law. However, if an employee's position is funded by federal grants then the person may be prohibited from running in partisan elections under the federal Hatch Act. Also, if the individual is elected, they may have to quit their city job because of dual office holding restrictions that prohibit an individual from holding two paid public offices at the same time or because the two positions are incompatible. Other than candidacy, Texas courts generally allow cities to impose reasonable restrictions on political speech engaged in by its employees. For instance, the City of Dallas Charter contained numerous political activity restrictions, including but not limited to the following:

- (a) No city employee may publicly endorse a candidate for city council;
- (b) No employee may contribute to a city council campaign;
- (c) No employee may wear city council campaign literature at work or in city uniform;
- (d) No employee may circulate petitions for city council candidates, although he may sign such petitions.

The Fifth Circuit held that prohibiting an employee from publicly endorsing a candidate was unconstitutional. However, the additional restrictions were not an infringement on First Amendment rights. Prohibiting political activity while on duty is proper, being reasonably necessary to the conduct of city business. However, in *Villejo v. City of San Antonio*, the court

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<sup>20</sup> 29 U.S.C. § 2601-2654.

<sup>21</sup> 29 C.F.R. § 825.702(d)(2).

<sup>22</sup> 42 U.S.C. §§ 12101-12117.

held that a city's directive barring employees from participating in any campaign for an "issue" or "measure" related election regarding the city violated the employee's First Amendment rights.

## CHAPTER 2—Independent Contractors

### *What is the difference between an independent contractor and an employee?*

This is one of the most frequent employment law questions received by the TML legal department. It is also one of the most complicated. Simply calling a person doing work for the city an “independent contractor” is not enough to make a worker an independent contractor. While federal and state statutes frequently define the term “independent contractor,” most of the guidance needed to answer this question comes from court opinions.

Generally, an independent contractor is hired for a specific job, paid a specific amount, and is not supervised or directed as to how that job is performed. In contrast, an “employee” is normally hired to perform a list of duties, is paid by the hour or by salary, and his or her work is directed and supervised by the employer.

More specifically, federal courts examine five factors to determine status: “(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.”<sup>23</sup> The Supreme Court of Texas has taken a similar view.<sup>24</sup> Another clue that an independent contractor is misclassified is if the individual is performing work that is or was traditionally done by regular employees of the city.

The Department of Labor has a misclassification initiative where it is focusing on finding misclassified independent contractors and penalizing employers.<sup>25</sup> As part of this focus, the Department of Labor has issued guidance on independent contractors versus employees that states that the ultimate issue is whether an person is economically dependent on the employer or not.<sup>26</sup> The other issues the DOL Administrator addresses in this determination include:

- (a) Is the work an integral part of the employer's business?
- (b) Does the worker's managerial skill affect her opportunity for profit or loss?
- (c) How does the worker's relative investment compare to the employer's investment?
- (d) Does the work performed require special skill and initiative?
- (e) Is the relationship between the worker and the employer permanent or indefinite?
- (f) What is the nature and degree of the employer's control?<sup>27</sup>

The document also includes examples.

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<sup>23</sup> *Hopkins. v. Cornerstone America.*, 545 F.3d 338, 343 (5th Cir. 2008). See also *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998).

<sup>24</sup> *Limestone Products Distribution, Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002) (holding that the appropriate test between an independent contractor and an employee is the “right to control” test).

<sup>25</sup> <http://www.dol.gov/whd/workers/misclassification/>.

<sup>26</sup> Department of Labor Administrator’s Interpretation 2015-1 (July 15, 2015) available at [http://www.dol.gov/whd/workers/misclassification/AI-2015\\_1.htm](http://www.dol.gov/whd/workers/misclassification/AI-2015_1.htm).

<sup>27</sup> *Id.*

One of the most important factors related to the question is tax status, i.e., whether employment taxes are paid by the employer. The Internal Revenue Service (IRS) uses three factors – similar to those used by the courts – to make this determination: (1) behavioral control; (2) financial control; and (3) the relationship of the parties.

(a) Behavioral control involves the extent of control over the employee or independent contractor as to how the work is done and what instructions or training is provided.<sup>28</sup>

(b) Financial control relates to whether the employer provides tools, who buys the equipment and products needed to perform the job, and whether the worker is simply getting paid or might make a profit or loss on the transaction. The timeframe for the employment, whether a set period or indefinite time, is considered.<sup>29</sup>

(c) The relationship of the parties is considered. In other words, is there a contract and what benefits, if any, are provided to the worker.<sup>30</sup>

More information on the above is available from the IRS at: <http://www.irs.gov/taxtopics/tc762.html>.

For federal discrimination laws like the Americans with Disabilities Act and Title VII (civil rights), the Equal Employment Opportunity Commission, the organization with which discrimination claims are filed, has taken a similar stance on who is an employee versus who is an independent contractor.<sup>31</sup>

The bottom line is that the layperson’s definition of “independent contractor” isn’t relevant in a legal analysis. That is why consultation with the city attorney is so important. If a city is trying to determine who is an employee and who is an independent contractor under a federal or state law, the city attorney should first look at the particular law and how it applies to the individuals who work for the city, and also review any case law that discusses the specific federal law. If there is doubt, it may be safer to treat the individual as an employee to avoid future disputes.

***Can an employee work both as an employee and an independent contractor for the same city?***

Only in very limited circumstances. The Internal Revenue Service (IRS) looks at the job and its duties to determine whether an individual is an employee or an independent contractor. If an employee performs two different types of services, and one of them meets the independent contractor requirements, the person could be an employee and an independent contractor doing each job.<sup>32</sup>

That being said, this determination should not be made lightly, as the city could be liable for overtime and penalties under the Internal Revenue Code and the Fair Labor Standards Act

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<sup>28</sup> *Behavioral Control*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Behavioral-Control>.

<sup>29</sup> *Financial Control*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Financial-Control>.

<sup>30</sup> *Type of Relationship*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Type-of-Relationship>.

<sup>31</sup> See EEOC Compliance Manual s. 2-I (2009), available at <http://www.eeoc.gov/policy/docs/threshold.html#2-I>.

<sup>32</sup> Letter from Victoria A. Judson, Div. Counsel/Assoc. Chief Counsel of Tax Exempt & Gov’t Entities, to Frank R. Wolf, U.S. Rep. (Sept. 24, 2012), available at <http://www.irs.gov/pub/irs-wd/12-0069.pdf>.

if it is wrong in allowing a worker to assume both roles. The city may file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, to request an IRS determination of whether an individual worker is an employee or independent contractor.<sup>33</sup>

***Should a city give an independent contractor a W-2?***

No. An employer is not required to give an independent contractor a W-2 or pay employment taxes on the amount paid to the independent contractor. The city should give the independent contractor a 1099-MISC form for the amount the city pays to an individual so that the person can pay his or her own taxes.<sup>34</sup>

***What happens if an employee is misclassified as an independent contractor?***

If an employee is misclassified as an independent contractor, a city could owe the federal government, state government, and the individual additional funds. Under the Internal Revenue Code, a city would owe the federal government income tax, unemployment tax, Federal Insurance Contribution Act taxes (including social security and Medicare taxes), and other payments.<sup>35</sup> Under the Fair Labor Standards Act, a city could owe the employee additional payments if the employee was not paid minimum wage based on the hours required to complete the job and could also owe overtime to the individual if the job took more than 40 hours in a seven day work period and the person is not exempt from overtime.<sup>36</sup> Other laws, such as the Family Medical Leave Act, could be implicated. If the person would have met the definition of an “employee” according to a city’s personnel manual or any benefits contracts, the city may owe the individual benefits such as health benefits and paid time off. Finally, the city may also need to pay unemployment taxes and additional liability insurance in order to cover the person for workers compensation purposes.<sup>37</sup> In between 2010 and 2012, about 35,000 workers were misclassified as independent contractors in Texas according to the Texas Workforce Commission and reported by the Legislative Budget Board.<sup>38</sup> Because this issue is so widespread in Texas, some lawmakers have tried to get laws passed related to misclassification that would create additional penalties.<sup>39</sup>

However, the IRS provides a Safe Harbor provision when an employer mistakenly classifies an employee as an independent contractor, but only if certain criteria are met.<sup>40</sup> The

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<sup>33</sup> Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, available at <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

<sup>34</sup> 26 U.S.C. § 6041A; 2014 Instructions for Form 1099-MISC, available at <http://www.irs.gov/pub/irs-pdf/i1099misc.pdf>.

<sup>35</sup> 26 U.S.C. §§ 3111 (FICA); 3301 (unemployment tax); 3402 (federal income taxes).

<sup>36</sup> *Press Releases: Employee Misclassification as Independent Contractors*, DOL.GOV, <http://www.dol.gov/whd/workers/misclassification/pressrelease.htm> (noting Department of Labor cases where an entity had to pay for misclassification of employees).

<sup>37</sup> See TEX. LAB. CODE § 204.002.

<sup>38</sup>

<http://www.lbb.state.tx.us/Documents/Publications/GEER/Government Effectiveness and Efficiency Report 2015.pdf>

<sup>39</sup> See <http://www.texastribune.org/2015/03/15/groups-try-again-misclassification-bills/>; TEX. S.B. 927 (84<sup>th</sup> Leg. 2015) available at

<http://www.legis.state.tx.us/Search/DocViewer.aspx?ID=84RSB009271B&QueryText=%22sb+927%22&DocType=B>.

<sup>40</sup> IRS PUB. 1976 (REV. 05-07), available at <http://www.irs.gov/pub/irs-pdf/p1976.pdf>.

criteria include: (1) a reasonable basis for treating the individual as an independent contractor; (2) treating similarly situated workers the same; and (3) filing tax documents for the employer's independent contractors.<sup>41</sup> Also, the IRS has a voluntary program under which an employer may avoid some of the past employee tax liability if it has been misclassifying its employees and would like to classify its employees correctly in the future.<sup>42</sup> A city that takes advantage of the program would have to properly classify its workers in the future and still pay some of the past employment taxes it missed from misclassifying its employees.

Employers will classify workers as independent contractors partially to find cost savings in personnel, but because of the penalties and costs involved in misclassifying workers, it is important that each employer look beyond possible cost savings and ensure that individuals are properly classified to avoid these costly penalties.

***What can a city do to ensure it is classifying its employees and independent contractors correctly?***

A city, under the direction of its city attorney, should review its job descriptions and personnel practices as applied to each employee or independent contractor according to the requirements of the IRS and the Fair Labor Standards Act. If the city would like a determination from the IRS, it can file a Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.<sup>43</sup>

***Is a city liable for the acts of an independent contractor while on city business?***

Not typically. Section 101.021 of the Civil Practices and Remedies Code states that a city is liable for a tort only if the act is committed by "an employee acting within his scope of employment. . . ."<sup>44</sup> However, a city may be liable for damages or injuries caused by an independent contractor if the city or its employees exercise sufficient control over the independent contractor.<sup>45</sup> For example, if city employees direct the use of the motor driven equipment by a subcontractor, a city could be liable for that activity. Is an independent contractor covered by my workers compensation insurance?

A city cannot cover an independent contractor under its workers compensation coverage, but a city must ensure an independent contractor covers his or her employees under certain contracts.<sup>46</sup>

***Resources***

**Federal State Local Government Tax Information:**

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<sup>41</sup> Section 530 of the Revenue Act of 1976.

<sup>42</sup> *Voluntary Classification Settlement Program*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Voluntary-Classification-Settlement-Program>.

<sup>43</sup> Available at <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

<sup>44</sup> See *City of Houston v. Ranjel*, 407 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2013).

<sup>45</sup> See *County of Galveston v. Morgan*, 882 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *City of El Campo v. Rubio*, 980 S.W.2d 943, 944 (Tex. App.—Corpus Christi 1998, pet. dismissed w.o.j.).

<sup>46</sup> See TEX. LAB. CODE §§ 504.014; 406.096 (requiring coverage when an independent contractor is involved in a building or construction project).

<http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments>

**IRS Pamphlet on Independent Contractors:**

<http://www.irs.gov/pub/irs-pdf/p1779.pdf>

**Federal State Reference Guide (tax and employment laws for public entities):**

<http://www.irs.gov/pub/irs-pdf/p963.pdf>

**Texas Workforce Commission:**

<http://www.twc.state.tx.us/businesses/classifying-employees-independent-contractors>;

[http://www.twc.state.tx.us/news/eft/appx\\_d\\_irs\\_ic\\_test.html](http://www.twc.state.tx.us/news/eft/appx_d_irs_ic_test.html)

## **CHAPTER 3—Compensation and the Fair Labor Standards Act**

### ***What is the Fair Labor Standards Act?***

The Fair Labor Standards Act (FLSA) is a federal law that generally provides for a minimum wage for employees and that requires a covered, nonexempt employee be compensated at a rate of one-and-one-half times his or her regular hourly rate of pay for all hours worked over 40 in a standard seven-day work period.<sup>47</sup> It also provides for exemptions to this general rule.

Not all employees of a city are affected by the FLSA. Certain employees, including elected officials and their personal staffs, legal advisors, and bona fide volunteers, are not covered by the Act<sup>48</sup> . Other employees are exempted from specific provisions of the Act These exemptions will be discussed below.

### ***Is my city required to comply with the FLSA?***

Yes. Section 203(s)(1)(C) provides that the FLSA covers all public employees of a state, a political subdivision, or an interstate government agency.<sup>49</sup>

### ***What is the minimum wage?***

The current minimum wage is currently \$7.25 an hour.<sup>50</sup>

### ***Which employees are required to be paid overtime?***

All employers must pay overtime to all “nonexempt” employees if they work more than 40 hours in a seven-day work period. However, some employees are “exempt” and do not have to be paid overtime if they work over 40 hours a week. The exemptions are based on a salary test and the definitions of executive, professional, and administrative employees. An “exempt” employee is not required to be paid for overtime, but, with limited exceptions, must be paid his or her salary regardless of the number of hours the employee works.

### ***How can the city differentiate between exempt and nonexempt employees?***

Most city employees are “nonexempt” employees and must be paid overtime if they work more than 40 hours in a seven-day work week. The “standard” salary test provides that any employee who earns less than \$455 a week (\$23,660 a year) is automatically entitled to overtime pay, regardless of the employee’s position or duties. On the other hand, an employee who earns more than \$100,000 a year is exempt from overtime compensation, regardless of job classification, under the “highly compensated employee” test.<sup>51</sup>

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<sup>47</sup> 29 U.S.C. § 201, *et seq.*

<sup>48</sup> *Id.* § 203(e).

<sup>49</sup> *Id.* § 203.

<sup>50</sup> *Id.* § 206.

<sup>51</sup> The Department of Labor has proposed a rule to increase the salary requirement to \$122,148, but the rule is currently in litigation in the U.S. Fifth Circuit Court of Appeals. More information on this rulemaking can be found here: <http://www.dol.gov/whd/overtime/NPRM2015/>.

The three primary exemptions for overtime pay are executive, professional, and administrative.<sup>52</sup> For an employee to be considered exempt under the executive employee test, the employee must:

- (a) have as a primary duty the management of the enterprise or of a recognized department or subdivision;
- (b) customarily and regularly direct the work of two or more employees;
- (c) have authority to hire or fire other employees (or the employee's recommendations as to hiring, firing, promotion, or other change of status of other employees are given particular weight); and
- (d) be compensated on a salary basis at a rate not less than \$455 a week.<sup>53</sup>

To qualify under the professional employee exemption, an employee must have as a primary duty the performance of office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.<sup>54</sup> The employee must also be compensated on a salary basis at a rate not less than \$455 a week.

Finally, an employee is exempt under the administrative employee test if the employee: (a) is responsible for the performance of office work directly related to the management or general business operations of the employer or the employer's customers; (b) exercises discretion and independent judgment with respect to matters of significance within the organization; and (c) is compensated on a salary or fee basis at a rate no less than \$455 a week.<sup>55</sup>

Whether an employee is exempt is a fact question based on job duties. The city should consult with its city attorney and human resources professional to determine which city employees are exempt from overtime.

***Do we have to pay overtime if an employee works more than eight hours in a day?***

No. Overtime is based on the number of hours worked in a seven-day workweek, not on the amount of hours worked in a single day.

***Do we have to pay overtime or double time if an employee works on a state or federal holiday?***

No. Employees must only be paid overtime pay, one-and-one-half times the regular rate of pay, if the employee is nonexempt and works more than 40 hours in a seven-day workweek. It is generally up to the city to decide whether to pay additional amounts if an employee works on a holiday.

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<sup>52</sup> *Id.* § 213(a)(1).

<sup>53</sup> *Id.* § 213; 29 C.F.R. § 541.100. The Department of Labor has proposed a rule to increase the salary requirement to \$47,892. More information on this rulemaking can be found here: <http://www.dol.gov/whd/overtime/NPRM2015/>.

<sup>54</sup> 29 U.S.C. § 213; 29 C.F.R. § 541.300.

<sup>55</sup> 29 U.S.C. § 213; 29 C.F.R. § 541.200.

***Can we pay our employees in compensatory time instead of overtime?***

Yes. City employees can be paid compensatory time (paid time off) instead of overtime. A nonexempt employee earns one-and-one-half hours of compensatory time for every hour of work over 40 hours in a seven-day work period. However, compensatory time may only be given to employees if the employee agrees before beginning work to accept compensatory time off in lieu of overtime through individual agreements, making acceptance of compensatory time a condition of employment<sup>56</sup> or through a collective bargaining agreement.<sup>57</sup>

***When does the city have to pay compensatory time?***

The city must allow an employee to use compensatory time off if the employee requests it and the use of the time does not “unduly disrupt” the city’s work.<sup>58</sup> The city also must pay the employee his compensatory time off hours when he leaves employment with the city, regardless of whether he is terminated or quits.<sup>59</sup>

***How many hours of compensatory time can an employee earn?***

An employee who is not engaged in public safety activities can only accrue 240 hours of compensatory time off (160 hours of overtime). If an employee works more than these hours they must be paid overtime wages.<sup>60</sup>

***Does the city have to give employees a certain amount of sick, vacation, or other paid time off?***

No. Generally the city decides when and how much sick, vacation, and other paid leave to give. However, federal and state laws such as the Family Medical Leave Act, the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment, and laws dealing with the military may require some unpaid time off. At least two state laws also have some time off requirements. Section 437.202 of the Government Code states that an employee who is a member of the state military forces or the armed forces is entitled to a paid leave of absence of up to 15 working days in a fiscal year for authorized training or duty.<sup>61</sup> Finally, police and fire employees must be given the same number of days off as other city employees.<sup>62</sup> Also, fire employees must also have September 11<sup>th</sup> listed as one of their holidays.<sup>63</sup>

***Does the city have to give employees breaks?***

A city is not required to provide an employee with a meal period or rest period. However, if

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<sup>56</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000)

<sup>57</sup> 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.

<sup>58</sup> 29 U.S.C. § 207(o)(5).

<sup>59</sup> *Id.* § 207(o)(4).

<sup>60</sup> *Id.* § 207(o)(3).

<sup>61</sup> TEX. GOV'T CODE § 437.202.

<sup>62</sup> TEX. LOC. GOV'T CODE § 142.0013.

<sup>63</sup> *Id.*

a city allows an employee to take such a break, whether the break would be compensable depends on the duration of the break and whether the employee worked during the break. A city is not required to compensate an employee for a meal break if the following requirements are met: (1) the employee is completely relieved from performing any job duty; (2) the employee is free to leave the worksite; (3) the meal break is at least thirty minutes long<sup>64</sup>; and (4) the location or worksite an employee is taking an uncompensated 30 minute meal break from does not necessitate that the employees travel more than a few minutes to the closest available break location/location where they may eat, drink, or smoke.<sup>65</sup> Breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable.<sup>66</sup>

The only state and federally mandated break requirement is for nursing mothers. The Patient Protection and Affordable Care Act amended the FLSA, requiring that employers provide special areas and break times to nursing mothers who are nonexempt employees to express breast milk for one year after the birth of their nursing child.<sup>67</sup> gives exempt government employees the same right to breaks and space to express breast milk.<sup>68</sup>

### ***What is the difference between a part-time and a full-time employee?***

Federal law, benefits vendors, and the city itself determine the definition of a full time or part time employee. Recent changes in health care law make the definition of part-time and full-time a federal matter. Basically, if an employee works more than 30 hours a week over the course of a year, then employers with 50 or more employees must offer them health coverage or face a penalty.<sup>69</sup> For more information on the Affordable Care Act please see that chapter of this manual. Benefits can often be affected by an employee's full-time or part-time status. If the city is wondering at which point it must provide benefits, such as health benefits (when not required by federal law) or retirement benefits to its employees, the city should review its personnel policies and contact its benefits providers to see what their requirements are. The Texas Municipal Retirement System can be reached at <http://www.tmr.org/>. The Texas MultiState Intergovernmental Employee Benefits Pool can be reached at <https://www.iebp.org/>. City policy determines what leave and other city benefits an employee receives, such as vacation or sick leave.

### ***Do we have to pay employees for the time they spend waiting "on call"?***

This question is a fact-based question and depends on what the employee is required to do during on call time. Issues that weigh towards the requirement of paying on call time include: (1) being required to stay at or near the job site; (2) short response times; (3) limitations on the types of activities that individuals can participate in while on call (for example a prohibition on drinking alcohol); (4) a high number of call ins during on call time; and (5) requiring that the employees respond to a high percentage of calls (for example if only one or two individuals must respond to a high number of calls). Issues that would make paying for on call time voluntary would be: (1) freedom of movement of the employees; (2) longer

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<sup>64</sup> See *Bernard v. IBP, Inc.*, 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. § 785.19.

<sup>65</sup> *Naylor v. Securiguard, Inc.*, 801 F.3d 501 (5th Cir. 2015)

<sup>66</sup> 29 C.F.R § 785.15.

<sup>67</sup> 29 U.S.C. § 207(r); <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>.

<sup>68</sup> TEX. GOV'T CODE § 619.003.

<sup>69</sup> 26 U.S.C. § 4980H.

response times (30 minutes or more is a good limit); (3) no limitations on the activities of those on call; (4) low number of call ins; or (5) allowing individuals who are on call to respond to a limited number or low percentage of call ins.<sup>70</sup> Of course, any time an employee is called in or otherwise works he must be paid for any time actually worked.

***Can a city deduct from an employee's salary or require an employee to reimburse the city for damage to or loss of city equipment, such as a laptop computer or cellular phone?***

It depends on whether an employee is exempt or non-exempt under the Fair Labor Standards Act (FLSA). Section 13(a)(1) of the FLSA provides a complete exemption from minimum wage and overtime for an employee who meets the duties test (administrative, executive, or professional), is paid at a rate of at least \$455 per week, and is compensated on a "salary basis."<sup>71</sup> For an employee to be considered paid on a "salary basis," the employee must be paid "a predetermined amount...not subject to reduction because of variations in the quality or quantity of the work performed."<sup>72</sup> Subject to limited exceptions, the FLSA requires an exempt employee to receive the full salary for any week in which the employee performs any work, regardless of quantity or quality of work.<sup>73</sup> Making deductions from the salary of an exempt employee's pay for any reason, other than for what is provided for under the regulations, would result in a violation of the "salary basis" rule and a loss of the employee's exempt status.<sup>74</sup>

The Department of Labor (DOL) held that a deduction from the salary of an exempt employee for the loss, damage, or destruction of the employer's property is an impermissible deduction, and would destroy the employee's exempt status because the employee's salary would not be "guaranteed" or paid "free and clear."<sup>75</sup> This holds true even if an employer and an employee have entered into an agreement that the employer will deduct for any damages, or that the employee will receive the full salary and the employer will seek a reimbursement.<sup>76</sup> With regard to nonexempt employees, the DOL opined that a policy allowing an employer to deduct from the salary of a nonexempt employee for damages would be valid as long as the employee's pay does not go below the minimum wage.<sup>77</sup>

***Can a city official be held individually liable for violations of the Fair Labor Standards Act?***

Yes. The Fifth Circuit Court of Appeals, the federal court of appeals covering Texas, has held that the definition of employer in the Fair Labor Standards Act (FLSA) could subject an employee or supervisor to individual liability.<sup>78</sup> The FLSA includes in the definition of employer "any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>79</sup> Thus, if a supervisor or employee "acts, directly or indirectly" for the

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<sup>70</sup> 29 C.F.R. § 785.17; <http://www.dol.gov/elaws/esa/flsa/hoursworked/screenER80.asp>.

<sup>71</sup> 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.600(a).

<sup>72</sup> 29 C.F.R. § 541.602(a).

<sup>73</sup> *Id.*

<sup>74</sup> 29 C.F.R. §§ 541.602; 541.710.

<sup>75</sup> Dep't Labor Op. FLSA2006-7 (2006).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Lee v. Coahoma Cty., Miss.*, 937 F.2d 220, 226 (5<sup>th</sup> Cir. 1991).

<sup>79</sup> 29 U.S.C. § 203(d).

employer, then that person could be held individually liable for the violation.<sup>80</sup> An employee may also recover damages for emotional distress in an FLSA retaliation claim.<sup>81</sup> Accordingly, city officials should be especially careful to follow the provisions of the FLSA, not only to protect the city, but to prevent individual liability.

***Are city officials protected by any immunity when an FLSA claim is filed against them?***

Yes. While there does not appear to be any Fifth Circuit case on point, qualified immunity generally protects city officials from liability for violations of federal law. Qualified immunity is a defense that is used when an individual issued under federal law. To be covered by qualified immunity, the official has to show that the action taken: (1) was discretionary; (2) was within his authority to take; and (3) did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.<sup>82</sup> Even though a city official could be held individually liable for violations of the FLSA, they also could be protected by qualified immunity if they meet certain criteria. Thus, not every violation of the FLSA will subject an individual to personal liability, so long as the decision is not “objectively unreasonable in light clearly established law.”<sup>83</sup>

***Is a city council authorized to give an employee a bonus?***

Cities are prohibited from granting extra compensation to an employee after her services have been rendered.<sup>84</sup> However, a city is authorized to correct improper payments. For example, if an employee who is classified as nonexempt under the Fair Labor Standards Act (overtime) was not properly compensated for his or her overtime work, back pay may be proper to remedy that situation. However, if a city gives longevity pay or some other pay that is included in the budget and is offered to the employee before the work is performed, such extra pay may be permissible. Please consult with local legal counsel regarding specific cases.

Also, a bill from the 2013 Texas legislative session prohibits a city from paying more than the contracted amount to a current employee or a terminated employee unless the city meets certain notice and hearing requirements.<sup>85</sup>

***Resources***

**Department of Labor:**

<http://www.dol.gov/compliance/laws/comp-flsa.htm>

**FLSA Fact Sheets:**

<http://www.dol.gov/whd/fact-sheets-index.htm>

**FLSA Statute:**

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<sup>80</sup> *Lee*, 937 F.2d at 226.

<sup>81</sup> *Pineda v. JTCH Apartments, L.L.C.* (5<sup>th</sup> Cir. 2016) (NEEDS FULL CITATION)

<sup>82</sup> *Perry v. Greanias*, 95 S.W.3d 683, 699 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002).

<sup>83</sup> *See Modica v. Taylor*, 465 F.3d 174, 188 (5<sup>th</sup> Cir. 2006) (holding that a state agency official was protected by official immunity in a case involving the Family Medical Leave Act).

<sup>84</sup> TEX. CONST. art. III, § 53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ).

<sup>85</sup> TEX. LOC. GOV'T CODE § 180.007.

<http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf>

**FLSA Regulations:**

[http://www.dol.gov/dol/cfr/Title\\_29/Chapter\\_V.htm](http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm)

**FLSA Poster:**

<http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>

**IRS Resource:**

<http://www.irs.gov/pub/irs-pdf/p5138.pdf>

## **CHAPTER 4—Compensation for Public Safety**

### ***Are there special FLSA rules that apply to police officers and fire fighters?***

Yes. The Fair Labor Standards Act (FLSA) provides partial and total exemptions from overtime for peace officers and fire fighters in some cities. A partial exemption can be found in section 207(k) of the FLSA which provides that employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis.<sup>86</sup> The employer is responsible for setting the “work period.” A “work period” may be from seven consecutive days to 28 consecutive days in length. For example, fire protection personnel are due overtime under such a plan after 212 hours worked during a 28-day period (53 hours in a seven-day work period), while law enforcement personnel must receive overtime after 171 hours worked during a 28-day period (43 hours in a seven-day work period).<sup>87</sup>

### ***Can a city ever have a total exemption from overtime for fire and police personnel?***

Yes. The FLSA provides an overtime exemption for law enforcement or fire protection employees of a police or fire department that employs less than five employees in law enforcement or fire protection activities.<sup>88</sup>

### ***Which fire and police employees are counted towards the five employees used to calculate the exemption?***

All personnel involved in law enforcement or fire suppression activities are counted towards the five employees regardless of part-time or full-time status.<sup>89</sup> The law enforcement agency and fire suppression employees are treated separately. A city could have less than five employees in law enforcement and claim the exemption even if the city had five or more employees in fire suppression and could not claim the exemption for the fire suppression employees.

Also, an employee who is assigned to the fire department or police department and who performs support services, such as a dispatcher, alarm operator, clerk, or mechanic, does not count towards the five-employee threshold. Likewise, because volunteers are not considered employees, they do not count towards the minimum employee threshold.<sup>90</sup> However, a higher paid exempt officer who engages in fire protection or law enforcement activities, such as a fire or police chief, is counted for purposes of determining whether the complete overtime exemption applies.<sup>91</sup>

### ***How does the 207(k) exemption work?***

This exemption, commonly referred to as the “7(k)” exemption, allows a city to establish a work period of 7 to 28 consecutive days for determining when overtime pay is due to

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<sup>86</sup> 29 U.S.C. § 207(k).

<sup>87</sup> *Id.*; 29 C.F.R. § 553.201.

<sup>88</sup> 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.

<sup>89</sup> 29 C.F.R. § 553.200.

<sup>90</sup> *Cleveland v. City of Elmendorf*, 388 F.3d 522 (5th Cir. 2004)

<sup>91</sup> 29 C.F.R. § 553.216.

employees engaged in fire protection or law enforcement activities.<sup>92</sup> This exemption allows qualifying employees to work longer periods of time before they are entitled to overtime. For example, employees engaged in fire protection activities must be paid overtime for hours worked beyond 212 during a 28-day work period (53 in a 7-day work period), while law enforcement employees must be paid overtime for hours worked beyond 171 during a 28-day work period (43 in a 7-day work period).<sup>93</sup> To avail itself of the 7(k) exemption, a city must establish a work period.<sup>94</sup> A work period does not have to coincide with the pay period. For example, a city can establish a work period of 28 days with an employee receiving pay every 2 weeks.

***Which law enforcement and fire protection employees can be covered by the 7(k) exemption?***

Only certain law enforcement or fire protection employees are covered by the 7(k) exemption. If an employee does not qualify as an employee engaged in fire protection activities or law enforcement activities, the employee must be compensated under the general overtime rule. The Department of Labor (DOL) regulations define an employee engaged in law enforcement activities as an employee:

- (a) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,
- (b) who has the power to arrest, and
- (c) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.<sup>95</sup>

The U.S. Department of Labor (DOL) regulations define an employee engaged in fire protection activities as an employee:

an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.<sup>96</sup>

***Are there any employees who engage in law enforcement activities that are not covered by the 7(k) exemption?***

The DOL regulations specifically provide that a building or health inspector, an animal

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<sup>92</sup> 29 U.S.C. § 207(k).

<sup>93</sup> 29 C.F.R. § 553.201.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 553.211(a).

<sup>96</sup> *Id.* § 553.210.

control personnel, and sanitarians, among others, would normally not meet the definition of an employee engaged in law enforcement activities.<sup>97</sup> Additionally, employees who may be members of a fire or police department and who perform support activities, such as dispatchers, radio operators, repair workers, clerks, or janitors do not qualify for the 7(k) exemption.<sup>98</sup>

***Do “fire activities” include employees who are paramedics and fire fighters?***

Under section 203(y) of the FLSA, an “employee in fire protection activities” means: an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who— (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.<sup>99</sup>

Cities that utilize employees who perform dual-functions as firefighters and paramedics should be aware of a Fifth Circuit opinion, which invalidated a DOL regulation (29 C.F.R. §553.212) and held that firefighters and certain dual-function paramedics can qualify for the 7(k) exemption even if they spend more than twenty percent of their time performing non-fire suppression activities, such as dispatching.<sup>100</sup>

***Does the 7(k) exemption apply to volunteer fire departments?***

While the 7(k) exemption is limited to public agencies and does not apply to private entities, the Fifth Circuit has held that a volunteer fire department that provided traditional fire fighting and fire protection services, was funded almost exclusively by taxes, was accountable to the county, and for which the county had ultimate authority over its actions, was a public agency for purposes of the 7(k) exemption.<sup>101</sup>

***Can a state law or ordinance give more overtime benefits than the FLSA requires?***

The FLSA does not preempt a state law or municipal ordinance that provides more benefits than the FLSA requires.<sup>102</sup> As such, a city that has a population of more than 10,000 may in some instances not utilize the 7(k) exemption for its nonexempt police officers and certain non-exempt employees of the fire department. Under Texas law, a city with a population of more than 10,000 may not require its police officers to work more hours during a calendar week than the number of hours in the normal work week of the majority of the employees of the city, other than police officers or fire fighters.<sup>103</sup> If a majority of nonpublic safety employees in a city work 40 hours, a police officer would be entitled to overtime pay when the officer works more than 40 hours. However, a city may require a police officer to work

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<sup>97</sup> *Id.* § 553.211(e).

<sup>98</sup> *Id.* § 553.211(g).

<sup>99</sup> 29 U.S.C. §203(y).

<sup>100</sup> *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5<sup>th</sup> Cir. 2006).

<sup>101</sup> *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dep’t. Inc.*, 897 F.2d 765 (5<sup>th</sup> Cir. 1990).

<sup>102</sup> 29 U.S.C. § 218.

<sup>103</sup> TEX. LOC. GOV’T CODE § 142.0015(f).

more hours than permitted in the event of an emergency.<sup>104</sup> In addition, if a majority of police officers working for the city sign a written waiver of their rights, the city may adopt a work schedule requiring police officers to work more hours than permitted.<sup>105</sup> In this case, an officer is entitled to overtime pay if the officer works more hours during a calendar month than the number of hours in the normal work month of the majority of the employees of the city other than fire fighters or police officers.<sup>106</sup> A police officer or fire fighter can also work extra hours when exchanging hours with another fire fighter or police officer.<sup>107</sup>

In addition, certain nonexempt employees of the fire department who do not fight fires or provide emergency medical services (e.g., a mechanic, a clerk, an investigator, an inspector, a fire marshal, a fire alarm dispatcher, and a maintenance worker) are considered to have worked overtime if they work more hours in a week than the number of hours in a week that the majority of the city employees other than firefighters, emergency medical service personnel or police officers work.<sup>108</sup> A city can still use the 7(k) exemption for non-exempt firefighters or members of a fire department who provide emergency medical services.<sup>109</sup>

***Is a police chief considered exempt under the executive or administrative test?***

If the duties and salary of a police chief, ranking police officer, or detective would meet the “standard” or “highly compensated employee” tests for executive or administrative employees, then he or she could be considered exempt. The police chief is almost certain to qualify for one or the other exemption. However, in cities with small departments, a police chief often spends more time involved in patrol, response, and other law enforcement activities than supervising other employees, and therefore would not be exempt from overtime under the executive test. Other ranking police officers and detectives may be exempt, depending on their job duties and responsibilities, and how closely they are supervised.<sup>110</sup>

***Do we have to pay our police and fire fighters a minimum amount?***

If your city has a population of 10,000 or more then there are minimum amounts that must be paid to fire fighters and police officers. These minimums can be found in Local Government Code Section 141.031. Also, in cities over 10,000, police officers and fire fighters must receive a certain amount of longevity pay based on their years of service.<sup>111</sup>

***Resources***

**Department of Labor:**

<http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>

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<sup>104</sup> *Id.* § 142.0015(g).

<sup>105</sup> *Id.* § 142.0015(j).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* § 142.001(d).

<sup>108</sup> *Id.* § 142.0015(c).

<sup>109</sup> *Id.* § 142.0015(b).

<sup>110</sup> 29 U.S.C. § 213.

<sup>111</sup> TEX. LOC. GOV'T CODE § 141.032.

## CHAPTER 5—Leave including Family and Medical Leave Act

### *What is the Family and Medical Leave Act?*

Under the Family and Medical Leave Act (FMLA), eligible employees are entitled to 12 weeks or 26 weeks of unpaid leave for certain qualifying events.<sup>112</sup>

### *Is my city covered by the FMLA?*

All cities as public entities are covered by the FMLA, regardless of the city's size.<sup>113</sup> However, cities with no eligible employees (for example, cities with less than 50 employees) only need to put up posters and provide information to their employees regarding FMLA.

### *Which employees are eligible for leave under the FMLA?*

Not all city employees are eligible for FMLA leave. To be eligible for leave, an employee must:

- (a) have been employed by the city for at least 12 months, which do not have to be consecutive;
- (b) have worked for at least 1,250 hours in the 12-month period immediately preceding the date the FMLA leave begins; and
- (c) be employed by a city that has at least 50 employees at the site where the employee works or within 75 miles of that work site.<sup>114</sup>

On January 16, 2009, FMLA regulations went into effect that clarify leave provisions and add new leave options for military personnel and their families. Also, the United States Supreme Court's decisions in *United States v. Windsor* and *Obergefell v. Hodges*, means that the definition of spouse firmly includes same- sex spouses.<sup>115</sup> The Department of Labor finalized the rule regarding spouses in March 2015 to include a husband or wife whose marriage is recognized in the state in which they live.<sup>116</sup> After *Obergefell*, every state now must recognize same sex marriages.

### *What is a city required to do if it is covered by the FMLA but does not have any employees who are eligible for FMLA leave?*

All cities are covered by the FMLA, but many do not have sufficient number of employees to be required to comply with FMLA leave requirements. A city in that position must post FMLA posters, but may decide for itself what kind of leave options to offer to its employees. These and other employment posters are available in a document titled "Employment Law Posters" on the legal page of the Texas Municipal League Web site.

<http://www.tml.org/p/Employment%20Law%20Posters.pdf>.

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<sup>112</sup> 29 U.S.C. §§ 2601-2654.

<sup>113</sup> 29 C.F.R. § 825.104.

<sup>114</sup> *Id.* §§ 825.108(d); 825.110.

<sup>115</sup> *Windsor*, 133 S.Ct. 2675 (2013) available at [http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf); *Obergefell*, 14-556 (2015) available at [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

<sup>116</sup> 29 C.F.R. § 825.122.

### ***What types of events qualify for leave under the FMLA?***

Not all medical and family situations qualify for FMLA leave. An employee can take FMLA leave for the following reasons: (1) to care for a newborn child; (2) to have a child placed with the employee for adoption or foster care; (3) to care for the employee's spouse, child, or parent with a serious health condition; and (4) for a serious health condition that prevents the employee from performing his job. Under the 2009 rules, two new events will qualify for leave under the FMLA: (1) any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty; and (2) caring for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member.<sup>117</sup>

### ***What benefits do eligible employees enjoy under the FMLA for qualifying events?***

An eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for: (1) the birth and care of a newborn child; (2) the placement of a child with the employee for adoption or foster care; (3) care of a family member with a serious health condition; (4) the employee's own serious health condition that makes the employee unable to perform the functions of his or her job; or (5) any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty).<sup>118</sup> An eligible employee is entitled to a total of 26 workweeks of leave during any single 12-month period to care for a covered service member with a serious injury or illness.<sup>119</sup> A city is also required to maintain the employee's health benefits as if the employee were continuously employed during the leave period.<sup>120</sup> An employee on an FMLA leave of absence, as well as perhaps other leaves where the employee is still employed by the employer, is not qualified to receive state unemployment benefits.<sup>121</sup>

Eligible employees do not have to take the entire leave at once. An employee may take leave under the FMLA intermittently or on a reduced leave schedule for a serious health condition of the employee or the employee's family member, or for a qualifying exigency.<sup>122</sup>

### ***What intermittent leave benefits does an employee receive under the FMLA?***

Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.<sup>123</sup> Intermittent leave is only required to be given by an employer if: (1) medically necessary due to the serious health condition of a covered family member or the employee; (2) medically necessary due to the serious

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<sup>117</sup> 29 C.F.R. § 825.112(a).

<sup>118</sup> *Id.* § 825.100.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* § 825.209.

<sup>121</sup> *Texas Workforce Comm'n v. Wichita Cnty.*, 507 S.W.3d 919 (Tex. App. 2016)

<sup>122</sup> *Id.* § 825.203.

<sup>123</sup> *Id.*

injury or illness of a covered service member; or (3) necessary because of a qualifying exigency. While an employee generally must receive permission from the employer to take intermittent leave for the birth of a child, an employee with a pregnancy-related illness may take leave intermittently for a serious health condition.<sup>124</sup>

***What happens when an employee returns from FMLA leave?***

Generally, a city is required to restore an eligible employee to the same position the employee held when the employee began FMLA leave, or to an equivalent position with equivalent benefits and pay.<sup>125</sup> If the city determines that restoration of a key employee would cause substantial and grievous economic injury to the city, the city may notify the key employee that he will not be restored at the end of the leave.<sup>126</sup> A “key employee” is any exempt employee who is among the highest paid ten percent of all employees within 75 miles of the employee’s worksite.<sup>127</sup>

***Am I required to pay an employee who is on leave under the FMLA?***

Generally, leave under the FMLA is unpaid. However, a city may require an employee to substitute accrued paid leave (vacation or sick leave) for FMLA leave.<sup>128</sup> If an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the Fair Labor Standards Act, the time taken may be counted against the employee’s FMLA leave entitlement.<sup>129</sup> A city should have a written policy regarding how such leave and use of compensatory time off will be treated.

***What notice requirements must a city provide to employees under the FMLA?***

Every city, even those with no eligible employees, is required to post a notice that explains the provisions of the FMLA and provides information concerning the procedures for filing complaints of violation of the FMLA, regardless of whether it has any eligible employees or not.<sup>130</sup> The notice must be posted in a conspicuous place where it can be readily seen by employees and applicants for employment. When a city’s workforce is comprised of a significant portion of employees who are not literate in English, the city must provide the notice in a language in which the employees are literate.<sup>131</sup>

If a city has eligible employees, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the city’s employee handbook or personnel policies.<sup>132</sup> If the city has neither, the city must provide the employee with written guidance on employees’ rights and obligations under the FMLA when the employee is hired. If a city with no eligible employees nevertheless says that its employees have FMLA rights under its

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 825.214.

<sup>126</sup> 29 C.F.R. §§ 825.217-219.

<sup>127</sup> *Id.* § 825.217.

<sup>128</sup> *Id.* § 825.207.

<sup>129</sup> *Id.* § 825.207(f).

<sup>130</sup> *Id.* § 825.300.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

personnel handbook or other materials, these rights are then held by ineligible employees.

***What happens if a city violates an employee’s FMLA rights?***

If a city violates the FMLA rights, then it can be liable for damages including lost wages, benefits, fees, and court costs.<sup>133</sup> A city can be held liable if it denies valid FMLA leave or retaliates against an employee who asks for or is given FMLA leave.<sup>134</sup>

***Can a city official be personally liable for violations of the Family Medical Leave Act?***

Yes. The Fifth Circuit Court of Appeals, the federal court of appeals covering Texas, has held that the definition of employer in the Family Medical Leave Act (FMLA) could subject an employee or supervisor to individual liability.<sup>135</sup> The FMLA includes in its definition of employer “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”<sup>136</sup> Thus, if a supervisor or employee “acts, directly or indirectly” for the employer, then that person could be held individually liable for the violation.<sup>137</sup> Accordingly, city officials should be especially careful to follow the provisions of the FMLA, not only to protect the city, but to prevent individual liability.

***Are city officials protected by any immunity when an FMLA claim is filed against them?***

Yes. Even though a city official could be held individually liable for violations of the FMLA, they are also protected by qualified immunity if they meet certain criteria.<sup>138</sup> In *Modica*, the Fifth Circuit held that because the law was not clearly established when the individual supervisor, a state agency employee, made her decision, she was protected by qualified immunity.<sup>139</sup> Accordingly, not every violation of the FMLA will subject an individual to personal liability, so long as the decision is not “objectively unreasonable in light clearly established law.”<sup>140</sup>

***May an eligible pregnant employee or eligible employee family member take FMLA while expecting a child?***

A pregnant employee, or her spouse, may be eligible to take FMLA leave during pregnancy only if the pregnancy causes a serious health condition as defined by the FMLA. An eligible employee is also eligible to take FMLA leave to attend prenatal appointments and due to complications, such as morning sickness.<sup>141</sup>

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<sup>133</sup> 29 U.S.C. § 2617; *Lubke v. City of Arlington*, 455 F.3d 489, 494 n. 1 (5<sup>th</sup> Cir. 2006).

<sup>134</sup> *Id.*; *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 396 (5<sup>th</sup> Cir. 2013) (holding that employer could be liable if it could not show that its termination of an individual on FMLA leave would have been done even if the individual had not been on FMLA leave).

<sup>135</sup> *Modica v. Taylor*, 465 F.3d 174, 184-86 (5<sup>th</sup> Cir. 2006).

<sup>136</sup> 29 U.S.C. § 2611(4)(A)(ii)(I).

<sup>137</sup> *Modica*, 465 F.3d at 184-85.

<sup>138</sup> *Id.* at 187-88.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 188.

<sup>141</sup> *Id.* § 825.115.

***May an eligible employee take FMLA to take care of a newborn?***

Yes. Both eligible parents are entitled to take up to 12 weeks of parental leave during the first year of a child's life. However, if both parents work for the same city employer, the city may require that they take a combined total of 12 weeks to care for the newborn. The leave does not have to be taken immediately following the birth of the child, but must be taken within one year of the birth of the child, unless the child has a serious health condition.<sup>142</sup>

***Are employers required to provide special accommodations for employees who are breast feeding mothers?***

Yes. The Patient Protection and Affordable Care Act amended the FLSA, requiring that employers provide special areas and break times to nursing mothers to express breast milk for one year after the birth of their nursing child.<sup>143</sup> A 2015 Texas bill, House Bill 786, by Representative Armando Walle, gives exempt government employees the same right to breaks and space to express breast milk.<sup>144</sup>

***How often do employers have to allow nursing employees to take a break?***

Employers are required to allow employees "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."<sup>145</sup> These breaks must be allowed as frequently as needed. Employers should be aware that each woman is different, and the frequency and duration of each break will vary among employees.

***Does a nursing employee need to be paid for breaks used for expressing breast milk?***

Generally, no. Nonexempt employees would only need to be paid for this time if the break is similar to breaks that other employees are paid for, like short coffee breaks. Exempt employees' pay cannot be docked for taking breaks during the work day to express milk.

***Other than break times, what other types of special accommodations must be provided to nursing employees?***

Nursing employees must be provided with a private location, shielded from view and free from any intrusion from others, to express breast milk.<sup>146</sup> Under the FLSA, a bathroom, even if private, does not count as a location. A private space does not have to be established strictly for the use of the breastfeeding employee; it does, however, have to be available any time the employee needs to express milk. Also, a city cannot discriminate against a breastfeeding mother simply because she needs to express breastmilk while at work.<sup>147</sup>

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<sup>142</sup> *Id.* § 825.120.

<sup>143</sup> 29 U.S.C. § 207(r); [www.dol.gov/whd/regs/compliance/whdfs73.htm](http://www.dol.gov/whd/regs/compliance/whdfs73.htm).

<sup>144</sup> TEX. GOV'T CODE § 619.003.

<sup>145</sup> 29 U.S.C. §207(r)(1)(A).

<sup>146</sup> *Id.*

<sup>147</sup> *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5<sup>th</sup> Cir. 2013).

*Are there any exceptions to this requirement?*

Yes. A city employer with less than 50 employees does not have to provide nursing employees with these breaks or private areas if it would cause an undue burden to the employer.<sup>148</sup>

*Does a city have to allow a customer or other user of city facilities to breastfeed in city facilities or on city property?*

Nursing mothers have the right to breastfeed anywhere they are legally allowed to be.<sup>149</sup> Thus, if an individual is in the public portions of city property—such as a park, a municipal court, or city hall—she has the right to breastfeed there under state law.

**Resources**

**Pregnancy Discrimination Act:**

<http://www.eeoc.gov/facts/fs-preg.html>

**EEOC guidance on pregnancy issues:**

[http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)

**Department of Labor:**

<http://www.dol.gov/whd/fmla/index.htm>

**FMLA statutes:**

<http://www.dol.gov/whd/regs/statutes/fmla.htm>

**FMLA rules:**

<http://www.ecfr.gov/cgi-bin/text-idx?SID=4a5c0dc753376103647e9c8e9bc9463f&node=29:3.1.1.3.54&rgn=div5>

**FMLA Posters:**

<http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>

**FMLA Notice of Eligibility for Employees:**

<http://www.dol.gov/whd/fmla/finalrule/WH381.pdf>

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<sup>148</sup> 29 U.S.C. § 207(r)(3).

<sup>149</sup> TEX. HEALTH & SAFETY CODE § 165.002.

## CHAPTER 6—Volunteers

### *Can city councilmembers volunteer for the city?*

It depends on the situation. A city councilmember may volunteer for a volunteer fire department or other organization that protects the health, safety, or welfare of the city if the city council adopts a resolution allowing city councilmembers to do so.<sup>150</sup> But the attorney general has stated that a city official cannot volunteer for the governmental entity that it governs if the volunteer position would be: (1) supervised and controlled by the governing body; (2) the volunteer activity would normally be done by a compensated employee; and (3) the activity was not temporary or intermittent.<sup>151</sup> Thus, a city councilmember may be able to volunteer to plant flowers or help with a park clean up day, but would likely be precluded from regularly performing the duties of the city secretary or a utility employee.

### *Can city employees volunteer at the city?*

A city employee may volunteer for the same city, but only if her job duties are not the “same type of services” as her volunteer work.<sup>152</sup> The Department of Labor (DOL) defines “same type of services” to mean similar or identical services. In general, DOL would consider the duties and other factors contained in the definitions of occupations in the Dictionary of Occupational Titles in determining whether the volunteer activities constitute the “same type of services” as the employment activities. For example, police officers can volunteer different work (non-law enforcement related) in city parks and schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed.

### *Can a city pay for its volunteer police officers’ insurance or certification?*

Some cities have concerns that providing Texas Commission on Law Enforcement (TCOLE) certification for their reserve officers will endanger the officers’ status as volunteers. *Cleveland*

*v. City of Elmendorf* specifically held that TCLE certification, which is required for peace officers engaged in law enforcement in Texas, is not a benefit that violates an officer’s status as a volunteer.<sup>153</sup>

Cities also often ask about insurance for reserve officers. Title 29 C.F.R. Section 553.106 specifically states that workers’ compensation is considered to be a “reasonable benefit” that does not jeopardize an individual’s *volunteer status*. Also, state law requires a city to insure or otherwise cover each volunteer police force member against any injury suffered in the course and scope of the volunteer’s duties performed at the request of the city.<sup>154</sup>

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<sup>150</sup> TEX. LOC. GOV’T CODE § 21.003.

<sup>151</sup> Tex. Atty. Gen. Op. No. JC-0371 (2001); *see also* Tex. Atty. Gen. Op. No. JM-0386 (1985) (holding that an alderman cannot be on the city’s police reserve force).

<sup>152</sup> 29 C.F.R. § 553.103.

<sup>153</sup> 388 F.3d 522 (5th Cir. 2004).

<sup>154</sup> TEX. GOV’T CODE § 614.192.

***Is the city liable for the actions of volunteers?***

The Texas Tort Claims Act waives governmental immunity for certain actions of governmental employees, but does not waive governmental immunity for volunteers who are unpaid.<sup>155</sup> Therefore, the city is arguably not liable for the actions of its volunteers.

However, liability can be predicated on the actions of a paid employee who supervised volunteers even if liability cannot be predicated on the actions of the volunteers themselves.<sup>156</sup> Cities may be liable for acts of employees and volunteers where the city: (1) has the right to direct the volunteer in his/her duties; (2) has an interest in the work being carried out by the volunteer; (3) accepts direct or indirect benefit from the volunteer's work; and (4) has the right to fire or replace the volunteer.<sup>157</sup>

***Is the city liable if a volunteer is injured while performing work for the city?***

To the extent authorized by the Texas Tort Claims Act, cities may be liable to persons, including volunteers, for property damage, personal injury, and death proximately caused by the wrongful act, omission, or negligence of a city employee, or the condition or use of personal or real property.<sup>158</sup> Cities owe the same duty of care to volunteers as to others on city property.<sup>159</sup> Consequently, cities may want to limit their liability for negligence by obtaining workers' compensation insurance coverage for their volunteers. Cities can opt to cover volunteer fire fighters, police officers, emergency medical personnel, and "other volunteers" that are specifically named under the cities' workers' compensation insurance.<sup>160</sup> With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals.<sup>161</sup>

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<sup>155</sup> TEX. CIV. PRAC. & REM. CODE § 101.021(1); 101.001; *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994) (regarding a volunteer deputy sheriff).

<sup>156</sup> *Smith v. University of Texas*, 664 S.W.2d 180 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

<sup>157</sup> *El Paso Laundry Company v. Gonzales*, 36 S.W.2d 793 (Tex. Civ. App.—El Paso 1931, writ dism'd).

<sup>158</sup> TEX. CIV. PRAC. & REM. CODE § 101.021.

<sup>159</sup> *City of Austin v. Selter*, 415 S.W.2d 489 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

<sup>160</sup> TEX. LAB. CODE § 504.012.

<sup>161</sup> *Id.* § 408.001.

## CHAPTER 7—Drug Testing

### *May a city perform random or suspicionless drug tests on its employees?*

The TML Legal Department and city attorneys receive many calls from cities on this issue. Most cities either: (1) desire to implement random drug testing for all their employees; or (2) already have such policy in place. Many are surprised to learn that they generally may not have drug testing without individualized suspicion for all employees, sometimes referred to as “random drug testing”. Unless an exception applies (such as special safety or security concerns, adequate individualized reasonable suspicion, or Department of Transportation regulations), a city may not drug test its employees.

### *Which employees may a city randomly drug test?*

A city may randomly drug test its employees that are in safety or security sensitive positions. Examples of job duties that the courts have found to be safety or security sensitive sufficient to warrant suspicionless drug testing include: driving passengers as United States Department of Transportation licensed drivers; operation of trucks that weigh more than 26,000 pounds; tending to or driving school children as school bus attendants and drivers; teaching children; armed law enforcement officials whose duties include interdiction of drugs; nuclear power plant duties; and working on gas pipelines, among others.<sup>162</sup> Examples of employees whose job duties have not been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases and library workers.<sup>163</sup>

While who may be tested for drugs is always going to be a fact-based inquiry based on the duties of each employee, some duties lean towards allowing drug testing without individualized suspicion based on prior case law, including: carrying of passengers; driving with commercial drivers licenses or United States Department of Transportation licenses; positions that are heavily regulated by state and federal law; and operating heavy machinery.<sup>164</sup> Some duties and situations that, by themselves, may not warrant suspicionless drug testing include: office duties; handling money; driving a city vehicle or police car, prior drug use; or working with the public.<sup>165</sup> Before performing a suspicionless drug test on an employee, a city should ensure that there is a safety or security issue involved in the person’s job duties that would be affected by drug use. Since job duties and their safety or security sensitive nature is a fact issue, a city should always consult its city attorney or

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<sup>162</sup> *Krieg v. Seybold*, 481 F.3d 512 (7<sup>th</sup> Cir. 2007) (licensed drivers); *Int’l Bhd. of Teamsters, v. Dep’t of Transp.*, 932 F.2d 1292 (9<sup>th</sup> Cir. 1991) (large trucks); *Nat’l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (employees involved in interdiction of drugs); *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986) (school bus); *Crager v. Bd. of Educ. of Knott County*, 313 F.Supp.2d 690 (E.D. Ky. 2004) (teachers); *IBEW, Local 1245 v. United States Nuclear Regulatory Comm’n*, 966 F.2d 521 (9<sup>th</sup> Cir.1992) (nuclear power plant, gas pipelines).  
<sup>163</sup> *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (prosecute drug cases); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9<sup>th</sup> Cir. 2008) (library workers).

<sup>164</sup> *Int’l Bhd. of Teamsters*, 932 F.2d at 1295 (carrying of passengers); *Krieg v. Seybold*, 481 F.3d 512 (7<sup>th</sup> Cir. 2007) (driver’s license); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (heavily regulated industries); *Plane v. United States*, 796 F. Supp. 1070, 1075-77 (W.D. Mich. 1992); *Middlebrooks v. Wayne County*, 521 N.W.2d 774 (1994) (heavy machinery).

<sup>165</sup> *Lanier v. City of Woodburn*, 518 F.3d 1147 (9<sup>th</sup> Cir. 2008) (office); *Nat’l Treasury Empls. Union v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988) (driving a car).

local counsel before implementing a random drug testing policy or testing any employee for drug use.

Besides employees who perform safety or security sensitive functions as described above, individuals who may be tested for drugs include: (1) an applicant for employment, after the job offer is made but before they take the position, if some safety or security concern is present; (2) an employee that drives commercial vehicles and who is covered by the U.S. Department of Transportation Regulations; or (3) an employee that the city has reasonable suspicion to believe is using drugs.<sup>166</sup>

However, a city should adopt a written policy and consult with its city attorney before drug testing any of its employees or adopting a drug policy.

### ***What is reasonable suspicion?***

Reasonable suspicion is a decision that the supervisor needs to make based on objective factors such as the appearance or actions of the employee. For example, an employer may arguably test for drugs after an accident.<sup>167</sup> A personnel policy that requires drug testing of any employee involved in a city related vehicle accident should apply to all employees equally. The employee's actions and appearance that cause the supervisor to have individualized suspicion that the employee is on drugs should be documented.

### ***Besides search and seizure constitutional issues, are there any other concerns with drug testing?***

Drug testing information is confidential and should be treated very carefully. Employers must comply with the Americans with Disabilities Act when dealing with the results of such tests.<sup>168</sup> Employers are required to keep drug test results in a separate file from an employee's personnel file and that file must remain confidential.<sup>169</sup>

Also, a city should ensure that any drug testing or drug testing policy is applied equally to each similarly situated employee, to forestall complaints of discrimination.

### ***Does Texas regulate the drug testing of employees?***

The Texas Labor Code, Section 21.120, allows an employer, which includes a city, to adopt a drug-free workplace policy. However, the policy must not be written or applied in a discriminatory manner and must be in compliance with federal law.

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<sup>166</sup> 42 U.S.C.A. § 12114; *Lanier v. City of Woodburn*, 518 F. 3d 1147 (2008); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (pre-employment; post-offer testing); *Krieg v. Seybold*, 481 F.3d 512 (7<sup>th</sup> Cir. 2007) (commercial drivers license); *Nat'l Treasury Emps. Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990).

<sup>167</sup> *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 677.

<sup>168</sup> 42 U.S.C. § 12112.

<sup>169</sup> *Id.* § 12112(d)(3)(B).

### ***Should a city adopt a drug testing policy?***

Before a city implements any kind of drug testing, a city should adopt a written drug testing policy. It should also give the drug testing policy to each of its employees and have its employees acknowledge receipt of the policy. Also, it is a good idea for a city to adopt such a policy before a problem occurs.

### ***What considerations are there for a city that chooses to adopt a written drug testing policy?***

Drug testing policies raise constitutional issues such as the right to privacy and the right against unreasonable searches and seizures, as well as, under some circumstances, issues involving the Americans with Disabilities Act (ADA).<sup>170</sup> A drug testing policy should include when an employee may be drug tested, which employees or applicants may be tested, what job duties are considered safety or security sensitive, drug testing procedures that are minimally intrusive and respect the employee's right to privacy as much as possible, notice procedures for those who may be tested, how the results will be treated, and a policy for what occurs should a drug test come back positive. Also, many drug testing policies are included in drug free workplace policies adopted by cities.

A city should also ensure that its policy follows any ADA regulations, as well as other state and federal law that deal with medical information. The written drug policy should be strictly and consistently followed. Also, if a city is a federal contractor or a grantee of federal funds, the city must comply with the federal Drug-free Workplace Act of 1988. This act requires that a city adopt a "drug-free awareness" program and drug policy. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and mass transit industries. Any city employee with a Commercial Drivers License would fall under this Act and would be required to be tested for drugs pre-employment, post-accident, reasonable suspicion, and other testing. Any written city policy should reflect these requirements if a city has CDL employees.

Finally, a city should ensure that any adopted policy has been reviewed by its attorney and that implementation of the policy is guided by the city attorney's advice.

### ***Resources***

#### **Texas Workforce Commission:**

Basic

Information:

[http://www.twc.state.tx.us/news/efte/drug\\_testing\\_in\\_the\\_workplace.html](http://www.twc.state.tx.us/news/efte/drug_testing_in_the_workplace.html)

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<sup>170</sup> *Id.* §§ 12101-12213.

## CHAPTER 8—Employment Discrimination and Retaliation

### *What is Title VII of the Civil Rights Act?*

Title VII is the federal statute that prohibits an employer from discriminating against an employee on the basis of race, color, sex, national origin, or religion.<sup>171</sup> Discrimination under Title VII does not apply only to hiring or firing an individual, but includes all aspects of the employment relationship, including: compensation, assignment, classification, transfer, promotion, layoff, recall, job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits, pay, retirement plans, disability leave, or other terms and conditions of employment.<sup>172</sup> Same sexual harassment is currently protected by Title VII, but sexual orientation discrimination is not in the Fifth Circuit which covers Texas.<sup>173</sup> Also, the Equal Employment Opportunity Commission has ruled that Title VII does protect individuals from employment discrimination based on his or her gender identity.<sup>174</sup>

### *Which employers does Title VII apply to?*

The provisions of Title VII apply only to an employer that employs more than 15 employees. Independent contractors, elected officials, or any person chosen by such officer to be the officer's personal staff are not considered "employees."<sup>175</sup>

### *What if part of the position requires that a limitation be placed on one of the protected classes?*

Title VII creates a "bona fide occupational qualification" (BFOQ) exception, which allows an employer to hire (or refuse to hire) an individual on the basis of the employee's religion, sex, or national origin where religion, sex, and national origin are BFOQs reasonably necessary to the normal operation of the employer's business.<sup>176</sup> This is a very narrow and limited exception, and requires an analysis of facts that are specific to each case. Race or color is never a BFOQ.

Title VII also allows an employer to fail or refuse to hire an individual for national security reasons pursuant to a security program in effect pursuant to a federal statute or an Executive Order.<sup>177</sup> What kind of liability will a city have if it violates Title VII?

Title VII places the following caps on the amount of compensatory damages (excluding back and front pay) that may be awarded to a plaintiff:

- More than 14 but fewer than 101 employees - \$50,000
- More than 100 but fewer than 201-\$100,000

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<sup>171</sup> 42 U.S.C. § 2000e-2.

<sup>172</sup> *Id.* § 2000e-3(a).

<sup>173</sup> *EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444 (5<sup>th</sup> Cir. 2013).

<sup>174</sup> <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>

<sup>175</sup> *Id.* § 2000e(f).

<sup>176</sup> *Id.* § 2000e-2(e).

<sup>177</sup> *Id.* § 2000e-2(g)(1).

- More than 200 but fewer than 501-\$200,000
- More than 500 employees- \$300,000<sup>178</sup>

A plaintiff cannot recover punitive damages from a city.<sup>179</sup>

### ***How does Title VII define and protect race?***

Neither Title VII nor the Equal Employment Opportunity Commission (EEOC) define “race.” However, the U.S. Supreme Court has interpreted race to include people of all races.<sup>180</sup> Recently, the EEOC issued a compliance manual that interprets racial discrimination to include employment action based on:

- racial or ethnic ancestry (for example, discriminating against a Chinese American because of their Asian ancestry);
- physical characteristics (discrimination based on an individual’s color, hair, or facial features);
- race-linked illnesses (for example, sickle cell anemia is a genetically-linked disease that disproportionately affects individuals of African descent);
- culture (discrimination based on a person’s name, cultural dress or grooming practices, accent or manner of speech); and
- perception (based on belief that person is a member of a particular race regardless of how that individual identifies themselves).

The EEOC defines “color” as “pigmentation, complexion, or skin shade or tone.”<sup>181</sup> Color discrimination can occur between persons of different races, ethnicities, or between persons of the same race or ethnicity.<sup>182</sup>

### ***National Origin?***

National origin discrimination is “the denial of employment opportunity based on an individual’s, (or his or her ancestor’s) place of origin or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”<sup>183</sup> It also includes discrimination based on: (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual’s name or spouse’s name is associated with a national origin group.<sup>184</sup>

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<sup>178</sup> 42 U.S.C. § 1981a(b)(2)-(3)

<sup>179</sup> *Id.* § 1981a(b)(1).

<sup>180</sup> *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

<sup>181</sup> *Race and Color Discrimination*, EEOC COMPLIANCE MANUAL (April 19, 2006), available at [www.eeoc.gov/policy/compliance.html](http://www.eeoc.gov/policy/compliance.html).

<sup>182</sup> *See Walker v. Secretary of the Treasury, I.R.S.*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989) (holding cause of action available for suit by light skinned Black person against a dark skinned Black person).

<sup>183</sup> 29 C.F.R. § 1606.1

<sup>184</sup> *Id.*

The most common claims of national origin discrimination arise from language requirements. The EEOC has stated that an employment decision that is based on an accent does not violate Title VII if an individual's accent interferes with an employee's performance of the job. More recently, litigation regarding "speak English only" rules has come into play. The EEOC's position is that a blanket "speak English only" rule that prohibits an employee from speaking any language other than English is a burdensome term and condition of employment.<sup>185</sup> A Texas federal district court also held that a policy that required employees to speak English at all times in the workplace violated Title VII's prohibition against discrimination based on national origin.<sup>186</sup>

The EEOC provides that a rule that requires employees to speak English only at certain times is permissible if justified by business necessity.<sup>187</sup> However, a city must be careful with any such policy and should consult its city attorney or local counsel before crafting or adopting such a policy and should ensure that it has documented its reason to substantiate the business necessity for such a policy.

### **Sex?**

Title VII protects both men and women from sex discrimination. Title VII also protects against "sexual stereotyping."<sup>188</sup> The Supreme Court has recognized that same-sex sexual harassment can form a basis for a valid claim under Title VII.<sup>189</sup> While neither Title VII<sup>190</sup> nor Texas law creates a cause of action for sexual orientation, some cities have passed ordinances that limit an employer's right to terminate an employee based on sexual orientation.<sup>191</sup> During the 2015 legislative session, the legislators introduced bills that would have invalidated city ordinances that protect this community from discrimination.<sup>192</sup> Other legislators introduced bills that would have protected all Texas employees from discrimination on the basis of sexual orientation.<sup>193</sup> None of these bills passed. After the United States Supreme Court's holding in *Obergefell v. Hodges*, however, any spouse, including same sex spouses, must be offered the same benefits as any other spouse of an employee.<sup>194</sup> This case arguably does not protect employees from other types of discrimination based on sexual orientation, but the EEOC argues that discrimination based on sexual orientation or transgender status is illegal under Title VII.<sup>195</sup>

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<sup>185</sup> 29 C.F.R. § 1606.7.

<sup>186</sup> *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

<sup>187</sup> 29 CFR § 1606.7.

<sup>188</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (finding potential discrimination under Title VII where employer told plaintiff that she could improve her chances of making partner if she would "talk more femininely, dress more femininely, have hair styled, and wear jewelry").

<sup>189</sup> *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5<sup>th</sup> Cir. 2013); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>190</sup> *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2<sup>nd</sup> Cir. 2005); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5<sup>th</sup> Cir. 1979).

<sup>191</sup> Austin, Fort Worth, Houston, Dallas, San Antonio, and El Paso have adopted ordinances that prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations.

<sup>192</sup> Tex. H.B. 1911 (84<sup>th</sup> R.S. 2015); Tex. H.B. 1556 (84<sup>th</sup> R.S. 2015); Tex. S.B. 1155 (84<sup>th</sup> R.S. 2015).

<sup>193</sup> Tex. H.B. 627 (84<sup>th</sup> R.S. 2015); Tex. H.B. 1911 (84<sup>th</sup> R.S. 2015); Tex. S.B. 856 (84<sup>th</sup> R.S. 2015).

<sup>194</sup> *Obergefell v. Hodges*, No. 14-556 (2015) available at [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

<sup>195</sup> [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

### ***Is sexual harassment considered discrimination under Title VII?***

In 1986, the U.S. Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.<sup>196</sup> Two years later, the Supreme Court decided two cases (*Faragher* and *Ellerth*)<sup>197</sup> that have made it more important than ever for employers to know how to minimize their liability when it comes to sexual harassment claims. In some cases, liability cannot be avoided, but in others, liability may be completely avoided.

If an employee suffers an adverse employment action (for example, termination, transfer, changes in shifts, pay reductions) at the hands of a supervisor, the employer is liable for the actions of the supervisor, even if the employer did not know of the harassment or did not even have a way of knowing that the harassment was taking place.<sup>198</sup> To avoid this form of liability, a city should make sure that the authority to take an adverse employment action does not solely rest on one supervisor and that adverse employment actions are carefully reviewed before they become effective.

If the employee is harassed by a supervisor, but does not suffer an adverse employment action, the employer can escape liability by showing two things: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>199</sup> As such, it is imperative that a city establish an effective anti-harassment policy, ensure that each employee receives a copy of the policy, reads and agrees to it, and ensure that the city follows the policy consistently. A city should also establish a complaints process that includes a point of contact for all complaints, provides a process for conducting an objective and thorough investigation of all complaints, and promises prompt remedial action to address any complaints. Additionally, employees who are assaulted by a supervisor are no longer restricted to pursuing their actions through the Equal Employment Opportunity Commission's administrative channels as there are now claims for both a civil sexual harassment claim and a civil assault claim.<sup>200</sup>

While the *Faragher* and *Ellerth* decisions applied to sexual harassment, the Court drew analysis from other types of harassment on the basis of other protected classes, including race, color, national origin, religion, disability, and age. Thus, an employer should develop a policy that covers all forms of harassment. To prove a claim for sexual harassment there has to be a showing that the "harassment" or discrimination was based on gender and that one gender was singled out for the treatment at issue.<sup>201</sup>

### ***Are there discrimination concerns related to discipline or job changes for an employee on workers' compensation?***

When an employee is injured on the job, the city would have three main legal concerns: workers' compensation, the Americans with Disabilities Act (ADA), and the Family Medical

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<sup>196</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>197</sup> *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>198</sup> *Faragher*, 524 U.S. at 777.

<sup>199</sup> *Id.* at 778.

<sup>200</sup> *B.C. v. Steak N Shake Operations, Inc.*, 60 Tex. Sup. Ct. J. 493 (2017).

<sup>201</sup> *Alamo Heights Indep. Sch. Dist. v. Clark*, No. 16-0244, 2018 WL 1692367 (Tex. April 6, 2018).

Leave Act (FMLA). First, if the employee qualifies for FMLA and has a serious medical condition that warrants time off, the city needs to give the individual these benefits.<sup>202</sup> However, a city policy could require that FMLA and workers' compensation be taken concurrently.<sup>203</sup> The next issue involves when the employee wants to return to work or is released by his doctor with some limitations. If the doctor's note indicates some limitations, the city must determine if the individual can perform the essential functions of the job. If the individual cannot perform the essential functions of the job, the city must then determine if there is a reasonable accommodation under the ADA that would enable the employee to perform her job without being an undue burden on the city.<sup>204</sup> If the city decides that no reasonable accommodation can be provided and the individual must be let go, then the city needs to ensure that it has appropriate documentation of this fact since the individual could have a claim under workers' compensation or under the ADA. For more information see the FMLA and ADA sections of this manual. Rights under the ADA, FMLA, and state workers compensation law could be a factor in litigation if an employee is terminated after exercising these rights. This type of disciplinary action should be discussed with local counsel before taking place.

### ***What types of religious beliefs are protected and how are they protected?***

Religion not only includes mainstream religions such as Catholicism, Judaism, Islam, or Buddhism, but also includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of a traditional religious view."<sup>205</sup> The fact that no religious group espouses such beliefs or a religious group to which the individual professes to belong may not accept such beliefs will not determine whether the belief is a religious belief under Title

VII.<sup>206</sup> For example, Wicca<sup>207</sup> and atheism<sup>208</sup> are protected as "religion" under Title VII. However, purely political, social or philosophical beliefs are excluded from the definition of "religion" under Title VII. For example, a court found that membership in the United Klans of America was not a protected religion under Title VII.<sup>209</sup> Neither was a personal religious creed that certain cat food contributed to an employee's state of well-being.<sup>210</sup>

### ***What should a city do if an employee needs an accommodation for a religious belief?***

An employer has an affirmative duty to reasonably accommodate the sincerely held religious beliefs of an employee or prospective employee unless the employer demonstrates that an accommodation would result in an undue hardship.<sup>211</sup> Common requests to accommodate religious practices include leave to observe religious days, requests for a time and place to pray, refusal to handle certain transactions of the city that are contrary to an employee's beliefs, and wearing religious garb. An employer may accommodate an employee's religious

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<sup>202</sup> 29 U.S.C. § 2601-2654.

<sup>203</sup> 29 C.F.R. § 825.702(d)(2).

<sup>204</sup> 42 U.S.C. §§ 12101-12117.

<sup>205</sup> 29 C.F.R. § 1605.1; *Welsh v. U.S.*, 398 U.S. 333 (1970); *U.S. v. Seeger*, 380 U.S. 163 (1965).

<sup>206</sup> 29 C.F.R. § 1605.1.

<sup>207</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9<sup>th</sup> Cir. 1994).

<sup>208</sup> *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7<sup>th</sup> Cir. 2003).

<sup>209</sup> *Bellamy v. Mason's Stores Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4<sup>th</sup> Cir. 1974).

<sup>210</sup> *Brown v. Pena*, 441 F.Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F. 2d 1113 (5<sup>th</sup> Cir. 1979).

<sup>211</sup> 42 U.S.C. § 2000e; 29 C.F.R. § 1605.2(d).

beliefs or practices by allowing flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, and modification of grooming requirements.<sup>212</sup> An employer is not required to provide an accommodation if the accommodation imposes an undue hardship on the employer's legitimate business interests. An accommodation works an undue hardship if it requires "more than a *de minimis* economic costs on the employer."<sup>213</sup> In determining whether an accommodation will result in an undue hardship, the EEOC will look at the cost in relation to the size and operation costs of the employer and the number of employees who require an accommodation.

The Texas attorney general of Texas has also weighed in specifically on the repercussions of the *Obergefell v. Hodges* case (legalizing same sex marriage nationwide) in an opinion.<sup>214</sup> He expressly states that an employee has the right to request a religious accommodation related to transactions involving same-sex marriages. Whether such an accommodation is available will be up to the employer based on: (1) the city's compelling interest related to any transaction; (2) the availability of others to assist in the transactions; and (3) the job description and duties of the requestor.

### ***Can a city official be held personally liable for employment discrimination?***

Yes, under Sections 1981 and 1983, federal statutes providing a cause of action of the violation of federal rights, a city official could be liable for damages for employment discrimination.

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides, in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

To prove a Section 1981 claim a plaintiff must show that:

- (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.).<sup>215</sup>

Section 1981 claims can be held against city officials in their individual capacity for allegations of race discrimination if the individual city official is acting the same as the state

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<sup>212</sup> *Id.* § 1605.2(e).

<sup>213</sup> *Id.*

<sup>214</sup> Tex. Atty. Gen. Op. KP-0025 (2015) available at <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>; *Obergefell v. Hodges*, No. 14-556 (2015) available at [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

<sup>215</sup> *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993).

in regards to the complained-of conduct.<sup>216</sup> Thus, a city official could be individually liable for a suit where the official has purposely discriminated against an employee based on his or her race and has taken a negative employment action against that employee.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, creates a private right of action for redressing the violation of federal law by those acting under color of state law. It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

Both of these sections can be used to bring suit against city officials in their individual capacities. One example of a Section 1983 claim would be a claim for sexual harassment as a violation of an employee's constitutional rights.<sup>217</sup>

However, if a resigning employee makes an allegation of discrimination, they must include an allegation of constructive discharge, or, in other words, that they resigned as a result of the employer creating a hostile work environment. They cannot allege discrimination by the employer alone, or they are seen to have not exhausted the administrative remedies available to them for the claim.<sup>218</sup> The applicable administrative remedies that must be exhausted commence on the date the employee gives notice of his resignation.<sup>219</sup>

A city official could have the defense of qualified immunity against a Section 1981 or Section 1983 claim, but only if the official meets the required criteria. "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"<sup>220</sup> However, qualified immunity is less likely to protect city officials against certain claims, such as sexual harassment under Section 1983, when their behavior is objectively unreasonable.<sup>221</sup>

### ***Are there state laws against employment discrimination?***

Yes. Chapter 21 of the Labor Code makes it unlawful to discriminate against an employee or applicant on the basis of race, color, disability, religion, sex, national origin, or age.<sup>222</sup> This chapter also makes the Texas Workforce Commission the enforcement agency for Title VII in Texas.<sup>223</sup> Section 21.055 of the Labor Code makes retaliation an unlawful employment practice.

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<sup>216</sup> *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337-38 (5<sup>th</sup> Cir. 2003).

<sup>217</sup> *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 550 (5<sup>th</sup> Cir. 1997).

<sup>218</sup> *Harris County Hospital District v. Parker*, 484 S.W.3d 182, 188 (Tex. App. 2015)

<sup>219</sup> *Green v. Breenan*, 136 U.S.14 (2015)

<sup>220</sup> *Bluitt v. Houston Indep. Sch. Dist.*, 236 F.Supp.2d 703 (S.D. Tex. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>221</sup> *Lauderdale v. Texas Dept. of Crim. Justice*, 512 F.3d 157, 166-67 (5<sup>th</sup> Cir. 2007).

<sup>222</sup> TEX. LAB. CODE § 21.051.

<sup>223</sup> *Id.* § 21.003; <http://www.twc.state.tx.us/about-texas-workforce>

### ***How should pregnant employees be treated?***

The answer depends on whether the pregnant employee is “disabled” or not under the Americans with Disabilities Act (ADA). If the pregnant employee is claiming that she is disabled or provides a physician’s letter indicating that she can no longer perform functions of her job then the city needs to go through the same reasonable accommodation analysis that it would go through for any other employee with a disability. In a recent opinion, the United States Supreme Court reviewed this issue.<sup>224</sup> The factual issue in this case was that a pregnant U.P.S. driver asked for an accommodation related to lifting during her pregnancy.<sup>225</sup> U.P.S. denied the request, even though it accommodated employees on workers compensation or who had a disability under the Americans with Disabilities Act in other cases. The Court held that the pregnant employee was discriminated against because she was able to show that: (1) she sought an accommodation; (2) the employer did not provide the accommodation; but (3) the employer had accommodated other similarly situated employees.<sup>226</sup> The employing city needs to be careful and treat a pregnant employee like it would treat any other sick or disabled employee. If the employee is not disabled, but has asked for some accommodation, then the city should consider accommodating the pregnant employee the same way it has accommodated other similarly situated employees.

Also, the Pregnancy Discrimination Act prohibits an employer from removing a pregnant employee from her assigned duties if she is able and willing to perform her job.<sup>227</sup> A pregnant employee must be allowed to work as long as she is able to perform her job. While a city may have concerns for the personal safety of the employee (including risks of harm to the fetus carried by the employee) case law has indicated that concerns for the safety of a pregnant employee is not a defense to unlawful discrimination.<sup>228</sup> For example, if the pregnant employee is willing and able to perform the duties of a first responder, she should be allowed to continue doing so. However, under the PDA, an employer is not required to grant preferential treatment to a pregnant woman but is obliged to ignore a woman’s pregnancy and “treat the employee as well as it would have if she were not pregnant.”<sup>229</sup> A city also must allow a female employee to express breast milk at work and cannot discriminate against a woman because she is lactating.<sup>230</sup>

### ***Is there any Texas law on this issue?***

State law also covers this issue. Section 180.004 of the Local Government Code requires a city to “make a reasonable effort to accommodate an employee” who is pregnant and whose physician has stated that she is physically restricted because of the pregnancy. Also, a city must provide a temporary work assignment if one is available and the pregnant employee’s

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<sup>224</sup> *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338 (2015).

<sup>225</sup> *Id.* at 1344.

<sup>226</sup> *Id.* at 1354.

<sup>227</sup> 42 U.S.C. § 2000e; 29 C.F.R. § 1604.10; *Allison-LeBlanc v. Dep’t of Pub Saf. and Corrections, Off. of State Police*, 671 So.2d 448 (La. App. 1<sup>st</sup> Cir. 1995)(holding that it was discrimination to automatically place pregnant employee on light duty without a finding of a disability).

<sup>228</sup> *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

<sup>229</sup> *Urbano v. Continental Airlines, Inc.* 138 F.3d 204, 206 (5<sup>th</sup> Cir. 1998) (quoting *Piraino v. Int’l Orientation Res., Inc.*, 84 F.3d 270, 274 (7<sup>th</sup> Cir. 1996)).

<sup>230</sup> 29 U.S.C. § 207(r); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5<sup>th</sup> Cir. 2013).

doctor has determined that the employee cannot perform her permanent work assignment.

***May an employer transfer an employee to light or alternate duty on the basis of pregnancy?***

Yes, but only if she indicates a need for such assistance. An employer may not single out pregnancy-related conditions for special procedures when determining an employee's ability to work. If a pregnant employee is temporarily unable to perform job functions because of her pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows other temporarily disabled employees to take a lighter or alternative duty, the employer also must give an employee who is pregnant the same options. Pregnant employees must be permitted to work so long as they are able to perform the essential functions of their jobs. An employer may not take "anticipatory" action against a pregnant employee, or make general assumptions about the impact that a pregnancy might have on a woman's ability to do her job.<sup>231</sup> According to the Equal Employment Opportunity Commission, if an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer cannot require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.<sup>232</sup>

***Are there special exceptions for law enforcement agencies?***

No. A law enforcement agency may not remove a pregnant officer from an assignment, or force her to assume a light duty assignment unless she is unable to perform the essential functions of a police officer position.<sup>233</sup> In other words, when assigning a pregnant officer to light duty, an agency must use the same criteria applied for other temporarily disabled officers. A pregnant employee should not be forced into a light duty assignment so long as she is physically able to perform the essential functions of her regular assignment. Likewise, a city employer should be careful when allowing a pregnant employee to elect a light duty assignment before it is medically necessary, unless other, non-pregnant employees are allowed to make this election.

***Does an employer have a responsibility to protect pregnant employees from duties that may be harmful to their babies?***

No. According to the Supreme Court's ruling in *UAW v. Johnson Controls*, employers may not have fetal protection policies that exclude women from certain hazardous jobs, even if the intent of the policy is benevolent. Decisions about the welfare of future children are the responsibility of parents, not employers. Under this case, the Court stated that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." An employer "may only take into account the woman's ability to get her job done," not whether the job poses a risk to the fetus.

***What should a city do if an employee refuses to accommodate a same-sex spouse because of a religious belief?***

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<sup>231</sup> *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7<sup>th</sup> Cir. 1999).

<sup>232</sup> [www.eeoc.gov/facts/fs-preg.html](http://www.eeoc.gov/facts/fs-preg.html).

<sup>233</sup> *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. App. 1 Dist. 1991).

An employer has an affirmative duty to reasonably accommodate the sincerely held religious beliefs of an employee or prospective employee unless the employer demonstrates that an accommodation would result in an undue hardship.<sup>234</sup> Common requests to accommodate religious practices include leave to observe religious days, requests for a time and place to pray, refusal to handle certain transactions of the city that are contrary to an employee's beliefs, and wearing religious garb. An employer may accommodate an employee's religious beliefs or practices by allowing flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, and modification of grooming requirements.<sup>235</sup> An employer is not required to provide an accommodation if the accommodation imposes an undue hardship on the employer's legitimate business interests. An accommodation works an undue hardship if it requires "more than a *de minimis* economic cost on the employer."<sup>236</sup> In determining whether an accommodation will result in an undue hardship, the EEOC will look at the cost in relation to the size and operation costs of the employer and the number of employees who require an accommodation.

The Texas attorney general of Texas has also weighed in specifically on the repercussions of the *Obegerfell v. Hodges* case in an opinion.<sup>237</sup> He expressly states that an employee has the right to request a religious accommodation related to transactions involving same-sex marriages. Whether such an accommodation is available will be up to the employer based on: (1) the city's compelling interest related to any transaction; (2) the availability of others to assist in the transactions; and (3) the job description and duties of the requestor.

## ***Resources***

### **EEOC Information:**

<http://www.eeoc.gov/facts/qanda.html>

### **Title VII Statute:**

<http://www.eeoc.gov/laws/statutes/titlevii.cfm>

### **Title VII Regulations:**

Sex Discrimination:

[http://www.access.gpo.gov/nara/cfr/waisidx\\_09/29cfr1604\\_09.html](http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1604_09.html)

### **Religious Discrimination:**

[http://www.access.gpo.gov/nara/cfr/waisidx\\_09/29cfr1605\\_09.html](http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1605_09.html)

### **National Origin Discrimination:**

[http://www.access.gpo.gov/nara/cfr/waisidx\\_09/29cfr1606\\_09.html](http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1606_09.html)

### **Employee Selection:**

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<sup>234</sup> 42 U.S.C. § 2000e; 29 C.F.R. § 1605.2(d).

<sup>235</sup> *Id.* § 1605.2(e).

<sup>236</sup> *Id.*

<sup>237</sup> *Tex. Atty. Gen. Op. KP-0025 (2015) available at*

<https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.

[http://www.access.gpo.gov/nara/cfr/waisidx\\_09/29cfr1607\\_09.html](http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1607_09.html)

**Pregnancy Discrimination Act:**

<http://www.eeoc.gov/facts/fs-preg.html>

**EEOC guidance on pregnancy issues:**

[http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)

**Texas Workforce Commission:**

<http://www.twc.state.tx.us/about-texas-workforce>

<http://www.twc.state.tx.us/news/eft/tocmain2.html>

## **CHAPTER 9—Disability Accommodation and Discrimination: Americans with Disabilities Amendments Act of 2008**

### ***What is the Americans with Disabilities Act?***

The Americans with Disabilities Act (ADA) is a federal law intended to prevent discrimination against individuals who have a disability.<sup>238</sup> This includes prohibitions on discrimination against individuals with disabilities in the employment relationship.<sup>239</sup> The ADA prohibits discrimination in all employment practices against “qualified individuals with disabilities.”<sup>240</sup> A city as employer may not discriminate against these individuals in matters of hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment. In 2008, the ADA Amendments Act was passed which broadened the definition of disability to include more individuals.<sup>241</sup> The ADA applies to all city employers, regardless of the number of employees a city has.<sup>242</sup>

### ***What is a disability?***

A disability is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual.” It also includes individuals who are “regarded as” having such an impairment.<sup>243</sup> A major life activity is considered to be substantially limited if an individual cannot perform the activity at all or is limited in the “condition, manner or duration under which an individual can perform” the activity when compared to what an average person can do.<sup>244</sup> Under the Pregnancy Discrimination Act, pregnancy by itself is not a “disability” but may include impairments that may be disabilities depending on the situation.

### ***What is a “major life activity”?***

Major life activities include activities that most people can do to take care of themselves and live regular lives including, but not limited to: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” It also includes “major bodily functions” which includes correct functioning of the digestive, immune, neurological, respiratory, circulatory, and reproductive systems.<sup>245</sup> Any medical or mental problem that interferes with a person’s normal activities or work would likely fall into one of these categories, making the determination of a disability almost always fall on the side of the individual having a disability.

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<sup>238</sup> 42 U.S.C. § 12101.

<sup>239</sup> *Id.* § 12111.

<sup>240</sup> *Id.* § 12112.

<sup>241</sup> ADA Amendments Act of 2008 (P.L. 110-325) available at <http://www.ada.gov/pubs/adastatute08.htm>; 29 C.F.R. part 1630 available at <http://www.ecfr.gov/cgi-bin/text-idx?SID=68f496c105428213835bf25393b6e309&mc=true&node=pt29.4.1630&rgn=div5>

<sup>242</sup> TEX. LAB. CODE § 21.001; *Mount Lemmon Fire District v. Guido*, 586 U.S. \_ (2018).

<sup>243</sup> 42 U.S.C. § 12102; *Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 49 (1<sup>st</sup> Cir. 2011).

<sup>244</sup> 29 C.F.R. § 1630.2.

<sup>245</sup> 42 U.S.C. § 12102.

### ***Who is a “qualified individual”?***

A “qualified individual,” who must be given a “reasonable accommodation” for her disability, is an individual who can perform the “essential functions” of the job regardless of a reasonable accommodation.<sup>246</sup> The city as employer determines the “essential functions” of a job, but a city should be careful not to let it appear that its job description, job posting, or other listing of essential functions is discriminatory against individuals with disabilities.<sup>247</sup>

### ***What is a reasonable accommodation?***

A reasonable accommodation is an accommodation to an employee that allows a qualified individual with a disability able to perform the job despite the disability.<sup>248</sup> For example, this would include changing the job site in some way to make it more accessible for an individual or allowing different break periods for an individual with a disability. A reasonable accommodation could also include time off for the individual with a disability.<sup>249</sup> This accommodation could mean a city would need to keep a position open for an individual with a disability for an extended period. It has not been definitively decided whether an absence control policy could be used to terminate an individual with a disability who is on ADA leave.

### ***When does a city have to give a reasonable accommodation?***

A city must make a reasonable accommodation for an employee when the employee:

- (a) has a disability under the Act;
- (b) can perform the essential functions of the job with the reasonable accommodation; and
- (c) the reasonable accommodation does not present an “undue hardship” to the city as employer.<sup>250</sup> “Undue hardship” means that “significant difficulty or expense” would have to be incurred for an employee with a disability to be accommodated.<sup>251</sup> The factors included in determining whether an accommodation is “reasonable” or should be given includes:
  - (i) the cost of the accommodation;
  - (ii) the size of the employer and its financial resources when compared to the suggested accommodation;
  - (iii) the number of employees; and
  - (iv) the type of position involved.<sup>252</sup> The larger the employer or the more employees an employer has, the more difficult or expensive an accommodation must be before it will be considered an “undue hardship.” Whether a city must give a reasonable accommodation is a fact question that should be reviewed by local counsel or city attorney before a final determination is made.

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<sup>246</sup> 42 U.S.C. § 12111.

<sup>247</sup> 29 C.F.R. § 1630.2.

<sup>248</sup> 42 U.S.C. § 12111.

<sup>249</sup> See <http://www.eeoc.gov/policy/docs/accommodation.html> for examples of reasonable accommodations.

<sup>250</sup> 42 U.S.C. § 12112.

<sup>251</sup> *Id.* § 12111; 29 C.F.R. § 1630.15.

<sup>252</sup> 42 U.S.C. § 12111(10)(B).

***How does a city find out it needs to give a reasonable accommodation?***

A city only must accommodate a “known” disability.<sup>253</sup> First, a city employer would start looking into giving an employee a reasonable accommodation if the employee requests it. An employer must be careful not to treat the individual as having a disability, but this would not keep them from asking how the employer can help an individual do their job if there are job performance issues. Also, the city may also be able to ask an employee for medical information when the employer and employee are trying to formulate a reasonable accommodation under limited conditions.<sup>254</sup> For job applicants, an employer cannot ask an applicant if they are disabled or need a reasonable accommodation, even if it appears clear to the employer that this will be the situation. Instead an employer should ask the applicant whether they can perform the essential functions of the job and then base any action on the answer to this question.

***Can a city require that all job applicants have a medical exam to make sure they can perform the job?***

Under the ADA, a medical examination for job applicants can only be required if: (1) all job applicants are required to undergo the same medical examination for the job category; (2) the job applicant has already been offered the job, but conditioned the job offer on the outcome of the medical examination; and (3) that information obtained is kept confidential. After an individual becomes an employee of the city, any medical examination must be job related and necessary for city business.<sup>255</sup> Also, a city should be very careful when approaching job applicants about disabilities. In an interview or job application, a city should focus on whether an individual can perform the essential job functions, not whether the individual may or may not have a physical or mental disability.

***Can a city require that job applicants take a physical agility test or a test to make sure they can perform the specific tasks of the job that they are applying for?***

A city can give job applicants tests that test the applicant’s ability to perform essential functions of the job or physical fitness tests before any job offer is made. Tests must be job related and consistent with business necessity. Also, a city must be careful that any test does not tend to screen out or actually screen out persons with disabilities.

***What if a “disabled” employee cannot do the job even with a reasonable accommodation?***

An employee must be able to perform the essential functions of the job to be protected under the ADA. This may or may not include the provision of a reasonable accommodation by the city. If there is no reasonable accommodation that would allow the individual to perform the job then that individual does not need to be hired or retained by the city. The best way to show what are the essential functions of a job is to have a detailed job description in place for each position before individuals are interviewed or hired for the position. When making the decisions of what the essential job functions are and whether an individual can perform

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<sup>253</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>254</sup> 29 C.F.R. pt. 1630 app. §1630.9 (1998).

<sup>255</sup> 42 U.S.C. § 12112; 29 C.F.R. § 1630.4(c).

these functions, a city should consult with local counsel or its city attorney.

***Can attendance be considered an essential job function?***

Yes. According to the Ninth Circuit's decision, attendance *is* an essential function of the job for *all* employees who work at a place of business.<sup>256</sup>

***How does the ADA work with drug use?***

Questions involving drug use and testing can be found in the Drug Testing portion of this document. It includes information about the ADA.

***What happens if the city violates an individual's rights under the Americans with Disabilities Act?***

If an employee or applicant is discriminated against based on their disability, the city may be liable for compensatory damages.<sup>257</sup> A court can also award back pay, front pay, or require that an individual be reinstated.<sup>258</sup>

***Can a city's sick leave policy violate the ADA?***

Yes. A city can have a sick leave policy that violates the ADA. First, the EEOC has stated that an absence control policy that states that employees are automatically terminated after a certain length of time can violate the ADA, because they do not provide for any interaction with the employee regarding a possible disability. Also, a city cannot have a sick leave policy that requests information from an employee or the employee's doctor about the nature of the employee's illness. But a city may have a policy that asks for a doctor's note, the date of the appointment, and that it was medically necessary.<sup>259</sup>

***Is there individual liability for supervisors for violations of the Americans with Disabilities Act?***

Not currently in Texas. Federal courts in Texas have held there is not individual liability for supervisors for violations of the Americans with Disabilities Act.<sup>260</sup> However, the specific issue has not been decided by the Fifth Circuit, the federal court of appeals covering Texas, so each supervisor in Texas should be careful to avoid violations of the Americans with Disabilities Act not only due to the implications to the city, but also because a court could hold in the future that there is individual liability for supervisors.

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<sup>256</sup> *Samper v. Providence St. Vincent Med.Ctr.*, 675 F.3d 1233 (9<sup>th</sup> Cir. 2012).

<sup>257</sup> 42 U.S.C. § 1981a(a)(2).

<sup>258</sup> *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 732 (5<sup>th</sup> Cir. 2007).

<sup>259</sup> *EEOC v. Dillard's Inc.*, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012).

<sup>260</sup> *Pena v. Bexar Cty., Tex.*, 726 F.Supp.2d 675 (W.D. Tex. 2010). *See Lollar v. Baker*, 196 F.3d 603, 609 (5<sup>th</sup> Cir. 1999) (holding that there is no individual liability under the Rehabilitation Act which has similar language to the Americans with Disabilities Act).

***Does the ADA require employers to take any other action?***

Every city employer also must post notices at locations where job applicants and employees can access the notices. These notices can be found at: [http://www1.eeoc.gov/employers/upload/eeoc\\_self\\_print\\_poster.pdf](http://www1.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf).

***Other than as employers, does the ADA require cities to take any other action?***

Cities must comply with ADA regulations regarding accessibility of city buildings and facilities. The federal government has provided two handbooks to assist cities with this task. These include:

ADA Compliance Guide for Small Towns: <http://www.ada.gov/smtown.htm>.  
Technical Manual for Local Governments: <http://www.ada.gov/taman2.html>.

***Resources***

**Americans with Disabilities Act Statutes (as amended in 2008):**  
<http://www.ada.gov/pubs/adastatute08.htm>

**Americans with Disabilities Act Resources:**  
[www.ada.gov](http://www.ada.gov)

**Basic Americans with Disabilities Act Information from the Equal Employment Opportunity Commission:**  
<http://www.eeoc.gov/facts/ada17.html>

**Title II Technical Assistance Manual for State and Local Governments:**  
<http://www.ada.gov/taman2.html>

## CHAPTER 10—Age Discrimination: Age Discrimination in Employment Act

### *What is the Age Discrimination in Employment Act?*

The Age Discrimination in Employment Act of 1967 (ADEA) is a federal statute that protects individuals who are 40 years of age or older from employment discrimination based on age.<sup>261</sup> The ADEA's protections apply to both employees and job applicants.<sup>262</sup> Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.<sup>263</sup>

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.<sup>264</sup> The ADEA applies to employers with 20 or more employees, including state and local governments.<sup>265</sup>

- Job Notices and Advertisements

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a “bona fide occupational qualification” (BFOQ) reasonably necessary to the normal operation of the business.<sup>266</sup>

- Pre-Employment Inquiries

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

- Benefits

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.<sup>267</sup>

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<sup>261</sup> 29 U.S.C. § 631.

<sup>262</sup> *Id.* §§ 623(a); 623(b).

<sup>263</sup> *Id.* § 623(i).

<sup>264</sup> *Id.* § 623(d).

<sup>265</sup> *Id.* § 630.

<sup>266</sup> *Id.* § 623(f)(1); *also see* TEX. LAB. CODE §§ 21.101-.104.

<sup>267</sup> *Id.* §§ 623(f)(2)(A); 623(f)(2)(B).

***What happens if a city violates an individual’s ADEA rights?***

If a city discriminates against an employee or an applicant, the city could be liable for back pay, compensatory pay, and front pay.<sup>268</sup>

***Can a city set an age limit on how old a peace officer or fire fighter can be and still comply with state law and the ADEA?***

Yes. State law states that a city “does not commit an unlawful employment practice by imposing a minimum or maximum age requirement for peace officers or fire fighters.”<sup>269</sup> An amendment to the ADEA was passed in 1996 that allows public employers, including cities, to have maximum hiring ages and mandatory retirement ages for law enforcement officers and firefighters.<sup>270</sup>

***Is there individual liability for supervisors for age discrimination?***

No. Courts have interpreted both state law provisions, and the federal Age Discrimination in Employment Act, as not allowing individual liability.<sup>271</sup>

***Resources***

**EEOC Information:**

<http://www.eeoc.gov/eeoc/publications/age.cfm>

**ADEA Statute:**

<http://www.eeoc.gov/laws/statutes/adea.cfm>

**ADEA Regulations:**

[http://www.eeoc.gov/laws/types/age\\_regulations.cfm](http://www.eeoc.gov/laws/types/age_regulations.cfm)

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<sup>268</sup> *Julian v. City of Houston*, 314 F.3d 721 (5<sup>th</sup> Cir. 2002).

<sup>269</sup> TEX. LAB. CODE § 21.104.

<sup>270</sup> 29 U.S.C. § 623(i).

<sup>271</sup> *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674 (5<sup>th</sup> Cir. 2001); *Benavides v. Moore*, 848 S.W.2d 190, 198 (Tex. App.—Corpus Christi 1992, writ denied); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5<sup>th</sup> Cir.1996). See TEX. LAB.

CODE §§ 21.002, 21.051(8); 29 U.S.C. § 623(a).

## CHAPTER 11—Texas Whistleblower Act

### *What is the Texas Whistleblower Act?*

The Texas Whistleblower Act (Act) prohibits a city from suspending, or terminating the employment of, or taking other adverse personnel action against an employee who “in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.”<sup>272</sup>

### *In addition to suspension or termination, what is considered an “adverse personnel action” under the Act?*

“Personnel action” is defined as “an action that affects an employee’s compensation, promotion, demotion, transfer, work assignment, or performance evaluation.”<sup>273</sup> Some courts have opined that reprimands or severe harassment may be enough to trigger the Act.<sup>274</sup> The Supreme Court of Texas has held that removing unpaid duties from an employee was not an adverse personnel action.<sup>275</sup>

### *Who is considered an “appropriate law enforcement authority” under the Act?*

A report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government who the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.<sup>276</sup> Simply reporting to a supervisor who may not have the authority to take action regarding the reported violation is not usually considered a “report to an appropriate law enforcement authority” under the Act.<sup>277</sup> Also, the Supreme Court of Texas recently ruled that someone who has the managerial authority to enforce a “law”, such as university president, is not necessarily a “law enforcement authority” as required by the statute.<sup>278</sup>

### *What is considered a “law”, the violation of which can be the subject of whistleblowing?*

A “law” is a state or federal statute, an ordinance of a local governmental entity, or “a rule adopted under a statute or ordinance.”<sup>279</sup> A charter provision can also supply the law in these situations.<sup>280</sup> A personnel or other internal policy can be considered a “law” under this statute if a city has adopted the policy by ordinance or resolution.<sup>281</sup> A city should ensure that

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<sup>272</sup> TEX. GOV’T CODE § 554.002(a).

<sup>273</sup> *Id.* § 554.001(3).

<sup>274</sup> *See Univ. of Houston v. Barth*, 178 S.W.3d 157, 163-64 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no pet.).

<sup>275</sup> *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007).

<sup>276</sup> TEX. GOV’T CODE § 554.002(b).

<sup>277</sup> *See City of Elsa v. Joel Homer Gonzalez*, 325 S.W.3d 622, 626 (Tex. 2010) (per curiam); *Tharling v. City of Port Lavaca*, 329 F.3d 422 (5<sup>th</sup> Cir. 2003).

<sup>278</sup> *Texas A & M University-Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013); *see also U.T. Sw. Med. Ctr. V. Gentilello*, 398 S.W.3d 680 (Tex. 2013).

<sup>279</sup> TEX. GOV’T CODE § 554.001(1); *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854-55 (Tex. 2013).

<sup>280</sup> *City of Beaumont v. Bouillion*, 873 S.W.2d 425 (Tex. App.—Beaumont, 1993), writ granted, reversed 896 S.W.2d 143 (Tex., 1995), rehearing overruled.

<sup>281</sup> *City of Waco v. Lopez*, 183 S.W.3d 825, 829 (Tex. App.—Waco 2005).

it follows its own policies, procedures, and ordinances and then not to retaliate against an employee who reports a violation of a city's own policies.

***What are the penalties associated with a claim under the Whistleblower Act?***

An employee who is “retaliated” against for reporting a violation of law is entitled to sue for: (1) injunctive relief; (2) actual damages; (3) court costs; and (4) reasonable attorney fees.<sup>282</sup> In addition, the employee may be entitled to reinstatement to the employee’s former position, compensation for wages lost during the period of suspension or termination, and reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.<sup>283</sup> Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter.<sup>284</sup> The Act also imposes a civil penalty not to exceed \$15,000 on a supervisor who, in violation of the Act, suspends or terminates the employment of a public employee or takes an adverse personnel action against the employee.<sup>285</sup> The penalty shall be paid by the supervisor, not the city, and shall be deposited in the state treasury.<sup>286</sup>

***Is there a statute of limitations for whistleblower claims?***

A grievance must be filed no later than the 90th day after the date on which the alleged violation occurred or was discovered by the employee through reasonable diligence.<sup>287</sup> However, there are different statute of limitations and procedures for cities and city employees where the city has a grievance procedure in place.<sup>288</sup> For more information on this topic, please see the Attorney General of Texas’s Public Officers: Traps for the Unwary handbook.

***Is there a notice requirement under the Whistleblower Act?***

A city is required to post in a prominent location a sign, prescribed by the attorney general’s office, informing its employees of their rights under the Act.<sup>289</sup>

***Resources***

**Texas Whistleblower Act Poster:**

[https://www.texasattorneygeneral.gov/files/agency/whistleblower\\_poster.pdf](https://www.texasattorneygeneral.gov/files/agency/whistleblower_poster.pdf)

**Texas Whistleblower Act:**

<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.554.htm>.

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<sup>282</sup> TEX. GOV’T CODE § 554.003(a).

<sup>283</sup> *Id.* § 554.003(b).

<sup>284</sup> *Id.* § 554.0035.

<sup>285</sup> *Id.* § 554.008(a).

<sup>286</sup> *Id.* §§ 554.008(c) & (d).

<sup>287</sup> *Id.* § 554.005.

<sup>288</sup> *Id.* § 554.006(a).

<sup>289</sup> *Id.* § 554.009.

## CHAPTER 12—Military Leave: USERRA and State Military Leave

### *What is the Uniformed Services Employment and Reemployment Rights Act?*

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that was enacted in 1994 to (1) encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian employment that can result from such service; (2) provide for prompt reemployment of persons returning to civilian jobs from military service; (3) prohibit discrimination against individuals because of their service in the uniformed services; and (4) prohibit retaliation against an individual who has taken an action to enforce a protection afforded under USERRA.<sup>290</sup>

### *Does USERRA apply to my city?*

The provisions of USERRA apply to all employers, including cities, regardless of size.<sup>291</sup> The protections of USERRA extend to members of the uniformed services and to individuals who have applied for membership, have performed service, have applied for service, or are obligated to serve in the uniformed services.<sup>292</sup> An employee's rights under USERRA are not diminished because the employee holds a temporary, part-time, probationary, or seasonal position, or because the employee is an executive, a manager, or a professional employee.<sup>293</sup>

### *What are the “uniformed services”?*

Uniformed services include the armed forces (Army, Navy, Air Force, Marine Corps, and Coast Guard), the Army National Guard and the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.<sup>294</sup> While service in the Texas state military forces is not considered “service in the uniformed services” under USERRA, state law provides that individuals serving in the state military forces have the same protections in employment, reemployment, and retention in employment as provided by USERRA.<sup>295</sup>

### *What “service” qualifies for USERRA protections?*

USERRA protects an individual who voluntarily signs up to perform uniformed service, as well as an individual who is involuntarily called up.<sup>296</sup> Service also includes active duty for training, inactive duty training, or full-time National Guard duty. It also covers a period of time when an employee is absent from work for an initial or recurring military fitness examination or to perform authorized funeral honors duty.<sup>297</sup>

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<sup>290</sup> 38 U.S.C. §§ 4301; 4311(b).

<sup>291</sup> 20 C.F.R. §§ 1002.34(a); 1002.39.

<sup>292</sup> 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18.

<sup>293</sup> 20 C.F.R. §§ 1002.41; 1002.43.

<sup>294</sup> *Id.* §§ 1002.5(o); 1002.5(l); 1002.59.

<sup>295</sup> *Id.* § 1002.57 (b); TEX. GOV'T CODE § 431.017.

<sup>296</sup> 20 C.F.R. § 1002.5(l).

<sup>297</sup> *Id.* §§ 1002.54; 1002.55.

***Is an employee required to provide notice of service to a city?***

With certain exceptions, an employee or an appropriate military official must provide advance notice to the employer (as far in advance as is reasonable) that the employee intends to leave employment to perform service.<sup>298</sup> This notice can be either verbal or written.<sup>299</sup> An employee is excused from providing notice if the employee is prevented from doing so by military necessity, or if it is impossible or unreasonable under all circumstances to do so.<sup>300</sup> An employee does not need to provide notice to the employer of intent to return to work after completing uniformed service.<sup>301</sup> An employee's reemployment rights are still protected, even if the employee tells the employer before entering or completing uniformed service that she does not intend to seek reemployment after completing service.<sup>302</sup>

***What criteria must the employee meet to be eligible for reemployment after service in the uniformed services?***

In general, an employee who has been absent from a position due to service is eligible for reemployment if the employee meets the following criteria: (1) the employer has received advance notice of the employee's service; (2) the employee's service is for a cumulative period of five years or less; (3) the employee timely returns to work or applies for reemployment; and (4) the employee's separation or dismissal from service does not disqualify the employee.<sup>303</sup> However, new rules could allow a service member who has returned after five years or more to be eligible for reemployment if she has been on certain operations so contact your city attorney or local counsel if this situation arises.

***How long does an employee returning from service have to apply for reemployment?***

Returning service members have a set period of time in which to report back to work to preserve their USERRA reemployment rights. Service members who were in service for more than 180 days must submit an application for reemployment (written or verbal) within 90 days after completing service.<sup>304</sup> If the employee's service was for more than 30 days (but less than 181 days), the employee is required to submit an application for reemployment within 14 days after completing service, unless it is impossible or unreasonable for the employee to do so, in which case the employee must submit the application not later than the next full calendar day after it becomes possible to do so.<sup>305</sup> Service members gone less than 30 days must submit an application not later than the beginning of the first full, regularly scheduled work period after a period of eight hours for safe transportation.<sup>306</sup>

These reporting timelines are extended for service members who are hospitalized for, or convalescing from, an illness or injury incurred or aggravated during military service.<sup>307</sup> Those

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<sup>298</sup> *Id.* § 1002.85(a).

<sup>299</sup> *Id.* §1002.85(c).

<sup>300</sup> *Id.* § 1002.86.

<sup>301</sup> *Id.* § 1002.88.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* § 1002.32.

<sup>304</sup> *Id.* § 1002.115(c).

<sup>305</sup> *Id.* § 1002.115(b).

<sup>306</sup> *Id.* § 1002.115(a).

<sup>307</sup> *Id.* § 1002.116.

individuals have an additional two years from the date of completion of service to apply for reemployment.<sup>308</sup> This time can be extended to accommodate circumstances beyond the employee's control that make reporting impossible or unreasonable.<sup>309</sup>

***What reemployment rights does USERRA provide?***

If an employee meets the eligibility criteria for reemployment, an employer is required to promptly reinstate the employee when the employee returns from a period of uniformed service.<sup>310</sup> Prompt reemployment generally means as soon as practicable and, absent any unusual circumstances, must occur within two weeks of the employee's application for reemployment.<sup>311</sup>

Generally, an employee is entitled to reemployment in the position that the employee would have attained with reasonable certainty if not for the uniformed service, including the seniority, status, and rate of pay that the employee would have ordinarily attained in that position (known as an "escalator position").<sup>312</sup> The employee must be qualified for the reemployment position, and the employer is required to make reasonable efforts to help the employee become qualified to perform the duties of the position.<sup>313</sup>

Disabled employees have special rights with respect to the position in which they are reemployed after returning from uniformed service. Individuals who have a disability that was incurred in, or aggravated during, the period of service are entitled to the "escalator position."<sup>314</sup> An employer is required to make reasonable efforts to accommodate the disability and help the employee become qualified to perform the duties of the position.<sup>315</sup> If the employee is unable to perform the duties of the position after reasonable accommodation efforts by the employer, the employee must be reemployed in a position that the employee is able to perform and that is equivalent in seniority, status, and pay to the "escalator position."

***What protections does a reemployed service member have from being discharged from employment?***

USERRA protects employees who are reemployed after uniformed service from discharge by an employer. An employee whose period of service in the uniformed service was for more than 30 days (but less than 181 days) may not be discharged, except for cause, for 180 days after the employee's date of reemployment.<sup>316</sup> If an employee's period of service was for more than 180 days, an employer may not discharge an employee, except for cause, for one year after the employee's date of reemployment.<sup>317</sup> Discharge "for cause" includes discharge based on an employee's conduct or for other legitimate nondiscriminatory reasons,

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* § 1002.180.

<sup>311</sup> *Id.* § 1002.181.

<sup>312</sup> *Id.* §§ 1002.191; 1002.193.

<sup>313</sup> *Id.* § 1002.198.

<sup>314</sup> *Id.* § 1002.225.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* § 1002.247(a).

<sup>317</sup> *Id.* § 1002.247.

such as the elimination of an employee's position or laying off an employee.<sup>318</sup>  
***Is a city required to pay an employee who is serving in the uniformed services?***

While some employers may fully or partially pay employees performing service in the uniformed services, there is no requirement under USERRA for a city to pay an employee who is serving in the uniformed services.<sup>319</sup>

***How does USERRA protect health care benefits?***

USERRA does not require a city to establish a health plan or provide any particular health coverage.<sup>320</sup> If a city provides coverage under a health care plan, an employee who is performing service in the uniformed services is entitled to continued health care coverage (and coverage for dependents, if the health plan offers dependent coverage) for up to 24 months after the absence begins or for the period of military service, whichever is shorter.<sup>321</sup> Also, when an employee is reemployed, coverage generally must be reinstated without a waiting period or pre-existing condition exclusions.<sup>322</sup> For periods of up to 30 days of training or service, the city can require an employee to pay only the employee's share of the cost, if any, for coverage.<sup>323</sup> For longer tours, the city is permitted to charge the employee up to 102 percent of the entire premium.<sup>324</sup>

***Are employees who have family members in the military entitled to time off?***

On January 28, 2008, the United States Congress enacted House Resolution 4986, the National Defense Authorization Act of FY 2008 (NDAA), which grants family and temporary medical leave for certain employees who have relatives in the military.<sup>325</sup> This legislation amends the Family and Medical Leave Act (FMLA) to grant employees who are eligible for leave under the FMLA to 12 workweeks of leave during a twelve-month period because of any "qualifying exigency" arising out of the fact that the spouse, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces.<sup>326</sup> The statute also grants an FMLA-eligible employee who is the spouse, child, parent, or next of kin of a service member who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness to a total of 26 weeks of leave during a twelve-month period to care for the service member.<sup>327</sup> The U.S. Department of Labor has published proposed rules implementing this regulation.

***Does the state provide for any time off for members of the state military?***

Under Section 437.202 of the Government Code, an employee who is a member of the state military forces or the armed forces is entitled to a paid leave of absence of up to 15 working

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<sup>318</sup> *Id.* § 1002.248.

<sup>319</sup> *Id.* § 1002.151.

<sup>320</sup> *Id.* § 1002.164(b).

<sup>321</sup> *Id.* § 1002.164(a).

<sup>322</sup> *Id.* § 1002.168.

<sup>323</sup> *Id.* § 1002.166(a).

<sup>324</sup> *Id.* § 1002.166(b).

<sup>325</sup> H.R. 4986, 110th Cong. (2008).

<sup>326</sup> 29 U.S.C. § 2612(a).

<sup>327</sup> *Id.*

days for authorized training or duty.<sup>328</sup> State military forces include “the state military forces, a reserve component of the armed forces, or a member of a state or federally authorized Urban Search and Rescue Team.” These individuals must be paid and cannot be subject to lost time, loss of an efficiency rating, or a loss of vacation, personal, or sick leave. Also, a 2015 bill, H.B. 445, added a recordkeeping and notice requirement to the statute.<sup>329</sup> With the passage of H.B. 2486 in 2017, an employee who is a member of the Texas military forces, a reserve component of the armed forces, or of a state- or federally-authorized urban search and rescue team, and who is ordered to duty by proper authority, when relieved of duty, must be restored to the position that the employee held when ordered to duty.<sup>330</sup> However, this provision is limited to cities with five or more employees.

### ***Resources***

#### **Department of Labor:**

<https://www.dol.gov/vets/programs/userra/compliance.htm>

#### **USERRA Statute:**

<http://www.dol.gov/vets/usc/vpl/usc38.htm>

#### **USERRA Poster:**

[http://www.dol.gov/vets/programs/userra/USERRA\\_Federal.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf)

#### **Texas Workforce Commission:**

[http://www.twc.state.tx.us/news/efte/legal\\_issues\\_for\\_military\\_leave.html](http://www.twc.state.tx.us/news/efte/legal_issues_for_military_leave.html)

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<sup>328</sup> TEX. GOV'T CODE § 437.202; Tex. H.B. 445 (84<sup>th</sup> R.S. 2015) available at <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB00445F.htm>.

<sup>329</sup> Tex. H.B. 445 (84<sup>th</sup> R.S. 2015) available at <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB00445F.htm>.

<sup>330</sup> TEX. GOV'T CODE § 437.202; Tex. H.B. 2486 (85<sup>th</sup> R.S. 2017) available at <https://capitol.texas.gov/tlodocs/85R/billtext/html/HB02486F.htm>.

## CHAPTER 13—Employment and Open Government Laws

### *When can the city council talk about employment matters in executive session?*

The Open Meetings Act requires that meetings of governmental bodies be properly posted and open to the public.<sup>331</sup> However, the Act provides some exceptions that allow the governmental body to go into executive session, sometimes referred to as closed session, to discuss certain sensitive or confidential matters. One of the exceptions allows a governmental body to meet in executive session to discuss an individual officer or employee if certain requirements are met:

PERSONNEL MATTERS; CLOSED MEETING. (a) This chapter does not require a governmental body to conduct an open meeting:

(1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or

(2) to hear a complaint or charge against an officer or employee.

(a) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing.<sup>332</sup>

### *What issues can be discussed?*

The discussion must be about an individual employee's or officer's appointment, employment, evaluation, reassignment, duties, discipline, or dismissal or to hear a complaint or charge against the employee.

### *What if the employee does not want the discussion to take place in executive session?*

The city council may not meet in executive session to discuss an individual employee if that employee requests that the governmental body hold the discussion in open session.

### *May the city council discuss giving raises to all city employees or all employees in one department?*

The city may not discuss an entire department or salary increases to multiple or all employees in executive session because the discussion would not be about an individual employee.<sup>333</sup>

### *What should be on the agenda if the city is going to discuss an employee in executive session?*

Just like any other notice, the city needs to put enough information in the notice so that interested citizens will know the subject to be discussed. The more senior or executive the employee, the more information should be on the agenda.<sup>334</sup> The agenda posting should

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<sup>331</sup> TEX. GOV'T CODE § 551.041.

<sup>332</sup> Id. § 551.074.

<sup>333</sup> Tex. Att'y Gen. Op. No. H-496 (1975).

<sup>334</sup> *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).

contain the name or title of the individual and that the individual's employment, duties, salary, or other possible topics will be discussed with possible action. Correct notice is important because, if a city terminates an employee in violation of the Act, the city could be liable for wages between the time the employee was incorrectly terminated and the employee is correctly terminated.<sup>335</sup> The same potential for liability for wages would occur if the city discussed an employee's termination in executive session in defiance of a request of the employee to hold the meeting in open session.

### ***What information in a personnel file is confidential under the Public Information Act?***

The premise of the Public Information Act (PIA) is that all information “collected, assembled, or maintained” by or for a city is public information, unless a statutory exception to disclosure applies.<sup>336</sup> Most information—such as salary, evaluations, and reprimands—is public information. However, a number of exceptions to disclosure apply to documents that may be found in an employee's personnel file. For example:

- A city is prohibited from disclosing the social security number of a living person. A document that is otherwise public information, and which contains an employee's social security number, may be released after redacting the social security number. A city is not required to obtain an attorney general's opinion prior to redacting an employee's social security number.<sup>337</sup>
- A current or former employee's home address, home telephone number, emergency contact information, social security number, or information regarding the employee's family members may not be disclosed if the employee has requested that the city not reveal this information.<sup>338</sup> Cities are required to ask each employee, within fourteen days of the employee's date of hire, appointment, or ending of service with the city, whether he or she wants this information to be treated confidentially.<sup>339</sup>
- In a very limited exception, the PIA also allows a city to withhold information in an employee's personnel file if disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.”<sup>340</sup> This exception applies only to information that “contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public.”<sup>341</sup> This information typically includes personal financial information, certain medical information, or information relating to a sexual harassment investigation.

Certain tax documents and documents relating to consultation with a physician

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<sup>335</sup> *Ferris v. Tex. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App.—Austin 1991, writ denied).

<sup>336</sup> TEX. GOV'T CODE § 552.002(a).

<sup>337</sup> *Id.* § 552.147

<sup>338</sup> *Id.* §§ 552.024 and 552.117.

<sup>339</sup> *Id.* § 552.024 (b).

<sup>340</sup> *Id.* § 552.102(a).

<sup>341</sup> *Hubert v. Harte-Hanks Tex. Newspapers Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 685 (Tex. 1976)).

also would be considered confidential and must be withheld from disclosure.<sup>342</sup>

(Note: In a civil service city, different rules may apply to personnel files). Senator Kirk Watson passed a bill in 2015 which would make it a crime to release on a publicly accessible website the address or phone number of a public official or employee if the purpose is to bring harm to the public official or employee, or his or her family.<sup>343</sup>

### ***Can a city councilmember or mayor review an employee's personnel file?***

A councilmember or mayor has an inherent right to access an employee's personnel file if the records are requested in the individual's official capacity.<sup>344</sup> It is recommended that a city adopt a written policy regarding how a councilmember or city official can access an employee's personnel file and the protection of the information. A councilmember could be criminally or civilly liable for releasing confidential information in a personnel file to the public.

### ***Are there different rules for law enforcement officers?***

A peace officer's home address, home telephone number, and any information about the peace officer's family members is automatically excepted from disclosure, even if the peace officer does not request that the city to keep this information confidential.<sup>345</sup> Section 552.1175 gives peace officers the opportunity to withhold personal information (similar to information that is listed in Section 552.117) that is contained in records, other than employment records, maintained by a city or other governmental body.<sup>346</sup> However, to invoke the protections of Section 552.1175, a peace officer must notify the city.

### ***May an employee have access to his personnel file?***

Section 552.023 of the Government Code provides that a person, or the person's authorized representative, has a special right of access to information that relates to the person that would otherwise be withheld from disclosure to protect the person's privacy interests. However, if the city seeks to withhold information in order to protect the interests of the city or of law enforcement, an employee may not have access under Section 552.023. The city should consult with its city attorney or local counsel if a current or former employee requests access or copies to his or her personnel file.

### ***Is an employee's information related to his or her same-sex spouse open under the Texas Public Information Act?***

It depends. Section 552.1175 of the Government Code provides that a peace officer's personal information, including whether the officer has a spouse or other family members, is confidential and may not be released. Also, Section 552.024 allows an employee or official or former employee or official to elect in writing to keep his or her family member

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<sup>342</sup> TEX. OCC. CODE § 159.002(b); 42 U.S.C. § 12112; 26 U.S.C. § 6103(a).

<sup>343</sup> Tex. S.B. 923 (84<sup>th</sup> R.S. 2015) available at <http://www.capitol.state.tx.us/tlodocs/84R/billtext/html/SB00923F.htm>.

<sup>344</sup> Tex. Att'y Gen. Op. No. JM-119 (1983).

<sup>345</sup> TEX. GOV'T CODE § 552.117(a).

<sup>346</sup> *Id.* § 552.1175.

information, including that of their spouses, confidential. These provisions now extend to information related to a same-sex spouse.

### *Resources*

**Open Meetings Act Statute:**

<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.551.htm>

**Public Information Act Statute:**

<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.552.htm>

**Attorney General Handbooks:**

**Public Information Act**

[https://texasattorneygeneral.gov/files/og/PIA\\_handbook\\_2018.pdf](https://texasattorneygeneral.gov/files/og/PIA_handbook_2018.pdf)

**Open Meetings Act**

[https://texasattorneygeneral.gov/files/og/OMA\\_handbook\\_2018.pdf](https://texasattorneygeneral.gov/files/og/OMA_handbook_2018.pdf)

**Open Government Training**

<https://www.texasattorneygeneral.gov/og/open-government-training>

**Open Records Decisions**

<https://www.texasattorneygeneral.gov/og/open-records-decisions-ords>

## CHAPTER 14—Benefits

### *What is the federal law requires the provision of health benefits?*

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (Act) frequently referred to as Obamacare. The law enacts various health coverage reforms, most of which will be implemented by 2014. The stated purposes of the Act are:

1. To decrease the cost of health care in the United States.
2. To improve the quality of health care in the United States.
3. To make health care more accessible in the United States, particularly to the currently uninsured.

### *How does the Act ensure that each person will be covered by insurance?*

The Act implements new programs and regulations to ensure that every person has coverage. The major programs and regulations include: (1) the mandatory creation of health benefit exchanges; (2) coverage for pre-existing conditions; (3) extended young adult coverage; (4) the use of consumer operated and oriented plans to provide coverage; (4) improved incentives for small businesses to provide health coverage to their employees; and (5) an expansion of Medicaid. A brief overview of each program follows.

#### Health Benefit Exchanges

The Act requires individual states to develop their own system of “health benefit exchanges.” (Some states have opted out of establishing their own exchange(s), so the federal government has implemented exchange programs in those states—the case in Texas.) Exchanges are organizations (either governmental or non-profit) that are established to develop a more organized, efficient, and competitive market for buying health insurance.

Exchanges are available for both individuals and small-businesses (those with up to 100 employees) as a tool to compare rates and benefits, and to better inform consumers of the plans available to them from both public and private providers.

Beginning in 2014, the federal government opened an exchange for individuals and small businesses as Texas declined to open its own exchange.

<https://www.healthcare.gov/marketplace/individual/>

#### Pre-Existing Conditions

The Act’s pre-existing condition prohibition makes health care available to uninsured individuals who have been denied health insurance due to a pre-existing condition. The Act prohibits all providers from discriminating against all consumers with pre-existing conditions.<sup>347</sup>

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<sup>347</sup> 42 U.S.C. § 18001.

### Young Adult Coverage

The Act mandates that children be allowed to stay on a parent's health care plan until the age of 26. Factors such as being married, not living with their parents, attending school, not being financially dependent on their parents, or being eligible to enroll in their employer's plan does not affect a child's eligibility.<sup>348</sup>

### Improved Options for Small Businesses

The Act provides that small businesses with up to 25 employees, that pay average annual wages below \$50,000, and that provide health coverage may qualify for a small business tax credit of up to 35 percent (up to 25 percent for non-profits) to offset the cost of providing coverage.

Additionally, most small businesses with fewer than 100 employees can shop for insurance in the state exchanges, which are predicted to provide more choices and lower prices. Employers with fewer than 50 employees are exempt from "new employer responsibility policies." These policies require, among other things, that employers with 50 or more employees who work at least 30 hours per week must provide their employees insurance or be subject to certain penalties.

Also, employers with fewer than 50 employees also don't have to pay a penalty if their employees get tax credits through an exchange.

### ***Will there be a tax on an employer, including a city, which refuses to provide coverage to its employees?***

The Act does not mandate that employers provide health coverage. However, it does impose taxes in certain cases on those with 50 or more employees that refuse to do so.<sup>349</sup> Employers with fewer than 50 employees are not subject to a tax if the tax would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

Larger employers (generally those with over 100 employees) that do not provide coverage to their employees, or that provide coverage that is unaffordable, will be assessed a tax if any one of their employees receive a tax credit when buying insurance on their own in an exchange. The employer tax is \$2,000 multiplied by the number of workers in the business in excess of 30 workers (with the penalty amount increasing over time).

Larger employers that offer coverage can be subject to the tax as well. Employers who provide coverage that does not on average cover at least 60 percent of the cost of covered services for a "typical population" (or the premium for the coverage exceeds 9.5 percent of an employee's income) and has employees that receive a tax credit will be required to pay a penalty of \$3,000 up to a maximum of \$2,000 times the number of workers in excess of 30 workers. ("Typical population" means the medical services generally required by average citizens without any pre-existing conditions or additional specialty medical services.)<sup>350</sup>

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<sup>348</sup> 42 U.S.C. § 300gg-14.

<sup>349</sup> 26 U.S.C. § 4980H.

<sup>350</sup> <https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions>

The federal Department of the Treasury and the Internal Revenue Service have posted additional information online: <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>

City officials in a city with 50 or more full time employees should use the delay to continue to consult with local legal counsel on the issue.

***How will the government track who does and does not have coverage?***

Coverage is tracked through reports that are required to be submitted annually along with IRS tax filings.<sup>351</sup>

***Who will be responsible for reporting coverage?***

Every entity that provides coverage for another individual is responsible for reporting that information with its tax return.<sup>352</sup>

Individuals who obtain their own coverage will be responsible for submitting proof of coverage to the IRS. Health coverage providers will provide the proper proof of insurance documentation to be submitted.

For individuals who obtain coverage through their employer, the employer will complete the required reporting for the employee to IRS.

***If my city already provides me health coverage, how will the law affect me?***

Nothing in the law appears to require cities to dramatically change the ways in which they currently provide health coverage to their employees. Cities should be able to continue to self-insure, self-fund and/or participate in risk pools, such as the TML Intergovernmental Employee Benefits Pool, so long as those entities meet certain conditions.

Most employers that currently provide health coverage will probably continue to do so. In those cases, the Act's largest impact will be on premiums. Some believe that the Act will eventually cause premiums to decrease, while others believe the opposite.

If an employer decides to stop providing coverage, its employees will have to seek coverage elsewhere. The cost of such coverage under the Act's provisions can't currently be calculated. However, each city needs to provide notice of Affordable Care Act healthcare exchanges whether the employee is eligible for health benefits or not.<sup>353</sup>

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<sup>351</sup> 26 U.S.C. § 6055; <http://www.irs.gov/Affordable-Care-Act/Employers/Information-Reporting-by-Applicable-Large-Employers>.

<sup>352</sup> *Id.*

<sup>353</sup> <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>

### ***What is the Consolidated Omnibus Budget Reconciliation Act?***

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a health benefit program enacted by the federal government in 1986.<sup>354</sup> COBRA allows an employee to continue to receive employer-provided health benefits at the expense of the employee after the employee becomes ineligible for coverage under the employer's personnel policies.

### ***Do cities have to participate?***

COBRA covers all group health plans maintained by government entities, including cities, if the city employs twenty or more full time equivalent employees.<sup>355</sup> If a city provides health coverage to its employees, then the city must follow COBRA and allow an employee to continue coverage under its plan if the employee elects to do so. Eligible health coverage includes group health plans that are medical care and may include: hospital care, physician care, surgery, prescription drugs, and dental and vision care. A city that does not already offer health care coverage to its employees or their dependents does not have to participate.

### ***When would an employee be offered continued health benefits under COBRA?***

Coverage must be offered to "qualified beneficiaries." A qualified beneficiary is an individual who was covered by the city's group health plan the day before a "qualifying event" occurred and who is either an employee, a spouse of an employee, a former spouse of an employee, or an employee's dependent child.

### ***What is a qualifying event?***

A "qualifying event" is an event that causes an individual to lose group health coverage. A qualifying event could include the death of a covered employee, termination of an employee for any reason other than "gross misconduct," reduction in the hours of a covered employee's employment with the city, divorce or legal separation of a covered employee and spouse, or a child's loss of dependent status.<sup>356</sup>

### ***If a qualifying event occurs, what does the city have to do?***

If a city provides group health coverage, and an individual has certain qualifying events that may entitle the individual to continuation of health coverage under COBRA, the city must inform its health benefit plan administrator of the qualifying event. Some cities administer their own COBRA continuation coverage, while others have their health benefit provider administer their COBRA coverage. If a city administers its own COBRA coverage, the city would generally inform its benefits plan of the qualifying event, and then administer the coverage under federal law. If a city has its health benefits plan administer its COBRA coverage, the health plan is informed of the qualifying event by the city.

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<sup>354</sup> 29 U.S.C. § 1161 *et seq.*; 42 U.S.C. § 300bb-1 *et seq.*

<sup>355</sup> 42 U.S.C. § 300bb-1 *et seq.*

<sup>356</sup> 42 U.S.C. § 300bb-3.

After certain types of qualifying events, such as termination of the employee, reduction in hours of the employee, or the death of an employee, a city has thirty days to give notice to the administrator. However, for other qualifying events, such as divorce, legal separation, or a child's loss of dependent status under the plan, the employee is the one responsible for informing the COBRA benefits administrator.

If the city receives notice of an employee's qualifying event, it should work with the employee to give notice to the appropriate administrator, even if notice of the qualifying event triggering the coverage would ordinarily be the employee's responsibility. After the COBRA benefits plan administrator has notice of the event, the administrator is responsible for providing an election notice and other documentation to the employee in question. The administrator can also deny coverage for certain reasons, but must give notice to the employee in question. If the city has questions regarding who administers its COBRA coverage, it should contact its health benefits plan and its city attorney.<sup>357</sup>

***Does the city still have to offer COBRA coverage if an employee is terminated for cause?***

An employee and his dependents will generally be eligible for continuation of health coverage under COBRA even if the employee is fired for cause. However, an employee who is fired for "gross misconduct" would not be eligible for COBRA coverage or the COBRA subsidy described below. Unfortunately, the term "gross misconduct" is not specifically defined in COBRA or in regulations that implement COBRA. Therefore, whether a fired employee has engaged in gross misconduct will depend on the specific facts and circumstances. Generally, it can be assumed that being fired for most ordinary reasons, such as excessive absences or generally poor performance, does not amount to "gross misconduct." But "gross misconduct" may include illegal activities such as stealing, embezzling, or other mishandling of employer funds or property; violence and threats of violence that are related to the workplace; or drunk driving on the job.<sup>358</sup> If the employee is fired for "gross misconduct," the city would not be required to provide the employee and the employee's dependents continuation coverage under COBRA. The "gross misconduct" exception to COBRA continuation coverage would not apply to the situation where the employee is allowed to resign rather than be fired.<sup>359</sup>

***Does a city have to give an employee COBRA coverage if the employee quits?***

Quitting, retiring, being fired, or being laid off all count as qualifying events for COBRA continuation coverage.<sup>360</sup>

***Does a city have to give an employee COBRA coverage if the employee chooses to go part-time or has reduced hours due to an injury or disability?***

An employee whose hours are reduced and would lose his health coverage under the city's plan, whether because the employee chooses to go part time or the city requires it, would be

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<sup>357</sup> 42 U.S.C. § 300bb-6.

<sup>358</sup> See, e.g., *Collins v. Aggreko, Inc.*, 884 F. Supp. 450 (D. Utah 1995); *Burke v. Am. Stores Empl. Benefit Plan*, 818 F. Supp. 1131, 1136 (N.D. Ill. 1993).

<sup>359</sup> 42 U.S.C. § 300bb-3.

<sup>360</sup> 42 U.S.C. § 300bb-3.

eligible for COBRA continuation coverage. This includes the situation where the employee is absent from work due to disability, a temporary layoff, extended leave, or for any other reason besides Family Medical Leave Act (FMLA) leave. Keep in mind, that some “part time” employees who work less than 40 but at least 30 hours a week, must be offered health benefits under the Patient Protection and Affordable Care Act. Please see the Affordable Care Act chapter of this book for more information.

***How are health benefits handled if the employee is on FMLA leave and becomes ineligible for health coverage under a city’s plan?***

Usually, a qualifying event occurs if an employee’s absence from work would cause her and her family to lose coverage under the city’s group health plan. That rule does not apply, however, when employees take leave that is protected under the FMLA. If an employee is eligible for FMLA leave and takes the leave, the city is required to maintain the employee’s health insurance under the same conditions as before the leave (including any arrangement regarding payment of premiums).<sup>361</sup> This means that the city must continue to pay whatever amount of premium it paid before the individual went on leave and the individual must pay whatever amount he was required to pay before he went on FMLA leave. However, if an employee stays on leave past the twelve weeks of leave mandated by the FMLA for certain cities (generally those with more than 50 full-time employees), the extended absence would likely be a qualifying event that would require continuation coverage under COBRA.

***Who pays for the coverage?***

Who pays for the coverage depends on when the individual became eligible for continuation coverage and why the individual became eligible. In most cases, the city can choose to pay for part or all of the COBRA continuation coverage, or can require the individual to pay for the coverage. The maximum amount charged to these individuals cannot exceed 102 percent of the cost to the plan for coverage of similarly-situated individuals who are still eligible for coverage. The additional two percent can be charged as administrative costs. The individual can pay the premium on a monthly basis if they desire, and will either reimburse the city or pay the health benefits plan (depending on how the city decides to administer COBRA continuation coverage).<sup>362</sup> Also, whomever is administering the COBRA continuation coverage must give the individual at least 45 days after the individual elects to have the coverage to pay the first premium payment. But the plan can terminate coverage if the individual does not pay within the 45 day time frame.

***What benefits must be provided to same-sex couples?***

The Supreme Court of the United States has held that the government must treat same-sex marriages the same as all other marriages.<sup>363</sup> The case was brought by same-sex partners who wished to be married or have their marriages recognized in states that had defined marriage (either by statute or state constitution) as a union between one man and one woman. The partners argued that the state laws defining marriage as between one man and one woman

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<sup>361</sup> 29 C.F.R. § 825.209.

<sup>362</sup> 42 U.S.C. § 300bb-2.

<sup>363</sup> *Obergefell v. Hodges*, 14-556 (2015) available at [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by denying them their right to marry.

The Court held that the Fourteenth Amendment requires that each state license or recognize a marriage between any two people of the same sex the same as it recognizes and licenses marriages between two individuals of the opposite sex. In Texas, this holding means that the Texas Constitution’s definition of marriage being only between a man and a woman is unconstitutional.

***How does the Court’s opinion affect current employee health and other benefits?***

Any benefit required by state or federal law, as well as any benefit voluntarily offered by a city, that is extended to a spouse, must now also be extended to a same-sex spouse. Here are some examples:

|                          |   |   |  |
|--------------------------|---|---|--|
| Family Medical Leave Act | 29 U.S.C. § 2601; 29 C.F.R. § 825.102   | Provides unpaid leave to employees when their spouses have a serious medical condition and already defined spouse as the individual to whom someone legally married to based on where the marriage took place, not necessarily where the spouses reside   | <a href="http://www.dol.gov">www.dol.gov</a> |
| Family Medical Leave Act | 29 C.F.R. § 825.127(c)  | Unpaid leave up to 26 weeks to care for a spouse who has a serious illness or injury suffered in the military line of duty  | <a href="http://www.dol.gov">www.dol.gov</a> |
| Retirement               | Government Code Ch. 804; TMRS Ch. 854; city agreement with retirement carrier | Requires spousal consent in choosing retirement options that do not include spouse  | <a href="http://www.tmr.org">www.tmr.org</a> |
| Health Benefits          | Personnel Policy: Agreement with vendor                                       | If a personnel policy allows for health benefits for spouses, those must now be provided to same-sex spouses; if an insurance or health benefits coverage agreement provides for spousal coverage, that coverage must now be provided to same-sex spouses |  |

***Does the spouse of a former or deceased employee have the right to receive any particular benefits or notice?***

State and federal laws provide a variety of benefits to spouses, especially when an employee is killed in the course and scope of employment. Also, any benefits in a personnel handbook or collective bargaining or meet-and-confer agreement that are offered to the spouse of a former or deceased employee must also be offered to a same-sex spouse. Here are some examples:

|   |  |   |   |
|---|--|---|---|
| Deceased First Responders Monetary Benefits | Texas Labor Code §408.183 (b-1)                              | H.B. 2119 by Kacal/West, effective September 1, 2017, provides that eligibility for lifetime death benefits for the remarried spouse of a first responder killed in the line of duty applies regardless of the date on which the death of the first responder occurred. | <a href="http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.408.htm#408.183">http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.408.htm#408.183</a>         |
| Deceased Peace Officers Monetary Benefits   | Texas Constitution Sec. 51-d; Government Code Chs. 614 & 615 | Allows a spouse of a peace officer killed in the line of duty to receive monetary benefits, educational benefits, health benefits, and to purchase the officer's duty firearm   | <a href="http://www.ers.state.tx.us/employees/life-events/chapter615/">http://www.ers.state.tx.us/employees/life-events/chapter615/</a> ; Employment Law Manual |
| COBRA                                       | 29 U.S.C. §§ 1161-1169                                       | Requires that employer offer an extension of health benefits, and notification of the availability of any extension, to employees and their spouses when the employee loses employer health benefit coverage for certain reasons  | Employment Law Manual; <a href="http://www.dol.gov/ebsa/faqs/faq-consumer-cobra.html">http://www.dol.gov/ebsa/faqs/faq-consumer-cobra.html</a>                  |
| Last Paycheck                               | Texas Estates Code § 453.004                                 | Requires that an employer give a final paycheck of a deceased employee to a surviving spouse who presents an affidavit  | <a href="http://www.twc.state.tx.us">www.twc.state.tx.us</a>  |
| Unemployment                                | Texas Labor Code Chs. 204 and 207                            | The reason an employee terminates employment, such as to care for a spouse or move for a spouse's job, affects whether he or she is entitled to unemployment benefits; unpaid FMLA leave may be eligible <sup>364</sup>   | <a href="http://www.twc.state.tx.us/jobseekers/eligibility-benefit-amounts">http://www.twc.state.tx.us/jobseekers/eligibility-benefit-amounts</a>               |

<sup>364</sup> *Tex. Workforce Comm'n v. Wichita County*, No. 17-0130 (Tex. May 25, 2018).

|                      |                          |   |  |
|----------------------|--------------------------|---|--|
| Workers Compensation | Texas Labor Code Ch. 408 | Allows for death benefits for deceased employee's spouse; allows a spouse to sue on behalf of deceased employee who died in the course or scope of employment | <a href="http://www.twc.state.tx.us">www.twc.state.tx.us</a> |
|----------------------|--------------------------|---|--|

***Is a city required to provide any benefits to employees or their spouses?***

Generally, no. For health benefits, the Patient Protection and Affordable Care Act (PPACA), often referred to as “Obamacare”, assesses penalties against certain large employers who do not offer health benefits to their full-time employees or their dependents.<sup>365</sup> However, the definition in PPACA of “dependent” does not currently include a spouse.<sup>366</sup> Thus, a large employer would have to offer health benefits to its full time employees and their dependent children, but would not have to offer coverage to same-sex spouses. However, if the city does offer spousal benefits, same-sex spouses must also be offered the same benefits. For more information on PPACA please go here:

<http://www.tml.org/p/2012%20August%20Affordable%20Care%20Act%20CE.pdf>.

A city is not required to provide paid leave or other benefits to most employees, but must follow its own personnel policies, collective bargaining and meet-and-confer agreements, civil service rules, benefits vendor agreements, such as those with health benefits providers and retirement providers, and ordinances. Many vendor agreements include provisions for the treatment of spouses. For example, many health benefit carriers require the employer to offer benefits to spouses. Some statutes provide special benefits to peace officers and fire fighters, but these benefits do not typically extend to spouses.<sup>367</sup> (Benefits required for injured or deceased peace officers and their spouses are listed in the question above.)

***What are the consequences if a city does not treat same-sex spouse the same as other spouses?***

The consequences will depend on each law, but would generally be the same if the city does not correctly apply a law to a same-sex married couple. For example, the Family Medical Leave Act or COBRA laws authorize litigation and sometimes monetary damages if the law is not followed. Violations of these and similar laws may occur if the city does not provide a benefit to a same- sex spouse. Also, the city could be sued for violations of the Fourteenth Amendment of the U.S. Constitution, which was the basis of the holding in *Obergefell v. Hodges*.

***Does the health coverage offered have to be the same as current employees' coverage?***

The continuation coverage must be identical to the coverage that is currently available under the plan to similarly-situated individuals who are covered under the city's group health plan as employees or employees' dependents. Usually this will be the same coverage the individual had immediately before losing coverage with the city. The coverage must offer the same benefits, choices, and services as what current employees and dependents are

<sup>365</sup> 26 U.S.C. § 4980H.

<sup>366</sup> 26 U.S.C. § 152.

<sup>367</sup> See, e.g., TEX. LOC. GOV'T CODE § 142.0013.

receiving. However, the individual is also subject to the same rules and limits that would apply to current employees or dependents, such as co-payment requirements, deductibles, and coverage limits. Also, any changes made to the plan that would apply to current employees and their dependents would also apply to any with COBRA continuation coverage.<sup>368</sup>

### ***How long does coverage have to continue?***

Coverage lasts for a limited period of either eighteen or thirty-six months. The period for which continuation coverage must be available depends on why the individual lost her coverage in the beginning. However, the city and its health plan may provide longer periods of coverage beyond the maximum period required by law.

If the reason an individual is eligible for COBRA coverage is the end of employment or reduction of employee's hours, the individual and his dependents are eligible for up to eighteen months of coverage. For any other "qualifying event," the individual and the individual's dependents must be offered a maximum of thirty-six months of continuation coverage.

In addition, coverage may be extended if another qualifying event occurs while the individual is already on COBRA continuation coverage.<sup>369</sup>

### ***Are there any state laws that require continuation of health care coverage?***

Besides a city's possible personnel policies, contracts, retirement benefits, civil service rules, or collective bargaining agreements, there is also an additional health coverage requirement for survivors of a police officer killed in the line of duty. State law requires the city to pay the same amount for a surviving spouse's health insurance as it pays for current employees.<sup>370</sup> If a city pays 100% of current employees' health insurance, then the city would have to pay 100% for the surviving spouse if she meets the requirements of Chapter 615 of the Government Code. This law also applies to any dependent children under the age of 18 who meet the other criteria of a survivor. This rule would now also apply to same-sex spouses. Please see the chapter on same sex benefits for more information.

Chapter 175 of the Local Government Code also provides continuation of coverage for retirees in cities over 25,000 in population who are not eligible for group health benefits coverage through another employer. To receive continuation coverage under this chapter the retiree must inform the city of the individual's intent to continue coverage on the day of the individual's retirement or before.<sup>371</sup> Cities over 25,000 must provide written notice to retirees of his right to purchase continued coverage from the city.<sup>372</sup>

## ***Resources***

### **Department of Labor:**

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<sup>368</sup> 42 U.S.C. § 300bb-2.

<sup>369</sup> 42 U.S.C. § 300bb-2.

<sup>370</sup> TEX. GOV'T CODE §§ 615.071-.123.

<sup>371</sup> TEX. LOC. GOV'T CODE § 175.002.

<sup>372</sup> *Id.* § 175.005.

Basic Information: <http://www.dol.gov/dol/topic/health-plans/cobra.htm>

**U.S. Department of Health & Human Services:**

<http://www.healthcare.gov>

**Treasury Department Fact Sheet:**

<http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf>

**IRS information:**

<http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>

**CHAPTER 15—Employment Laws that May Apply to Your City**

*Federal Employment Laws*

| <b>Statute</b>   | <b>Minimum Number of Employees</b> | <b>What is it?</b>   |
|--|------------------------------------|--|
| <p><b>Title VII of the Civil Rights Act of 1964 – Title VII</b><br/>(42 U.S.C. §§ 2000e-2; 2000e-3 )</p> | <p>15 or more employees</p>        | <ul style="list-style-type: none"> <li>• Prohibits employment discrimination based on race, color, national origin, religion, or sex (includes Pregnancy, sex stereotyping, and sexual harassment).</li> <li>• Prohibits retaliation against an employee or applicant who opposes an unlawful employment action under Title VII, files a charge, testifies, assists or participates in an investigation, proceeding, or litigation under Title VII.</li> </ul>   |
| <p><b>Title I of the Americans With Disabilities Act - ADA</b><br/>(42 U.S.C. § 12112)</p>               | <p>15 or more employees</p>        | <ul style="list-style-type: none"> <li>• Prohibits employment discrimination against a qualified individual with a disability, and requires the employer to provide such employee with a reasonable accommodation unless doing so would result in an undue hardship to the city.</li> <li>• Prohibits retaliation against an individual for opposing employment practices that discriminate based on disability or for filing a charge, testifying, assisting or participating in an investigation, proceeding or litigation under the ADA.</li> </ul> |
| <p><b>Equal Pay Act – EPA</b><br/>(29 U.S.C. § 206 (d))</p>  | <p>All</p>                         | <ul style="list-style-type: none"> <li>• Prohibits pay differentials based on gender for employees working in substantially equal jobs requiring equal skill, effort, and responsibility under similar working conditions.</li> </ul>  |

| Statute  | Minimum Number of Employees | What is it?   |
|--|-----------------------------|---|
| <b>Fair Labor Standards Act – FLSA</b><br>(29 U.S.C. § 201 et seq.)                      | All                         | <ul style="list-style-type: none"> <li>• Establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full- time or part-time workers.</li> <li>• Prohibits a city from retaliating against any employee because the employee has filed any complaint, instituted or caused to be instituted any proceeding under or related to the FLSA, or has testified or is about to testify in any such proceeding.</li> </ul> |
| <b>Age Discrimination in Employment Act - ADEA</b><br>(29 U.S.C. § 621)                  | 20 or more employees        | <ul style="list-style-type: none"> <li>• Protects individuals (employee or applicant) who are 40 years or older from employment discrimination based on age.</li> <li>• Prohibits retaliation against an individual who opposes employment practices that discriminate based on age, or who files a charge, testifies, assists or participates in an investigation, proceeding, or litigation under the ADEA.</li> </ul>                                |
| <b>Section 1981 of the Civil Rights Act of 1866 – Section 1981</b><br>(42 U.S.C. § 1981) | All                         | <ul style="list-style-type: none"> <li>• Prohibits racial and ethnic bias in employment.</li> </ul>   |

| Statute   | Minimum Number of Employees | What is it?  |
|---|-----------------------------|--|
| <p><b>Uniformed Services Employment and Reemployment Rights Act – USERRA</b><br/>(38 U.S.C. § 4311 et seq.)</p> | <p>All</p>                  | <ul style="list-style-type: none"> <li>• Prohibits a city from denying any benefit of employment on the basis of an individual’s membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.</li> <br/> <li>• Prohibits retaliation against any person because such person has taken an action to enforce a right under USERRA, has testified or made a statement in connection with any proceeding under USERRA, has assisted or otherwise participated in an investigation under USERRA, or has exercised a right under USERRA (applies to any person regardless of whether a person has served in the uniformed services).</li> </ul> |

| Statute   | Minimum Number of Employees  | What is it?   |
|---|--|---|
| <p><b>Family Medical Leave Act – FMLA</b><br/>(29 U.S.C. § 2601 <i>et seq.</i>)</p> | <p>All cities provide notice; Only eligible employees are given benefits</p> | <ul style="list-style-type: none"> <li>• Requires an employer to grant an eligible employee (an employee of a city that has more than 50 employees who has been employed by the city for at least 12 months and has worked at least 1,250 hours during the last 12-month period immediately preceding the commencement of leave) up to 12 work-weeks of unpaid leave during a 12-month period for certain family and medical reasons (birth of a child, to care for an employee’s newborn child; placement of a child with the employee for adoption or foster care; to care for an employee’s family member who has a serious health condition; and for the employee’s own serious health condition).</li> <li>• Requires an employer to provide special leave benefits for uniformed military and their families.</li> <li>• Prohibits an employer from interfering, restraining, or denying the exercise of an employee’s right to take leave under the FMLA.</li> <li>• Prohibits an employer from retaliating against an employee who opposes practices made unlawful by the FMLA (applies to all employees even if not eligible for FMLA).</li> <li>• Requires an employee to be restored to the same position the employee held before taking leave or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.</li> </ul> |

| Statute  | Minimum Number of Employees | What is it?  |
|--|-----------------------------|--|
| <b>Immigration Reform and Control Act of 1986 – IRCA</b><br>(8 U.S.C. § 1324b) | Four                        | <ul style="list-style-type: none"> <li>• Prohibits employment discrimination against protected individuals (U.S. citizens, permanent residents, temporary residents, refugees, or asylees) on the basis of national origin or because of an individual’s citizenship status.</li> <li>• Requires all employers (regardless of size) to verify and keep records of work-authorization documents.</li> </ul> |
| <b>Service on Grand jury</b><br>(29 U.S.C. § 1875)                             | All                         | <ul style="list-style-type: none"> <li>• Prohibits an employer from discharging, threatening to discharge, intimidating, or coercing any employee because of the employee’s service on a petit or grand jury.</li> </ul>   |
| <b>Workplace Safety</b><br>(29 USC § 3660(c))                                  | All                         | <ul style="list-style-type: none"> <li>• Prohibits an employer from discharging an employee because the employee has filed a complaint or instituted or caused to be instituted any proceeding as to violations of safe workplace conditions.</li> </ul>   |

| Statute  | Minimum Number of Employees  | What is it?  |
|--|--|--|
| <p><b>Consolidated Omnibus Budget Reconciliation Act – COBRA</b><br/>(42 U.S.C. § 300bb-5)</p>   | <p>Applies if the City employed more than 20 employees in a typical business day during the preceding calendar year (includes full-time and part-time employees)</p> | <ul style="list-style-type: none"> <li>• Requires continuation coverage of health benefits to be offered to covered employees, their spouses, former spouses, and dependent children when certain specific events occur (death of a covered employee; termination or reduction in hours of a covered employee’s employment for reasons other than gross misconduct; divorce or legal separation from a covered employee; a covered employee becoming entitled to Medicare; and the child’s loss of dependent status under the health plan).</li> <li>• Special provisions under the Stimulus Bill now require employers to pay a portion of the COBRA health benefits for certain employees who have left their employment. The city’s contribution to these health benefits is repaid by the government.</li> </ul> |
| <p><b>Patient Protection and Affordable Care Act (commonly referred to as “health reform” or “Obamacare”)</b><br/>(42 U.S.C. §§ 18001-18121; 26 U.S.C. §§ 6055-6056)</p> | <p>Affects all health insurance and provides mandates to employers with fifty or more employees.</p>   | <ul style="list-style-type: none"> <li>• Penalizes any city employer that has 50 or more employees but does not provide essential health benefits to its full time (30 hours a week or more) employees.</li> </ul>   |

*Texas Employment Laws*

| Employment Law   | Minimum Number of Employees                           | What is it?  |
|--|---|--|
| <b>Municipal Civil Service for Firefighters and Police Officers</b> (TEX. LOC. GOV'T CODE ch. 143) | Police, fire; cities with 10,00 in population or more | <ul style="list-style-type: none"> <li>• Procedure and rules for establishing and maintaining civil service rules.</li> </ul>  |
| <b>Fire and Police Employee Relations: Collective Bargaining</b> (TEX. LOC. GOV'T CODE § 174.051)  | Police, fire  | <ul style="list-style-type: none"> <li>• Procedure and rules for establishing and maintaining collective bargaining.</li> </ul>  |
| <b>Local Control of Police Officer Employment Matters in Certain Municipalities</b> (TEX. LOC.     | Police, fire in certain types of cities               | <ul style="list-style-type: none"> <li>• Procedure and rules for establishing and maintaining meet and confer agreements.</li> </ul>   |
| <b>Texas Commission on Human Rights Act – TCHRA</b> (TEX. LAB. CODE § 21.051-.055)                 | All   | <ul style="list-style-type: none"> <li>• Prohibits employment discrimination on the basis of race, color, disability, religion, sex, national origin, or age.</li> <li>• Prohibits retaliation for opposing a discriminatory practice, making or filing a charge, filing a complaint, testifying or participating in an investigation, proceeding or hearing under the TCHRA.</li> </ul> |
| <b>Texas Whistleblower Act</b> (TEX. GOV'T CODE § 554.002)   | All   | <ul style="list-style-type: none"> <li>• Prohibits retaliation against an employee who in good faith reports a violation of law by the city or a city employee to an appropriate law enforcement authority.</li> </ul>   |
| <b>Texas Workers' Compensation Act</b> (Tex. LAB. CODE § 451.001)                                  | All   | <ul style="list-style-type: none"> <li>• Prohibits retaliation against an employee who files or pursues a workers' compensation claim in good faith, including hiring a lawyer to pursue a claim, or testifying in a claim proceeding.</li> </ul>  |
| <b>Jury Service</b> (TEX. CIV. PRAC. & REM. CODE   | All   | <ul style="list-style-type: none"> <li>• Prohibits an employer from discharging an employee because the employee is called to jury duty.</li> </ul>  |

| <b>Employment Law</b>   | <b>Minimum Number of Employees</b>  | <b>What is it?</b>  |
|---|---|---|
| <b>Military Service</b><br>(TEX. GOV'T CODE § 437.202)        | Eligible employee (member of state military forces or reserve component of the armed forces, or state or federally authorized urban search and rescue team) | <ul style="list-style-type: none"> <li>• Provides that an eligible employee is entitled to paid leave of absence of 15 days in a fiscal year for military training or duty, and is not subject to loss of time, efficiency rating, personal time, sick leave, vacation time, or salary.</li> <li>• Provides that an employee is entitled to be restored to the same position that the employee held when ordered to duty (in cities with at least five full-time employees, per § 437.202(d)).</li> </ul> |
| <b>Withholding of Wages</b><br>(TEX. FAM. CODE § 158.209)     | All   | <ul style="list-style-type: none"> <li>• Prohibits an employer from using a writ of withholding wages as grounds in whole or part for the refusal to hire, terminate, or take disciplinary action against an employee.</li> </ul>   |
| <b>Right to Work</b><br>(TEX. LAB. CODE § 101.052)            | All   | <ul style="list-style-type: none"> <li>• Prohibits an employer from denying employment to an applicant based on membership or non-membership in a labor union.</li> </ul>   |
| <b>Political Activity</b><br>(TEX. ELEC. CODE § 161.007)      | All   | <ul style="list-style-type: none"> <li>• Prohibits an employer from preventing an employee from attending a county, district, or state political convention as a delegate or retaliating against an employee for doing so.</li> </ul>   |
| <b>Political Activity</b> (TEX. LOC. GOV'T CODE § 150.002)    | Police, fire; 10,000 or more in population; not 143 civil service   | <ul style="list-style-type: none"> <li>• Prohibits a police or fire employee from engaging in political activity while in uniform.</li> </ul>   |
| <b>Running for Office</b><br>(TEX. LOC. GOV'T CODE § 150.041) | All   | <ul style="list-style-type: none"> <li>• Prohibits a city from prohibiting an employee from running for office and prohibits a city from disciplining an employee for running for office.</li> </ul>  |

| Employment Law   | Minimum Number of Employees              | What is it?   |
|--|--|---|
| <b>Voting</b><br>(TEX. ELEC. CODE §§ 276.001; 276.004)             | All                                      | <ul style="list-style-type: none"> <li>Prohibits retaliation against an employee because the employee voted for or against a candidate or measure, or because the employee refuses to reveal how they voted.</li> <li>Prohibits an employer from denying an employee time off to vote unless the polls are open on election day for two consecutive hours outside the employee's regular work hours.</li> </ul>   |
| <b>Genetic Information</b><br>(TEX. LAB. CODE § 21.401 et seq.)    | All                                      | <ul style="list-style-type: none"> <li>Prohibits employment discrimination and retaliation against an employee because of genetic information concerning an individual or because an individual refused to submit to a genetic test.</li> </ul>   |
| <b>Compliance with Subpoena</b><br>(TEX. LAB. CODE § 52.051)       | All                                      | <ul style="list-style-type: none"> <li>Prohibits a city from retaliating against an employee because the employee complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding</li> </ul>   |
| <b>Emergency Evacuations</b><br>(TEX. LAB. CODE §§ 22.002; 22.004) | All (except emergency service personnel) | <ul style="list-style-type: none"> <li>Prohibits an employer from discharging an employee who leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order.</li> </ul> <p><u>Exception:</u> does not apply to emergency service personnel if the city provides adequate emergency shelter; and does not apply to persons necessary to provide for safety and well-being of general public including persons necessary for the restoration of vital services.</p> |