Employment Law Manual for Texas Cities

2025 Editors

Stephanie Huser, Legal Counsel

Evelyn Njuguna, Director of Legal Services

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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 cities and city 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. While many people worked on this document, two attorneys previously contributed greatly to the substance of this handbook: Kathryn Hoang, who is now a municipal judge in Dallas, Texas, and Laura Mueller, who is now city attorney of the City of Dripping Springs.

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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. In most cases, in a general law city, the city council is the final hiring authority.[1] In a Type A general law city, most city employees are appointed or hired by the city council.[2] 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, 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.[3] While the mayor may appoint an individual to fill a vacancy in an "office," the appointment is subject to the city council's confirmation.[4] For nepotism purposes, a Type A city council has final hiring authority for all officers and employees, even if it has delegated hiring authority to another officer or employee, such as an administrator or department head.[5]

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 city manager form of government under Chapter 25 of the Local Government Code, the city council or commission is required to hire a city manager[6] and must also adopt a hiring policy by ordinance for each office and employee.[7] This policy could include granting primary hiring authority to the city manager.[8]

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

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[1] TEX. LOC. GOV'T CODE chs. 22, 23, & 24.
[2] *Id*.
[3] *Id*.
[4] *Id*. § 22.010.
[5] Tex. Atty. Gen. Op. No. DM-2 (1991).
[6] *Id*. § 25.026.
[7] *Id*. § 25.051.
[8] *Id*.

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 of the Labor Code.[9] 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.[10] 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.[11] 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.[12] 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 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.[13] 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.[14]

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

[9] *See* 42 U.S.C. § 2000e et seq.; TEX. LAB. CODE Ch. 21.
[10] *See id.* § 2000e-2(a); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).
[11] *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. (Tex.) 1982).
[12] *See Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 529 (6th Cir. 2001); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998); *Thomas v. Wash. Cty. Sch. Bd*., 915 F.2d 922, 924-26 (4th Cir. 1990).
[13] *Autry v. Fort Bend Independent School District*, 704 F.3d 344 (5th Cir. (Tex.) 2013).
[14] TEX. LAB. CODE § 21.059.

https://tml.careerwebsite.com/. The State of Texas also has a job posting site at 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.

What is discrimination in hiring?

Federal and state laws, and sometimes local ordinances, prohibit hiring practices that discriminate on the grounds of age (40 or older), disability, race (including protective hairstyles),[15] color, religion, sex (including gender identity and sexual orientation),[16] pregnancy, citizenship, union activity,[17] military service,[18] or national origin[19] (a thorough description of antidiscrimination 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.[20] 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 an 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 and 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 must go through to hire employees. If the process is followed by the city council or hiring authority and the policy is

[15] TEX. LAB. CODE § 21.1095.
[16] See *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination "because of sex" under Title VII of the Civil Rights Act.).
[17] TEX. LAB. CODE Ch. 101.
[18] 38 U.S.C. § 4311 (2021).
[19] *See, e.g.,* 41 U.S.C. § 2000e; TEX. LAB. CODE Ch. 21.
[20] *Available at* https://www.eeoc.gov/overview; *available at* https://www.twc.texas.gov/programs/civil-rights.

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.[21] However, a federal appellate court 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.[22] No similar cases have been brought in the Fifth Circuit, which governs Texas, however based on the Supreme Court cases that have approved random drug testing of employees who are in safety sensitive positions do not differentiate between applicants and employees. As such, the best practice is to drug test only applicants for safety or security sensitive positions after a job offer is made but before the applicant takes the position.[23] 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 have been upheld by the EEOC who investigates and enforces such claims as having a disparate impact on minority applicants.[24] 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 a greater effect on minority applicants if arrests are taken into account.[25]

Some cities 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. For example, the City of Austin adopted a Fair Chance Hiring Ordinance in March of 2016 that states that an employer with 15 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

[21] *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 630 (1989).
[22] 42 U.S.C.A. § 12114; *Lanier v. City of Woodburn,* 518 F. 3d 1147 (9th Cir. 2008).
[23] *Id.*
[24] *See, e.g.,* http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.
[25] *See* https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions for the EEOC's position and guidance.

belief that the individual is unsuitable for the job based on an individualized assessment of the individual's criminal history.[26]

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.

Note that although a city may implement similar hiring practices for its own organization, in light of recent legislation, a city should consult with its city attorney before adopting an ordinance applicable to all employers within the city. In 2023, the Texas Legislature passed a bill, H.B. 2127, that among other things, expressly preempts cities from adopting or enforcing ordinances regulating employment leave, hiring practices, breaks, employee benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than the city.[27]

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.)"[28] 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 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.[29] The final hiring authority is the city council in general law cities, but in a city that has adopted a Chapter 25 city manager form of government, the safest course of action is to treat the city manager and the city council both as final hiring authorities for purposes of nepotism. In a home rule city, the city council, city manager, or a department head could be the final hiring authority. This difference in hiring authority between a general law city and a home rule city exists because a general law city council can always change any delegation of hiring authority, making it always the final hiring authority. In contrast, a hiring authority appointed by charter can only be changed by charter amendment election under Chapter 9 of the Local Government Code.

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[26] City of Austin, Texas: Code of Ordinances §4-15-1
[27] TEX. LAB. CODE § 1.005; Tex. H.B. 2127 (88th R.S. 2023), *available at* https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB02127F.pdf#navpanes=0.
[28] *2024 Texas Guidebook for Employers*, TEXAS WORKFORCE COMMISSION, *available at* https://www.twc.texas.gov/sites/default/files/busops/docs/texas-guidebook-for-employers-2024.pdf.
[29] TEX. GOV'T CODE ch. 573.

The prohibited degree is within three degrees by blood or two degrees by marriage.[30] Hiring someone who is related to a member of council within the prohibited degree is not allowed, even if the related member abstains from voting on their employment or appointment.[31]

It is permissible, under the continuous employment exception, for an employee related to a member of the city council to continue his/her employment with the city if the individual has been working for the city for a certain amount of time (six months or a year depending on the situation) before the related councilmember is appointed or elected to office.[32] A home rule charter, city ordinance, or other city policy can be more restrictive than state law.

Can an employee be hired to work more than one job within the city?

A city's 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. Cities should 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 a poor performing employee?

Cities often struggle with the question of when and how to discharge a poorly performing employee. Even though Texas is an "at-will" employment state, where anyone can be discharged for any nondiscriminatory reason, many federal and state laws protect employees. These laws often prohibit a city from discharging an employee for fear of litigation for discrimination. Sometimes it seems that there are some people you just can't discharge, no matter what their failings are. Many times, supervisors hold back on discharging an employee in fear of a lawsuit. They ask themselves, "How can I safely discharge 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 an employee is terminated the employee can sue the city for discrimination or the violation of some right. However, there are a number 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

[30] TEX. GOV'T CODE § 573.002.
[31] *Id.* § 573.041.
[32] *Id.* § 573.062.

Government Code puts some limitations on how Type A cities can terminate certain employees who are also officers.[33] 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 he 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. For example, if one employee is late every day and is never disciplined but another employee is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure the city's 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 Whistleblower Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action. Also, keep in mind that the EEOC, who is the first handler of discrimination charges in most cases, has started sending discrimination charges to cities and other employers by electronic mail.

With regard to employees with employment agreements, cities should be aware of a process in state law that 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. This process affects all contractual employees but can have a special effect on city managers.[34]

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

[33] TEX. LOC. GOV'T CODE § 22.077.
[34] TEX. LOC. GOV'T CODE § 180.007.

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 has three main legal concerns: workers' compensation, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). First, if the employee qualifies for FMLA and has a serious medical condition that warrants time off, the city must give the individual these benefits.[35] However, a city policy could require that FMLA and workers' compensation be taken concurrently.[36] 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, under the ADA, the individual has a disability and can perform the essential functions of the job with or without a reasonable accommodation. 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 his or her job without the accommodation being an undue burden on the city.[37] 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 because 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 or discharged for running for public office under state law.[38] 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.[39] Also, if the individual is elected, they may have to resign from city employment 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.[40]

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:

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[35] 29 U.S.C. § 2601-2654.
[36] 29 C.F.R. § 825.702(d)(2).
[37] 42 U.S.C. §§ 12101-12117.
[38] TEX. LOC. GOV'T CODE § 150.041.
[39] 5 U.S.C. § 1502.
[40] TEX. CONST. ART. 16, § 40; (Note that the concept of common-law incompatibility is derived from a series of court cases and attorney general opinions that have prohibited the holding of multiple public positions in particular situations. Whether the holding of two public offices would violate common-law incompatibility requires a factual consideration of the duties of each position and must be considered on a case-by-case basis).

(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.[41]

The Fifth Circuit held that prohibiting an employee from publicly endorsing a candidate was unconstitutional.[42] However, the additional restrictions were not an infringement on First Amendment rights.[43] 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 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.[44]

Can a city take adverse employment action against an employee because of the employee's speech?

While government employees do not surrender their constitutional right to free speech by accepting public employment, this right is not unlimited.[45] A city may take appropriate adverse employment action against an employee for their speech depending on the type of speech the employee is engaging in.[46]

If an employee speaks pursuant to the employee's official duties, the employee does not speak as a citizen and his or her statements are not protected under the First Amendment.[47] Additionally, speech related to workplace grievances is generally not protected.[48]

When an employee speaks as a citizen (also known as private speech) on matters that are of "public concern," the employee's speech is generally protected.[49] Whether an employee's

[41] *Wachsman v. City of Dallas*, 704 F.2d 160, 161–62 (5th Cir. 1983).
[42] *Id*.
[43] *Id*.
[44] *Villejo v. City of San Antonio*, 485 F. Supp. 2d 777 (W.D. Tex. 2007).
[45] *Lane v. Franks*, 573 U.S. 228 (2014).
[46] *Pickering v. Board of Educ*., 391 U.S. 563, 574 (1968).
[47] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (finding that an assistant district attorney who wrote a memo attacking the veracity of an affidavit used in a criminal prosecution did not engage in protected speech as he was speaking as an employee and not a private citizen).
[48] *Connick v. Myers*, 461 U.S. 138 (1983) (finding that a questionnaire circulated among employees concerning internal office affairs was a workplace grievance not protected by the First Amendment); *Teague v. City of Flower Mound, Tex*., 179 F.3d 377, 383 (5th Cir. 1999) (police officer's grievance against the police chief concerning police misconduct did not qualify for the First Amendment protection); *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986) (an employee's statements in a secret diary criticizing the chief of police were not protected because they addressed a "wholly intragovernmental concern").
[49] *Pickering*, 391 U.S. 64 at 574. "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane*, 134 S. Ct. at 2380 (finding that truthful subpoenaed testimony provided in a court of law is a matter of public concern); *Brawner v. City of Richardson*, Tex. 855 F. 2d 187, 191092 (5th Cir. 1988) (the disclosure of misbehavior by public officials is

speech pertains to a matter of public concern, will depend on the context, form, content of the statement and the employee's intention regarding the statement.[50]

But there are instances in which an employee's speech even if related to a matter of public concern would not be protected by the First Amendment. The courts have clarified that even though an employee may be speaking on a matter of public concern, an employee's right to speak on such matters must be weighed against a government employer's interests in having a disruptive-free workplace.[51] As such, if a government employer's interests in promoting the efficiency of the public services it performs through its employees outweighs an employee's private speech on a matter of public concern, then that speech would not be protected. Further, an employee's speech on purely personal matters is not protected speech.[52]

However, cities should keep in mind that state law imposes additional protections on employee speech. The Texas Whistleblower Act prohibits a government employer from taking adverse employment action against a public employee who in good faith reports a violation of law by the employing entity or another public employee to an appropriate law enforcement authority.[53] This means that although it's possible that such employee report to a law enforcement agency may be considered work-related speech that may otherwise not be protected by the First Amendment, the Texas Whistleblower's Act protects said employee from adverse employment action. More information about the Texas Whistleblower's Act can be found in Chapter 11.

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a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department).

[50] *Connick*, 461 U.S. at 154.

[51] *Id*; see e.g., *Rankin v. McPherson*, 483 U.S. 378 (1987) (a non-public facing clerical employee's comment made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President and in a context critical of the President's policies outweighed the employer's interest in maintaining an efficient operation of the office).

[52] See e.g., *City of San Diego v. Roe*, 543 U.S. 77 (2004) (finding that First Amendment did not prevent the city from terminating a police officer after the officer sold videos of himself stripping out of a police uniform and engaging in sexually explicit acts); *Graziosi v. City of Greenville, Miss*., 775 F.3d 731, 734 (5th Cir. 2015) (finding that although a police sergeant spoke as a private citizen when she posted social media comments critical of her police chief to the mayor's public Facebook, her speech did not address a matter of public concern).

[53] TEX. GOV'T CODE § 554.002.

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 and federal regulations.

In March 2021, the U.S. Department of Labor (DOL) issued its first-ever formal regulation that defined the standard for determining whether a worker is considered an employee or an independent contractor.[54] The regulation provided a framework in which employers could evaluate a worker's status using a five-factor test, focusing on an employer's right to control the work and the worker's opportunity for profit or loss. Subsequently, in January 2024, the DOL rescinded the 2021 rule and issued its final rule revising its prior guidance.[55] The new rule, the Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA), became effective on March 11, 2024, and provides for a six-factor test that the DOL noted was consistent with longstanding judicial precedent.[56] The final rule continues to affirm that a worker is not an independent contractor if he is, as a matter of economic reality, economically dependent on an employer for work.[57] All employers, including cities, are now held to this new rule and should analyze whether a worker is an independent contractor or an employee under the FLSA based on the following six factors:

(1) opportunity for profit or loss depending on managerial skill;
(2) investments by the worker and the potential employer;
(3) degree of permanence of the work relationship;
(4) nature and degree of control;
(5) extent to which the work performed is an integral part of the potential employer's business; and
(6) skill and initiative.[58]

Additionally, the final rule states that no factor or set of factors among the list has a predetermined weight, and additional factors may be relevant if such factors indicate in some way that the worker is in business for himself, as opposed to being economically dependent on the employer for work.[59]

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[54] 2021 Independent Contractor Status Under the Fair Labor Standards Act Rule, *available at* https://www.govinfo.gov/content/pkg/FR-2024-01-10/pdf/2024-00067.pdf
[55] Independent Contractor Status Under the Fair Labor Standards Act, 89 Fed. Reg. 1,638 (Mar. 11, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795), *available at* https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-29274.pdf.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.

For more information the new rule, the DOL has published Frequently Asked Questions website here: https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs#g3. Some of following questions have been excerpted from the FAQs website.

Are any of the economic reality factors adopted in this rule more important than others when evaluating a worker's employment status?

No. Different factors might be more or less important in different cases depending on the facts of each individual case. For example, a factor leaning strongly towards one classification outcome (employee or independent contractor status) could be more relevant in the overall analysis for a particular worker than a different factor which might be a closer call. However, this final rule does not categorically weigh certain factors more than others in every case like the 2021 Independent Contractor Rule.

How does the final rule explain "opportunity for profit or loss depending on managerial skill?"

This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

How does the final rule explain "investments by the worker and the employer?"

This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker's investments do not have to be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if

on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

How does the final rule explain "degree of permanence of the work relationship?"

This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

How does the final rule explain "nature and degree of control?"

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the potential employer's control over the worker include whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose. Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control. As examples of such compliance actions that are not indicative of control, the final rule identifies a publication's requirement that a writer comply with libel law and a home care agency's requirement that all individuals with patient contact undergo background checks in compliance with a specific Medicaid regulation. Actions taken by the potential employer that go beyond compliance with a specific, applicable federal, state, tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. For example, a home care agency's imposition of extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control. More control by the potential employer favors employee status; more control by the worker favors independent contractor status.

How does the final rule explain "extent to which the work performed is an integral part of the employer's business?"

This factor considers whether the work performed is an integral part of the potential employer's business. This factor does not depend on whether any individual worker in particular an integral part of the business is, but rather whether the function they perform is an integral part of the business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.

How does the final rule explain "skill and initiative?"

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

When might "additional factors" matter in determining a worker's employment status?

Under the final rule, additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work. This guidance is identical to guidance provided in the 2021 Independent Contractor Rule and is consistent with judicial precedent.

Under the final rule, does a worker have to satisfy all the economic reality factors to qualify as an independent contractor?

No. Under the economic reality test, no single factor (or set of factors) automatically determines a worker's status as either an employee or an independent contractor. Instead, the economic reality factors are all weighed to assess whether a worker is economically dependent on a potential employer for work, according to the totality of the circumstances.

Can a worker voluntarily waive employee status and choose to be classified as an independent contractor?

No. Under the FLSA, a worker is an employee and not an independent contractor if they are, as a matter of economic reality, economically dependent on the employer for work. While businesses are certainly able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most suitable for them, if a worker is an employee under the FLSA, they cannot waive FLSA-protected rights

(such as minimum wage or overtime pay). The Supreme Court has explained that permitting employees to waive their FLSA rights would harm other employees and undermine the Act's goal of eliminating unfair methods of competition in commerce.

If a city has questions about worker classifications, who should the city contact?

If a city is trying to determine who is an employee and who is an independent contractor under the law, the city should first contact its city attorney or local legal counsel. For questions about the new rule, the Wage and Hour Division of the Department of Labor may be contacted at (202) 693-0406. The TML Legal Department attorneys may also assist in providing information about the new rule.

Can a worker be an employee for FLSA purposes even if he is an independent contractor for tax purposes?

Because the Internal Revenue Service (IRS) applies its own test to analyze if a worker is an employee or independent contractor for tax purposes, some workers who may be classified as independent contractors for tax purposes may be employees for FLSA purposes.[60] This could occur if, as a matter of economic reality, the worker is economically dependent on an employer for work.[61]

The IRS uses three factors to determine whether an individual is an independent contractor: (1) behavioral control; (2) financial control; and (3) the relationship of the parties.

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.[62]

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.[63]

The relationship of the parties is also considered. In other words, is there a contract and what benefits, if any, are provided to the worker.[64]

More information on this can be found at: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

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[60] Myths About Misclassification, DOL.GOV, *available at* https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail.
[61] *Id*.
[62] Behavioral Control, IRS.GOV, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Behavioral-Control.
[63] Financial Control, IRS.GOV, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Financial-Control.
[64] Type of Relationship, IRS.GOV, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Type-of-Relationship.

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

Yes, but 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.[65] 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.[66]

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 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.[67]

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.[68]

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.[69]

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.[70] Other laws, such as the

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[65] Independent contractor (self-employed) or employee?, IRS.GOV, *available at* https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

[66] 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.

[67] Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, *available at* https://www.irs.gov/forms-pubs/about-form-ss-8.

[68] 26 U.S.C. § 6041A; 2014 Instructions for Form 1099-MISC, *available at* https://www.irs.gov/forms-pubs/about-form-1099-misc.

[69] 26 U.S.C. §§ 3111 (FICA); 3301 (unemployment tax); 3402 (federal income taxes).

[70] Press Releases: Employee Misclassification as Independent Contractors, DOL.GOV, *available at* https://www.dol.gov/newsroom/releases?agency=57&state=All&topic=18210&year=all (noting Department of Labor cases where entities had to pay for misclassification of employees).

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.[71]

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.[72] Because this issue is so widespread in Texas, some lawmakers have tried to get laws passed related to misclassification that would create additional penalties.[73]

However, the IRS provides a safe harbor provision in Section 530 of the Revenue Act of 1978 for when an employer mistakenly classifies an employee as an independent contractor, but only if certain criteria are met.[74] The 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.[75] 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.[76] A city that takes advantage of the program must properly classify its workers in the future and still pay some of the past employment taxes it missed from misclassifying its employees. The IRS provides additional information on Section 530 relief on its website here: https://www.irs.gov/government-entities/worker-reclassification-section-530-relief.

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

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[71] *See* TEX. LAB. CODE § 204.002.
[72] Texas State Government Effectiveness and Efficiency Report, *available at* http://www.lbb.state.tx.us/Documents/Publications/GEER/Government_Effectiveness_and_Efficiency_Report_2015.pdf.
[73] *See* http://www.texastribune.org/2015/03/15/groups-try-again-misclassification-bills/; TEX. H.B. 1054 (88th Leg. 2023) *available at* https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB1054.
[74] IRS PUB. 1976 (REV. 05-07), *available at* http://www.irs.gov/pub/irs-pdf/p1976.pdf.
[75] Section 530 of the Revenue Act of 1976.
[76] *Voluntary Classification Settlement Program*, IRS.GOV, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program.

Employment Taxes and Income Tax Withholding.[77]

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. . . "[78] 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.[79] 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.[80]

Resources

Federal State Local Government Tax Information:
https://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

[77] Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, IRS.GOV, *available at* https://www.irs.gov/forms-pubs/about-form-ss-8.
[78] *See City of Houston v. Ranjel*, 407 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2013).
[79] *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. dism'd w.o.j.).
[80] *See* TEX. LAB. CODE §§ 504.014; 406.096 (requiring coverage when an independent contractor is involved in a building or construction project).

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.[81] 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.[82] 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.[83]

What is the minimum wage?

The minimum wage is currently $7.25 an hour.[84]

Which employees must be paid overtime under the FLSA?

Generally, 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.[85] 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.[86] Additionally, the FLSA provides partial and total exemptions from overtime for peace officers and firefighters in some cities (See Chapter 4 for public safety FLSA rules).

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.[87] Exempt employees are those who meet the salary test and perform certain duties. Currently, the "standard" salary test provides that any exempt

[81] 29 U.S.C. § 201, *et seq*.; 29 C.F.R. § 778.105.
[82] *Id.* § 203(e).
[83] *Id.* § 203.
[84] *Id.* § 206.
[85] *Id.* § 213.
[86] 29 CFR § 541.602.
[87] 29 U.S.C. § 207(a)(1).

employee who earns less than $684 a week ($35,568 a year) is automatically entitled to overtime pay, regardless of the employee's position or duties.[88]

On the other hand, an employee who earns at least $107,432 a year, including at least $684 per week paid on a salary or fee basis, is exempt from overtime compensation, regardless of job classification, under the "highly compensated employee" test.[89]

The three primary exemptions for overtime pay are executive, professional, and administrative.[90] 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 $684 a week.[91]

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.[92] The employee must also be compensated on a salary basis at a rate not less than $684 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 $684 a week.[93]

Whether an employee is exempt is a fact question based on job duties. When making these determinations, cities should ensure that their employee classifications (whether exempt or non-exempt) are thoroughly documented and are supported by a preponderance of the evidence (a legal evidence standard meaning more likely true than not).[94] Cities should also consult with

[88] 29 CFR § 541.600.
[89] 29 CFR § 541.601.
[90] *Id.* § 213(a)(1).
[91] See *Helix Energy Sols. Group, Inc. v. Hewitt*, 598 U.S. 39, 50–52 (2023) (noting all factors must be met to qualify under the executive employee test, and being compensated on a daily basis did not fit the "salary on a weekly basis" requirement.).
[92] 29 U.S.C. § 213; 29 C.F.R. § 541.300.
[93] 29 U.S.C. § 213; 29 C.F.R. § 541.200.
[94] *E.M.D. Sales, Inc. v. Carrera*, No. 23-217, 2025 WL 96207, at *2 (U.S. Jan. 15, 2025) (clarifying that the preponderance-of-the-evidence standard governs when an employer attempts to demonstrate that an employee is exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act).

their city attorney and human resources professionals.

Did the DOL adopt a new minimum salary threshold rule in 2024 that applies to cities?

On April 26, 2024, the Department of Labor issued a new final rule, which among other things, increased the standard salary level and highly compensated employee total annual compensation thresholds and applied to city employers.[95] Effective July 1, 2024, the standard salary level increased to $844 per week ($43,888 a year), meaning exempt employees earning less than this new amount were automatically entitled to overtime regardless of their duties. An additional increase was set to become effective on January 1, 2025, making the standard salary level $1,128 a week ($58,656 a year).[96] Future updates to the salary and compensation structure were also automatically planned to take place every three years thereafter. However, the rule faced several legal challenges, and on November 15, 2024, a federal district court struck down the DOL's new rule.[97] The ruling, which applied to all employers nationwide, effectively reinstated the previous rule.[98] Similarly, in December 2024, another Texas federal court also vacated the DOL rule and reverted the salary thresholds to the DOL 2019 levels.[99] In attempt to overturn these rulings, the DOL filed two separate appeals on November 26, 2024 and February 28, 20205 to the Fifth Circuit Court of Appeals.

Now that the DOL rule has been struck down, cities are not required to adjust their exempt employees' salaries. However, cities should continue to monitor the DOL appeals as it's possible that the rule may be reinstated, fully or partially.

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

No. Overtime under the FLSA is based on the number of hours worked in a seven-day workweek, not on the number of hours worked in a single day.[100]

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

No. Under the FLSA, employees must 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.[101] 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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[95] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32,842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541), *available at* https://www.govinfo.gov/content/pkg/FR-2024-04-26/pdf/2024-08038.pdf.
[96] *See* FAQs – Final Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, DOL.GOV, *available at* https://www.dol.gov/agencies/whd/overtime/rulemaking/faqs#earnings-thresholds8.
[97] *State of Texas v. U.S. Dep't of Labor*, No. 4:24-cv-499 (E.D. Tex. Nov. 15, 2024).
[98] *Id.*
[99] *Flint Ave. LLC v. U.S. Dep't of Labor*, No. 5:24-cv-00130 (N.D. Tex. Dec. 30, 2024).
[100] *Id*. § 201, *et seq*.; *Id.* § 778.105.
[101] *Id*.

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

Yes. City employees can be paid compensatory time off (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[102] or through a collective bargaining agreement.[103] Cities typically do this through their personnel policy.

When can an employee use accrued compensatory time?

A 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.[104] The city also must pay the employee his or her compensatory time off hours when the employee leaves employment with the city, regardless of whether the employee is terminated or quits.[105]

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 while employees engaged in public safety activities can accrue up to 480 hours of compensatory time off. If an employee works more than these hours they must be paid overtime wages.[106]

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 state military laws may require some unpaid time off. A number of state laws also have some paid time off requirements. See Chapter 5 for more information on employee leave.

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 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

[102] *Christensen v. Harris County,* 529 U.S. 576 (2000).
[103] 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.
[104] 29 U.S.C. § 207(o)(5).
[105] *Id.* § 207(o)(4).
[106] *Id.* § 207(o)(3).

employee is free to leave the worksite; (3) the meal break is at least thirty minutes long[107]; 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.[108] Breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable.[109]

The only state and federally mandated break requirement is for nursing mothers. In 2010, 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.[110] In 2022, Congress passed the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act which expanded and clarified employer obligations for break times and spaces for nursing mothers under the FLSA.[111] Under the new law, rights to receive break times and a private space to pump at work were expanded to nearly all employees, including FLSA exempt employees who were not previously covered. Texas law gives all government employees the same right to breaks and space to express breast milk.[112] For more information regarding the PUMP Act and state law requirements for cities, see Chapter 5.

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 on average at least 30 hours a week over the course of a year, that employee is considered a full-time employee, and employers with 50 or more employees must offer such employee health coverage or face a penalty.[113] For more information on the Affordable Care Act please see Chapter 14 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 https://www.tmrs.com/. 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. The Fifth Circuit Court of Appeals, the federal court of appeals covering

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[107] *See Bernard v. IBP., Inc.*, 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. § 785.19.
[108] *Naylor v. Securiguard, Inc*, 801 F.3d 501 (5th Cir. 2015)
[109] 29 C.F.R § 785.18.
[110] 29 U.S.C. § 207(r); http://www.dol.gov/whd/regs/compliance/whdfs73.htm.
[111] Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328.
[112] TEX. GOV'T CODE § 619.003.
[113] 26 U.S.C. § 4980H.

Texas, has adopted a standard in evaluating whether on call time is compensable, which comes down to if the employee can use his on-call time effectively for his own purposes.[114] In *Bright v. Houston Northwest Medical Center*, a biomedical equipment repair technician was required to be on-call every day of the year. During this time, he could not be intoxicated and was required to respond to repair calls within 30 minutes. However, because the employee was still able to conduct his personal affairs, sleep and rest at home, go shopping, and eat at restaurants, the court determined he was still able to use his on-call time effectively for his own purposes his on-call time was not compensable.[115]

Although it will depend heavily on the circumstances, factors that likely 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). Conversely, factors that would likely make paying for on call time voluntary would be: (1) freedom of movement of the employees; (2) longer 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.[116] 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 $684 per week, and is compensated on a "salary basis."[117] 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."[118] 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.[119] 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.[120]

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[114] *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671, *cert. denied*, 112 S.Ct. 882; *see also Offutt v. Sw. Bell Internet Services, Inc*., 130 S.W.3d 507, 508 (Tex. App.—Dallas 2004, no pet.).
[115] *Id*.
[116] 29 C.F.R. § 785.17; Fact Sheet #22: Hours Worked Under the FLSA, DOL.GOV, *available at* https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked.
[117] 29 U.S.C § 213(a)(1); 29 C.F.R. § 541.600(a).
[118] 29 C.F.R. § 541.602(a).
[119] *Id*.
[120] 29 C.F.R. §§ 541.602; 541.710.

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."[121] 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.[122] 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.[123]

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.[124] 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."[125] Thus, if a supervisor or employee "acts, directly or indirectly" for the employer, then that person could be held individually liable for the violation.[126] An employee may also recover damages for emotional distress in an FLSA retaliation claim.[127] 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.[128] 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."[129]

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[121] U.S. Dep't Labor, Wage & Hour Div., Opinion Letter (March 10, 2006), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2006_03_10_07_FLSA.pdf.
[122] *Id*.
[123] *Id*.
[124] *Lee v. Coahoma Cty., Miss.*, 937 F.2d 220, 226 (5th Cir. 1991).
[125] 29 U.S.C. § 203(d).
[126] *Lee*, 937 F.2d at 226.
[127] *Pineda v. JTCH Apartments*, L.L.C. 843 F.3d 1062, 1064 (5th Cir. 2016).
[128] *Perry v. Greanias*, 95 S.W.3d 683, 699 (Tex. App.—Houston [1st Dist.] 2002).
[129] *See Modica v. Taylor*, 465 F.3d 174, 188 (5th Cir. 2006) (holding that a state agency official was protected by official immunity in a case involving the Family Medical Leave Act).

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

Cities are prohibited from granting extra compensation to an employee after the employee's services have been rendered or that are not agreed upon before work begins.[130] 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. A city is also authorized to correct improper payments. For example, if an employee who is classified as nonexempt, therefore eligible for overtime pay under the Fair Labor Standards Act, was not properly compensated for his or her overtime work, back pay may be proper to remedy that situation. A city should consult with local legal counsel regarding specific cases.

Cities are also prohibited from paying more than the contracted amount to a current employee or a terminated employee unless the city meets certain notice and hearing requirements.[131]

Resources

Department of Labor:
https://www.dol.gov/agencies/whd/compliance-assistance/toolkits/flsa

FLSA Fact Sheets:
http://www.dol.gov/whd/fact-sheets-index.htm

FLSA Final Rule:
https://www.govinfo.gov/content/pkg/FR-2024-04-26/pdf/2024-08038.pdf

FLSA Regulations:
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

[130] TEX. CONST. art. III, § 53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ).
[131] TEX. LOC. GOV'T CODE § 180.007.

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.[132] 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).[133]

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.[134]

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.[135] The law enforcement agency and fire suppression employees are also 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.[136]

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.[137] Likewise, because volunteers are not considered employees, they do not count towards the minimum employee threshold.[138] 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.[139]

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[132] 29 U.S.C. § 207(k).
[133] *Id.*; 29 C.F.R. § 553.201.
[134] 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.
[135] 29 C.F.R. § 553.200.
[136] *Id*.
[137] 29 C.F.R. § 553.211.
[138] *Cleveland v. City of Elmendorf,* 388 F.3d 522 (5th Cir. 2004); *Id.* § 553.200.
[139] 29 C.F.R. § 553.216.

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 employees engaged in fire protection or law enforcement activities.[140] 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).[141] To avail itself of the 7(k) exemption, a city must establish a work period.[142] 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 plain clothed 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.[143]

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

[140] 29 U.S.C. § 207(k).
[141] 29 C.F.R. §§ 553.201, .230.
[142] *Id.*
[143] *Id.* § 553.211(a).

is at risk.[144]

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 control personnel, and sanitarians, among others, would normally not meet the definition of an employee engaged in law enforcement activities.[145] 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.[146]

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.[147]

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.[148]

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 firefighting 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.[149]

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

[144] *Id.* § 553.210.
[145] *Id.* § 553.211(e).
[146] *Id.* § 553.211(g).
[147] 29 U.S.C. § 203(y).
[148] *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423 (5th Cir. 2006).
[149] *Id.* § 553.202; *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dep't. Inc*., 897 F.2d 765 (5th Cir. 1990).

than the FLSA requires.[150] 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.[151] If a majority of non-public 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 more hours than permitted in the event of an emergency.[152] 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.[153] 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.[154] A police officer or fire fighter can also work extra hours when exchanging hours with another fire fighter or police officer.[155]

Police dispatchers, employed by a city police department who provide communication support services for the police department by responding to requests for assistance, may also adopt an alternate work schedule if a majority of the dispatchers vote in favor of an alternate work schedule.[156] Dispatchers working under an alternate work schedule are entitled to overtime pay if they work more hours during a calendar month than the number of hours in the normal work month of the employees of the city other than fire fighters or police officers.[157]

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.[158] A city can still use the 7(k) exemption for non-exempt firefighters or members of a fire department who provide emergency medical services.[159]

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 (discussed further in Chapter 3).[160] A

[150] 29 U.S.C. § 218(a).
[151] TEX. LOC. GOV'T CODE § 142.0015(f).
[152] *Id.*§ 142.0015(g).
[153] *Id.* § 142.0015(j).
[154] *Id.*
[155] *Id.* § 142.001(d).
[156] *Id.* § 142.0015(k).
[157] *Id.*
[158] *Id.* § 142.0015(c).
[159] *Id.* § 142.0015(b).
[160] 29 U.S.C. § 213.

police chief in many cases will 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.[161] Other ranking police officers and detectives may be exempt, depending on their job duties and responsibilities, and how closely they are supervised.[162]

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.[163]

Resources

Department of Labor:
http://www.dol.gov/whd/regs/compliance/whdfs8.pdf

[161] See 29 C.F.R. § 541.300.
[162] *Id*. § 213.
[163] 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.[164]

Is my city covered by the FMLA?

All cities as public entities are covered by the FMLA, regardless of the city's size.[165] 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:

(1) have been employed by the city for at least 12 months, which do not have to be consecutive;
(2) have worked for at least 1,250 hours in the 12-month period immediately preceding the date the FMLA leave begins; and
(3) 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.[166]

Employees who telework and meet the requirements noted above, are also eligible for FMLA leave.[167] 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.[168] The Department of Labor (DOL) 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.[169] 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?

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[164] 29 U.S.C. §§ 2601-2654.
[165] 29 C.F.R. § 825.104.
[166] *Id.* §§ 825.108(d); 825.110.
[167] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Feb. 9, 2023), *available at* https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-1.pdf?_ga=2.42016421.149572112.1689971024-395318381.1689971024.
[168] *Windsor*, 133 S.Ct. 2675 (2013) *available at* 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.
[169] 29 C.F.R. § 825.122.

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. The DOL updated its FMLA posters in April 2023 but has noted that previous versions (April 2016 and February 2013) still fulfill the posting requirements under law.[170] These posters are available on the DOL's website at https://www.dol.gov/agencies/whd/fmla/forms.

Although a city that does not have eligible employees is not required to provide FMLA benefits, such city can decide for itself what kind of leave options to offer to its employees.

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) the birth and care of a newborn child; (2) to have a child placed with the employee for adoption or foster care and to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, child, or parent with a serious health condition; (4) for a serious health condition that prevents the employee from performing the essential functions of his or her job; (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; and (6) to care 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.[171]

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).[172] 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.[173] A city is also required to maintain the employee's health benefits as if the employee were continuously employed during the leave period.[174]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.[175] A city must also restore the employee to the same, or virtually the same, position at the end of the leave period.[176]

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[170] FMLA Poster, DOL.GOV, *available at* https://www.dol.gov/agencies/whd/posters/fmla.
[171] 29 C.F.R. § 825.112(a).
[172] *Id.* § 825.100.
[173] *Id.*
[174] *Id.* § 825.209.
[175] *Texas Workforce Comm'n v. Wichita Cnty*., 507 S.W.3d 919 (Tex. App. 2016).
[176] *Id.* § 825.214.

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.[177]

In addition, a city's observed holidays may impact an employee's leave entitlement. The Department of Labor, in an opinion, has clarified that an employer-observed holiday during the workweek does not reduce the amount of an employee's FMLA leave, unless the employee was already scheduled to report to work on that holiday.[178]

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.[179] 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 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.[180]

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.[181] 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.[182] 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.[183]

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.[184] If an employee requests and is permitted to use accrued compensatory time to receive pay for time taken

[177] *Id.* § 825.203.
[178] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (May 30, 2023), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FMLA/2023_05_30_02_FMLA.pdf.
[179] *Id.* § 825.203.
[180] *Id*.
[181] *Id.* § 825.214.
[182] 29 C.F.R. §§ 825.217-219.
[183] *Id.* § 825.217.
[184] *Id.* § 825.207.

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.[185] 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.[186] 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.[187]

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.[188] 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.[189] If a city with no eligible employees nevertheless says that its employees have FMLA rights under its 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 an employee's FMLA rights, then it can be liable for damages including lost wages, benefits, fees, monetary losses sustained by the employee, and court costs.[190] 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.[191] Even where an employer hasn't denied a request, at least one federal court has indicated that an employer could violate the FMLA by even discouraging an employee from exercising her rights under the FMLA.[192]

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.[193] The FMLA includes in its

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[185] *Id.* § 825.207(f).
[186] *Id*. § 825.300.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] 29 U.S.C. § 2617; *Lubke v. City of Arlington*, 455 F.3d 489, 494 n. 1 (5th Cir. 2006).
[191] *Id.; Ion v. Chevron USA, Inc.*, 731 F.3d 379, 396 (5th 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).
[192] *Ziccarelli v. Dart*, 35 F.4th 1079, 1081 (7th Cir. 2022), cert. denied, 143 S. Ct. 309, 214 L. Ed. 2d 136 (2022).
[193] *Modica v. Taylor*, 465 F.3d 174, 184-86 (5th Cir. 2006).

definition of employer "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."[194] Thus, if a supervisor or employee "acts, directly or indirectly" for the employer, then that person could be held individually liable for the violation.[195] 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.[196] 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.[197] 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."[198]

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.[199]

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.[200] 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.[201] 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.[202]

Are employers required to provide other special accommodations for employees who are breastfeeding 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

[194] 29 U.S.C. § 2611(4)(A)(ii)(I).
[195] *Modica*, 465 F.3d at 184-85.
[196] *Id.* at 187-88.
[197] *Id.*
[198] *Id.* at 188.
[199] *Id.* § 825.115.
[200] *Id.* § 825.120.
[201] *Id.*
[202] *Id.*

for one year after the birth of their nursing child.[203] Then in December 2022, Congress passed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP for Nursing Mothers Act) which expanded and clarified employer obligations for break times and spaces for nursing mothers under the FLSA.[204] Under the new law, rights to receive break times and a private space to pump at work were expanded to nearly all employees, including FLSA exempt employees who were not previously covered. Since 2015, Texas law has provided public-sector employees, including city employees, the right to express breast milk at the employee's workplace.[205]

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."[206] These breaks must be allowed as frequently as needed.[207] 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?

Under the PUMP Act, if an employee is not completely relieved from her duties, the time used to pump breast milk at work must be paid. An employee is not considered to be relieved from duty if she is required to perform any duties, whether active or inactive, while on break.[208] Both nonexempt and exempt employees must be paid in the same manner other employees are paid for breaks, like short coffee breaks.[209] Exempt employees' pay cannot be docked for taking breaks during the workday 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.[210] The Department of Labor notes that possible locations may include a vacant office, storage room with a door, or an employer may create a private space using partitions, as long as privacy can be ensured.[211] Under the

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[203] 29 U.S.C. § 207(r); Wage and Hour Division Worksheet #73: FLSA Protections for Employees to Pump Breast Milk at Work, *available at* https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers.
[204] Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328; 29 U.S.C.A. § 218d (West).
[205] TEX. GOV'T CODE ch. 619.
[206] 29 U.S.C. §207(r)(1)(A).
[207] TEX. GOV'T CODE § 619.004.
[208] *See* Wage and Hour Division Fact Sheet #22, Hours Worked under the FLSA, *available at* https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked.
[209] FAQs – Pumping Breast Milk at Work, DOL.GOV, *available a*t https://www.dol.gov/agencies/whd/nursing-mothers/faq; Field Assistance Bulletin No. 2023-02, DOL.GOV, *available at* https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf.
[210] *Id.*
[211] *Id.*

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 must, however, be available any time the employee needs to express milk.[212] Also, a city cannot discriminate against a breastfeeding mother simply because she needs to express breast milk while at work.[213]

Are there any exceptions to the requirement to provide accommodations to nursing mothers?

While the FLSA provides an exception for employers with less than 50 employees if compliance would create an undue hardship, state law does not.[214] Cities, as public employers and regardless of the number of employees they have, must provide a place, other than a multiple user bathroom, that is shieled from view and free from intrusion from other employees and the public where an employee can express breast milk.[215] Note that under the FLSA, a bathroom, even if private, does not satisfy the requirement to provide a space for expressing breast milk.[216] However, a city (assuming it has less than 50 employees and can show complying with the FLSA would impose an undue burden) may satisfy its responsibility under state law to provide a place by making a single-user bathroom available for use.

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.[217] 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.

Is a city required to provide paid injury and illness leave for first responders?

In 2023, the Texas Legislature passed H.B. 471 which created a mandatory paid leave program for specific city employees who suffer from an illness or injury while on duty.[218] The new law applies only to paid city employees who are permanent firefighters, emergency medical services personnel, and full-time licensed police officers who regularly serve in a professional law enforcement capacity in the city's police department (collectively referred to as "first responders"). Fire chiefs and police chiefs also qualify for the leave, but volunteer firefighters do not.[219]

Under the program, a city is required to provide an eligible first responder with a leave of absence for an illness or injury related to the first responder's line of duty. The leave of absence

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[212] *Id*.
[213] *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013).
[214] 29 U.S.C.A. § 218d (West); TEX. GOV'T CODE § 619.004.
[215] TEX. GOV'T CODE § 619.004(2).
[216] 29 U.S.C.A. § 218d (West).
[217] TEX. HEALTH & SAFETY CODE § 165.002.
[218] TEX. LOC. GOV'T ch. 177A; Tex. H.B. 471 (88th R.S. 2023), *available at* https://www.legis.state.tx.us/tlodocs/88R/billtext/html/HB00471F.HTM.
[219] *Id*. § 177A.001.

must be with full pay for a period commensurate with the nature of the line of duty illness or injury, and if necessary, the leave of absence shall continue for at least one year.[220]

What happens if a first responder is unable to return to work after the leave of absence?

At the end of the one-year leave of absence period, a city may extend the leave at full or reduced pay. Once the leave of absence and any extension granted by the city has expired, a first responder who requires additional leave must be placed on temporary leave.[221] However, the bill did not provide for how long an employee may be placed on temporary leave.

A first responder who is temporarily disabled by a line of duty injury or illness and who has exhausted his or her leave of absence and any extension thereof may use accumulated sick leave, vacation time, and other accrued benefits before being placed on temporary leave.[222]

May a first responder be placed on light duty while recovering from a line of duty injury or illness?

If able, a first responder may return to light duty while recovering from a temporary disability, and if medically necessary, the light duty assignment may continue for at least one year.[223]

Does a first responder have job restoration rights after returning from temporary leave?

A first responder who has recovered from a temporary disability must be reinstated to the same rank and with the same seniority he or she had before going on temporary leave. And, until the first responder returns to work, the new law provides that another first responder may voluntarily perform the injured first responder's work.[224]

How does the line of duty illness or injury leave under the new law comport with labor agreements?

A collective bargaining agreement, meet and confer agreement, or other similar labor agreement that provides a benefit for an ill or injured first responder must provide a benefit that, at a minimum, complies with the provisions of H.B. 471.[225]

How does the line of duty illness or injury leave under the new law comport with the Workers' Compensation Act?

The new law provides that any benefits provided under the Workers' Compensation Act shall be offset, to the extent applicable, by any amount for incapacity received under the provisions

[220] *Id*. § 177A.003.
[221] *Id*.
[222] *Id*.
[223] *Id*. § 177A.004.
[224] *Id*.
[225] *Id*. § 177A.002.

of the bill.[226] This means that any benefits a first responder is entitled to under workers' compensation will be diminished by any benefits an employee receives under the provisions of H.B. 471.

Is a city required to adopt a paid quarantine leave policy for certain employees?

In 2021, the Texas Legislature passed H.B. 2073, which requires a city to adopt a paid quarantine leave policy for firefighters, peace officers, detention officers, and emergency medical technicians (as applicable for each city).[227] The policy must provide paid leave to these specific employees if they are ordered by a supervisor or local health authority to quarantine or isolate due to a possible or known exposure to a communicable disease while on duty.

The TML Legal Department has created a sample policy available here: https://www.tml.org/DocumentCenter/View/2801/Paid-Quarantine-Leave-Policy. However, a city should also consult with legal counsel and human resources when adopting its policy.

Is a city required to adopt a mental health policy for police officers?

In 2021, the Texas Legislature passed S.B. 1359, which requires law enforcement agencies to develop and adopt a mental health leave policy for police officers who experience a traumatic event in the scope of employment.[228] Under the law, while a policy must be adopted, the details of said policy are within the discretion of the law enforcement agency that develops the policy. The mental health leave policy must: (1) include clear and objective guidelines establishing when a police officer may be granted leave; (2) grant leave without deduction in salary or compensation; (3) list the number of leave days available; and (4) detail how much anonymity the police officer has when leave is taken.[229]

In addition, the law enforcement agency may provide a list of mental health services available in the area that the police officer may use.[230]

A sample policy from the Texas Police Chiefs Association is available here: https://www.tml.org/DocumentCenter/View/2851/TPCA-mental-health-leave-sample-policy. A city should also consult with legal counsel and human resources when adopting its policy.

Resources

Pregnancy Discrimination Act:
http://www.eeoc.gov/facts/fs-preg.html

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[226] TEX. LAB. CODE § 504.051.
[227] TEX. LOC. GOV'T CODE § 180.009; Tex. H.B. 2073 (87th R.S. 2021), *available at* https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02073F.pdf#navpanes=0.
[228] TEX. GOV'T § 614.015; Tex. S.B. 1359 (87th R.S. 2021), *available at* https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01359F.pdf#navpanes=0.
[229] *Id*.
[230] *Id*.

EEOC guidance on pregnancy issues:
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:
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf

CHAPTER 6—Volunteers

Can members of council volunteer for the city?

It depends on the situation. A member of council may volunteer for a volunteer fire department or other organization that protects the health, safety, or welfare of the city if the city council first adopts a resolution allowing members of council to do so.[231] But the attorney general has stated that a city official cannot volunteer for the governmental entity that it governs if: (1) the volunteer position would be 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.[232] 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.[233] The Department of Labor (DOL) defines "same type of services" to mean similar or identical services.[234] 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.[235] 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.[236]

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. However, a federal court has specifically held that TCOLE 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.[237]

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"

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[231] TEX. LOC. GOV'T CODE § 21.003; *see* Tex. Atty. Gen. Op. No. KP-0442 (2023) (concluding dual service as a member of council and volunteer for volunteer fire department is prohibited absent a resolution adopted by the city council.)
[232] Tex. Atty. Gen. Op. No. JC-0371 (2001); *see also* Tex. Atty. Gen. Op. No. JM-0386 (1985) (holding that an alderman cannot serve on the city's police reserve force).
[233] 29 C.F.R. § 553.103.
[234] *Id*.
[235] *Id*.
[236] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Oct. 22, 2004).
[237] *Cleveland v. City of Elmendorf, Tex*., 388 F.3d 522 (5th Cir. 2004).

that does not jeopardize an individual's ***volunteer status***.[238] 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.[239]

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.[240] 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.[241] 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 benefits from the volunteer's work; and (4) has the right to fire or replace the volunteer.[242]

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.[243] Cities owe the same duty of care to volunteers as to others on city property.[244] 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.[245] With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals.[246]

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[238] 29 C.F.R. § 553.106.
[239] TEX. GOV'T CODE § 614.192.
[240] TEX. CIV. PRAC. & REM. CODE § 101.021(1); 101.001; *Harris Cnty. v. Dillard,* 883 S.W.2d 166, 167 (Tex. 1994) (regarding a volunteer deputy sheriff).
[241] *Smith v. Univ. of Tex.*, 664 S.W.2d 180, 190 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
[242] *El Paso Laundry Co. v. Gonzales*, 36 S.W.2d 793 (Tex. Civ. App.—El Paso 1931, writ dism'd).
[243] TEX. CIV. PRAC. & REM. CODE § 101.021.
[244] *City of Austin v. Selter,* 415 S.W.2d 489 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).
[245] TEX. LAB. CODE § 504.012.
[246] *Id*. § 408.001.

CHAPTER 7—Drug Testing

May a city perform random drug tests on its employees?

The TML Legal Department and city attorneys receive many calls on this issue. Most cities either: (1) desire to implement random drug testing for all their employees; or (2) already have such a policy in place. Many are surprised to learn that unlike private employers, a city's ability to conduct drug testing on all its employees is limited by the Fourth Amendment to the United States Constitution. Because testing for drugs is considered a "search" under the Fourth Amendment, a city is generally prohibited from undertaking such test without "individualized suspicion."[247] However, a limited exception to this rule allows a city to conduct random drug testing of employees if a "special need," outside the need for law enforcement exists, and such "special need" outweighs the employees' privacy interest.[248]

When is random drug testing based on a "special need" allowed?

A special need beyond the need for law enforcement exists in "safety-sensitive" or "security-sensitive" positions that are "fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences."[249] The courts have determined that employees who hold the following safety-sensitive positions may be randomly drug tested without violating the Fourth Amendment: (1) law enforcement employees who carry firearms or who are directly involved in drug interdiction;[250] (2) public transporters in industries in which there is a documented problem with drug or alcohol related incidents;[251] (3) operators of heavy machinery, large vehicles or hazardous substances;[252] (4) employees working in high-risk areas such as highway medians;[253] and (5) wastewater treatment employees who handle hazardous chemicals.[254] Additionally, post-accident drug testing of employees holding safety-sensitive positions without individualized suspicion of wrongdoing has been upheld.[255]

A city that desires to implement a random drug testing policy should first articulate a "compelling interest" beyond the need for law enforcement that justifies such testing, and then determine which employees may legitimately be randomly tested. If a "compelling interest" beyond the need for law enforcement cannot be identified, the city should not perform random drug tests.

When is drug testing based on reasonable suspicion allowed?

A city may require an employee to undergo drug testing if the city has a reasonable suspicion,

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[247] *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).
[248] *See id* at 652; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).
[249] *Skinner*, 489 U.S. at 628.
[250] *Von Raab*, 489 U.S. at 679.
[251] *Skinner*, 489 U.S. at 602.
[252] *Id*; *Aubrey v. Sch. Bd. of Lafayette Par*., 148 F.3d 559 (5th Cir. 1988).
[253] *Bryant v. City of Monroe*, No. 14-30020, 2014 WL 6466862 (5th Cir. 2014))
[254] *Bailey v. City of Baytown, Texas*, 781 F. Supp. 1210 (S.D. Tex. 1991).
[255] *See Skinner*, 489 U.S. at 620.

based on individualized conduct, that the employee is under the influence of drugs or engaging in illegal use or drug abuse while on the job.[256] Whether individualized suspicion exists is a fact-specific inquiry. Before requiring an employee to undergo a drug test, the city should be able to articulate objective and specific observations that led to individualized suspicion, including, but not limited to, speech, behavior, conduct, or odor that suggests that an employee is under the influence of drugs, observation of drug use, a physical state of impairment, an incoherent mental state, or deteriorating work performance that is not attributable to other factors, changes in personal behavior that are otherwise unexplainable, or evidence of possession of illegal or unauthorized drugs or drug paraphernalia.[257] However, city employees or supervisors making this determination should receive adequate training, preferably from a medical professional, to ensure the behaviors are not attributable to other factors.[258]

A city may also drug test a non-safety sensitive employee after an accident where there is evidence that the employee was at least partially at fault.[259] However, across-the-board drug testing after any work-related injury of all employees, without a showing of individualized suspicion, special need, or nexus between the injury and drug impairment, is prohibited.[260]

Can a city drug test all applicants for employment?

Texas courts have not addressed whether a governmental entity can require drug testing of all applicants for employment. However, federal courts in other jurisdictions have struck down preemployment drug testing of employees in non-safety-sensitive positions.[261] Additionally, one court concluded that an employee's submission to drug testing, on pain of termination, does not constitute voluntary consent.[262] Although these cases are not binding on Texas employers, they are persuasive. Accordingly, a city that has or desires to implement a policy requiring pre-employment drug testing should consult with local legal counsel regarding this matter.

What rules apply to employees and applicants for employment who operate commercial motor vehicles?

All employees of a city who operate commercial motor vehicles that are subject to commercial drivers' license (CDL) requirements must undergo drug and alcohol testing pursuant to federal Department of Transportation regulations (DOT).[263] Said employees are subject to post-accident, random, reasonable suspicion, return-to-duty, and follow-up testing.[264] Also, applicants for

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[256] *Chandler v. Miller*, 520 U.S. 305, 313 (1997).
[257] *Am. Fed'n of Gov't Employees, AFL-CIO, Local 2391* v. Martin, 969 F.2d 788, 793 (9th Cir. 1992).
[258] *Nat'l Fed. of Fed. Emps, AFL-CIO v. Cheney*, 742 F. Supp. 4, 5-9 (D.C.D.C. 1990).
[259] *Skinner*, 489 U.S. at 630; *Bryant*, 593 at 299.
[260] *United Teachers of New Orleans v. Orleans Par. Sch. Bd. Through Holmes*, 142 F.3d 853, 856–57 (5th Cir. 1998).
[261] *See e.g.*, *Am. Fed'n of State, County and Mun. Empls. 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013), cert. denied, 572 U.S. 1060 (2014) (mandatory drug testing of all job applicants struck down); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (post-job offer drug testing of a library page was unconstitutional as applied to that position because the page's duties were not safety-sensitive).
[262] *Scott*, 717 F.3d at 873.
[263] *See* 49 U.S.C. §31306; 49 C.F.R. Part 382.
[264] *See* 49 CRF §§382.302; .305; .307; .309; and .311.

employment who are subject to DOT regulations must receive a negative drug test before being allowed to operate a commercial motor vehicle.[265] A city may not allow a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive duties.[266]

Additionally, all employers, including cities, who employ drivers with CDLs are required by federal law to use DOT's Federal Motor Carrier Safety Administration's Commercial Driver's License Drug and Alcohol Clearinghouse to determine a CDL driver's drug and alcohol program violations.[267] Employers and medical review officers, or their designated representatives, must also report information about current and prospective employees' positive drug and alcohol test results, as well as refusals to submit to testing, through the clearinghouse.[268] The clearinghouse can be accessed here: https://clearinghouse.fmcsa.dot.gov.

Are the results of a drug test confidential?

Generally, the results of a drug test should be kept confidential and not disclosed to third parties without the employee's consent. If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, this information must be treated as a confidential medical record and maintained in a secure file separate from an employee's personnel file.[269] As a best practice, drug test results received by a city should only be shared with city personnel on a need-to-know basis.

DOT regulations allow an employer to release the results of an employee's drug or alcohol test without the employee's consent in certain legal proceedings, including a lawsuit (e.g., a wrongful discharge action), grievance (e.g., an arbitration concerning disciplinary action taken by an employer), or administrative proceeding (e.g., an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test.[270] An employer is also allowed to release test results in response to a court order.[271]

Can a city require an individual to submit to and pass a drug test before the individual can be appointed to or run for an elective city office?

No. The Supreme Court of the United States has determined that requiring drug testing of elected officials, without individualized suspicion, as a condition for running for office is not permissible.[272] The Court found that there was no special need so substantial to override the individual's privacy interest as to suppress the Fourth Amendment's normal requirement of individualized suspicion.[273]

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[265] *Id*. §382.301.
[266] *Id*. §382.211.
[267] *Id*. §382.601 et seq.
[268] *Id*.
[269] 42 U.S.C. § 12112(d)(3)(B).
[270] 49 C.F.R. § 40.323.
[271] *Id*.
[272] *Chandler v. Miller*, 520 U.S. 305 (1997).
[273] *Id*. at 318-19.

Can a city adopt a drug and alcohol-free workplace?

Yes. Section 21.120 of the Labor Code 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.[274]

Similarly, the federal Americans with Disabilities (ADA) allows cities to entirely prohibit the illegal use of drugs and the use of alcohol at the workplace and prohibit employees from being under the influence of drugs and alcohol at the workplace.[275] The city may also hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.[276] A city that adopts such policy under the ADA is required to provide notice of said policy to applicants and employees.[277]

A city looking to adopt such policies should consult with its city attorney as the ADA's prohibitions on discriminating against qualified individuals with disabilities may be implicated. (See Chapter 9 for an overview of the ADA)

What should a city that chooses to adopt a drug testing policy consider?

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.

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).[278] 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.

If a city is a federal contractor or a grantee of federal funds, the city must comply with the

[274] TEX. LAB. CODE § 21.120.
[275] 42 U.S.C. §12114(c).
[276] *Id.*
[277] 42 U.S.C. § 12115.
[278] *Id.* §§ 12101-12213.

federal Drug-free Workplace Act of 1988.[279] The Act requires that a city adopt a "drug-free awareness" program and drug policy.[280] 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.[281] As noted above, any city employee with a Commercial Driver's License (CDL) 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:
https://efte.twc.texas.gov/drug_testing_in_the_workplace.html#:~:text=DRUG%20TESTING%20IN%20THE%20WORKPLACE

[279] 41 U.S.C. §§ 701-702
[280] *Id.*; *see* Federal Contractors and Grantee Resources, SAMHSA.GOV, *available at* https://www.samhsa.gov/workplace/employer-resources/contractor-grantee-laws.
[281] 49 U.S.C. § 5331; *see* Considerations for Safety and Security-sensitive Industries, SAMHSA.GOV, *available at* https://www.samhsa.gov/workplace/employer-resources/safety-security-sensitive.

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 (including sexual orientation and gender identity), national origin, or religion.[282] Discrimination under Title VII does not apply only to hiring or firing an individual, but also 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, conditions, or privileges of employment.[283]

Traditionally courts in interpreting Title VII, have required a person who has been unlawfully discriminated against to show that they suffered some "ultimate adverse employment action" (i.e., hiring, promotion, termination, etc.). However, in 2023, the Fifth Circuit Court of Appeals, in *Hamilton v. Dallas County*, modified this requirement broadening the types of personnel actions that can form the basis for a legal action.[284] In this case, a female county sheriff's officer was discriminated against by way of a sex-based scheduling policy that only allowed male officers to take full weekends off. The Court held that the policy was discriminatory as the days and hours that a person works fall under the "terms, conditions, or privileges" provision of Title VII.[285]

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.[286] This chapter also makes the Texas Workforce Commission the enforcement agency for Title VII in Texas.[287] In 2021 the Texas Legislature passed two bills, S.B. 45 and H.B. 21, which also make sexual harassment an unlawful employment practice.[288] In addition, Section 21.055 of the Labor Code makes retaliation an unlawful employment practice.

Which employers do Title VII and Chapter 21 apply to?

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[282] 42 U.S.C. § 2000e-2; See *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination "because of sex" under Title VII of the Civil Rights Act.).
[283] *Id.* § 2000e-3(a).
[284] *Hamilton v. Dallas Cnty*., 79 F.4th 494, 506 (5th Cir. 2023); *see also City of Houston v. Wills*, No. 14-23-00581-CV, 2024 WL 334243 (Tex. App.—Houston [14th Dist.] July 9, 2024) (first Texas court of appeals adopting new Fifth Circuit standard for what constitutes an adverse action).
[285] *Id*; see also *Harrison v. Brookhaven Sch. Dist*., 82 F.4th 427 (5th Cir. 2023).
[286] TEX. LAB. CODE § 21.051.
[287] *Id.* § 21.003; http://www.twc.state.tx.us/about-texas-workforce.
[288] TEX. LAB. CODE §§ 21.141-.142, .201-.202; Tex. S.B. 45 (87th R.S. 2021), *available at* https://www.legis.state.tx.us/tlodocs/87R/billtext/html/SB00045F.HTM; Tex. H.B. 21 (87th R.S. 2021), *available at* https://www.legis.state.tx.us/tlodocs/87R/billtext/html/HB00021F.HTM.

The provisions of Title VII apply only to an employer that employs 15 or more employees.[289] Independent contractors, elected officials, or any person chosen by such officer to be the officer's personal staff are not considered "employees."[290]

The provisions of Chapter 21 mirror federal law but also extend to government employers, including cities, regardless of the number of individuals employed.[291]

What is "retaliation," and is it prohibited?

Retaliation is prohibited conduct under Title VII and Chapter 21 of the Labor Code and occurs when an employer, including through a manager, supervisor, administrator, or other agent, takes adverse action that could dissuade a reasonable individual from engaging in "protected activity" (i.e. opposing any practice made unlawful by Title VII or making a complaint or charge, testifying, assisting, or participating in a Title VII proceeding or investigation).[292] The employment action must be "materially" adverse and typically includes a change in job title, pay grade, work hours, salary, or other benefits.[293] However, courts have also noted that a "diminution in prestige or change in standing among ... co-workers" as a result of an employer's actions could be considered a materially adverse action.[294] But "mere 'petty slights' or 'minor annoyances' do not rise to the level of a materially adverse action."[295]

If an individual sues for retaliation related to a protected activity, such as filing a sexual harassment complaint, the individual must prove that: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action.[296] Moreover, the individual need not prove that the sexual harassment allegation has merit.[297] Rather, the individual needs only show that he complained in good faith about the harassment and that the city took some adverse employment action against the individual because of the complaint.[298]

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

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[289] *Id*. § 2000e(e).
[290] *Id*. § 2000e(f).
[291] TEX. LAB. CODE § 21.002(8).
[292] *See* 42 U.S.C. § 2000e-3(a); TEX. LAB. CODE §21.055; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006); *Crawford v. Metropolitan Government*, 555 U.S. 271, 275 (2009); *Thompson v. North American Stainless*, 562 U.S. 170, 173-175 (2011); *Tex. Health & Human Services Comm'n v. Kadia*, No. 03-23-00100-CV, 2024 WL 3212411 (Tex. App.—Austin June 28, 2024).
[293] *Martinez v. Univ. of Tex. at Austin*, No. 23-50036, 2023 WL 6518165, at *4 (5th Cir. Oct. 5, 2023).
[294] *Id*.
[295] *Id*.
[296] *Willis v. W. Power Sports, Inc*., No. 23-10687, 2024 WL 448354, at *2 (5th Cir. Feb. 6, 2024); *Harper v. Lockheed Martin Corp*., No. 22-10787, 2024 WL 361313, at *4 (5th Cir. Jan. 31, 2024); *Martinez v. Univ. of Tex. at Austin*, No. 23- 50036, 2023 WL 6518165, at *3 (5th Cir. Oct. 5, 2023).
[297] *Vadie v. Mississippi State Univ*., 218 F.3d 365, 374 n.24 (5th Cir. 2000).
[298] See *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 763–64 (Tex. 2018); *Tex. Dep't of State Health Services v. Resendiz*, 642 S.W.3d 163, 180 (Tex. App.— El Paso 2021, no pet.).

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.[299] 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.[300]

Chapter 21 similarly creates a BFOQ exception for these protected classes but also includes age and disability where age or disability is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.[301]

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.[302]

What is racial discrimination?

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.[303] In 2006, 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);
- perception (based on belief that person is a member of a particular race regardless of how that individual identifies themselves);
- association (discrimination against an individual because of his/her association with someone of a particular race); and
- subgroup or "Race Plus" (for example, discrimination where employer rejects Black women with preschool age children, while not rejecting other women with preschool age children).[304]

The EEOC defines "color" as "pigmentation, complexion, or skin shade or tone."[305] Color discrimination can occur between persons of different races, ethnicities, or between

[299] *Id.* § 2000e-2(e); TEX. LAB. CODE § 21.119.
[300] *Id*.
[301] *Id*.
[302] *Id.* § 2000e-2(g)(1).
[303] *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 280 (1976).
[304] *Race and Color Discrimination*, EEOC COMPLIANCE MANUAL (April 19, 2006), *available at* https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination.
[305] *Id.*

persons of the same race or ethnicity.[306]

In 2023, the Texas Legislature passed H.B. 567 which provides that discrimination based on race includes discrimination on the basis of hair texture or protective hairstyles associated with race, including braids, locks, and twists.[307] It further provides that employers may not adopt or enforce a dress or grooming policy that discriminates on this basis.[308]

What is national origin discrimination?

National origin discrimination is "the denial of equal employment opportunity because of 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."[309] 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.[310]

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.[311] 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.[312] 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.[313]

The EEOC provides that a rule that requires employees to speak English only at certain times is permissible if justified by business necessity.[314] 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.

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[306] *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).
[307] TEX. LAB. CODE § 21.1095; Tex. H.B. 567 (88th R.S. 2023), *available at* https://www.legis.state.tx.us/tlodocs/88R/billtext/html/HB00567F.HTM.
[308] *Id*.
[309] 29 C.F.R. § 1606.1
[310] *Id*.
[311] *EEOC Enforcement Guidance on National Origin Discrimination*, EEOC.GOV, *available at* https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination.
[312] 29 C.F.R. § 1606.7.
[313] *EEOC v. Premier Operator Servs., Inc*., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); *see also Garcia v. Garland Indep. Sch. Dist*., 2013 WL 5299264, at *9 (N.D. Tex. Sept. 20, 2013).
[314] 29 CFR § 1606.7.

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

Under Title VII, an applicant or employee may not be treated unfavorably because of his or her religious beliefs.[315] 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."[316] 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.[317] For example, Wicca[318] and atheism[319] 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.[320] Neither was a personal religious creed that certain cat food contributed to an employee's state of well-being.[321]

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.[322] In 2023, the United States Supreme Court in *Groff v. DeJoy* clarified the standard employers must use when evaluating whether an accommodation creates an undue hardship.[323] In the particular case, Groff was a rural carrier associate for the United States Postal Service and never had to work on Sundays. After USPS contracted with Amazon to deliver packages on Sundays, Groff requested an accommodation as his religion did not allow him to work on Sundays. The employer offered for other employees to swap schedules but later resulted in another employee having to work every Sunday. When a replacement could not be found Groff was unable to attend work which led to discipline and termination. His employer, using the previous de minimis standard, determined no other accommodations were feasible without creating an undue hardship.[324] However, in its decision, the Court stated that rather than a mere *de minimis* cost standard, an undue hardship can only be shown when an accommodation would result in a *substantial* increase in costs in relation to the conduct of the particular business.[325] Additionally, an employer must consider all relevant factors in the case at hand, including the specific accommodations at issue and their practical impact considering the nature, size, and operating cost of the employer.[326] An employer may not consider employee hostility in

[315] 42 U.S.C. § 2000e-2; 29 CFR § 1605.
[316] 29 C.F.R § 1605.1; *Welsh v. U.S.*, 398 U.S. 333 (1970); *U.S. v. Seeger*, 380 U.S. 163 (1965).
[317] 29 C.F.R. § 1605.1.
[318] *Brown v. Woodland Joint Unified Sch. Dist*., 27 F.3d 1373 (9th Cir. 1994).
[319] *Reed v. Great Lakes Cos., 330 F.3d 931 (*7th Cir. 2003).
[320] *Bellamy v. Mason's Stores Inc.,* 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).
[321] *Brown v. Pena,* 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).
[322] 42 U.S.C. § 2000e; 29 C.F.R. § 1605.2(d).
[323] *Groff v. DeJoy*, 600 U.S. 447 (2023).
[324] *Id*. at 454-55.
[325] *Id*. at 468.
[326] *Id*. at 470.

evaluating the undue hardship.[327] While additional guidance on what constitutes a substantial burden will likely come by way of future legal decisions, the Supreme Court noted that the EEOC's current guidance with respect to religious accommodations "is sensible and will, in all likelihood, be unaffected by its decision.[328] EEOC guidance can be found at: https://www.eeoc.gov/religious-discrimination.

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.[329]

The Attorney General of Texas has also weighed in specifically on religious accommodation as a result of the *Obergefell v. Hodges* case (legalizing same sex marriage nationwide) in an opinion.[330] 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 depend on the facts of the particular case.

Given the new Supreme Court standard, cities should seek legal advice in determining whether a religious accommodation may be refused based on an undue hardship to the city.

What is sex discrimination?

Sex discrimination is a type of discrimination that involves treating an applicant or employee differently because of their sex.[331] Title VII and Chapter 21 protects both men and women from sex discrimination. Title VII also protects against "sexual stereotyping."[332] In recent cases, the Supreme Court has also clarified what constitutes sex-based discrimination under Title VII. In 2020, the Supreme Court held in *Bostock v. Clayton County, Georgia* that discrimination based on sexual orientation or gender identity is discrimination "because of sex" under Title VII of the Civil Rights Act.[333] Therefore, an employer who discharges, penalizes, or otherwise discriminates against an individual for being gay or transgender violates Title VII.[334]

Before *Bostock*, the Court the court also addressed same-sex marriages. In *Obergefell v.*

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[327] *Id*. at 472.
[328] *Id*. at 471.
[329] *Id.* § 1605.2(e).
[330] Tex. Atty. Gen. Op. KP-0025 (2015) *available at* https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2015/kp0025.pdf; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[331] 42 U.S.C. §§ 2000e(k), e-2.
[332] *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").
[333] *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020).
[334] *Id*.

Hodges, it held that any spouse, including same sex spouses, must be offered the same benefits as any other spouse of an employee.[335]

Additionally, the Court has recognized that same-sex sexual harassment can form a basis for a valid claim under Title VII.[336]

Is sexual harassment considered sex discrimination under Title VII?

Yes, in 1986, the U.S. Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.[337] To prove a claim for sexual harassment there must be a showing that the "harassment" or discrimination was based on gender and that one gender was singled out for the treatment at issue.[338]

What constitutes sexual harassment in the workplace?

Not all conduct of a sexual nature in the workplace constitutes sexual harassment. Rather, only unwelcome sexual conduct that is made a term or condition of employment (commonly referred to as "quid pro quo") or that creates a hostile working environment constitutes sexual harassment.[339] Similarly, Section 21.41 of the Labor Code defines sexual harassment as an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature if:

(a) Submission to the advance, request, or conduct is made a term or condition of an individual's employment, either explicitly or implicitly;
(b) Submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's employment;
(c) The advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance; or
(d) The advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.[340]

Examples of unwelcome conduct include, but are not limited to, innuendos, jokes, or gestures of a sexual nature; displaying of sexually suggestive objects, photos, or drawings; flirting; touching, or other bodily contact; and blocking or impeding physical movement.

Additionally, the United States Supreme Court has recognized that conduct so intolerable that it compels an employee to resign can be a valid sexual harassment claim under Title VII (commonly referred to as "constructive discharge").[341]

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[335] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[336] *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).
[337] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).
[338] *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018).
[339] *See* 29 C.F.R. § 1604.11(a).
[340] *Id*. at § 21.141(2).
[341] *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 133 (2004).

Courts have also held that both women and men can be sexually harassed, and that same sex sexual harassment is actionable under Title VII.[342] Thus, the gender of the harasser or the person being harassed makes no difference.

Effective September 1, 2021, the timeframe by which a victim of sexual harassment has to file a sexual harassment claim with the Texas Workforce Commission was expanded from 180 days to 300 days after the date the alleged harassment occurred.[343]

How serious must the conduct be in order to rise to actionable sexual harassment?

For quid pro quo sexual harassment, a victim must show that he or she suffered a "'tangible employment action' that 'resulted from his [or her] acceptance or rejection of his [or her] supervisor's alleged sexual harassment.'"[344] A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[345]

For sexual harassment to create an "abusive" or "hostile" work environment, the harassment must be sufficiently severe or pervasive to alter the terms and conditions of employment.[346] Such a work environment must be deemed both objectively and subjectively offensive—one such that a reasonable person would find hostile or abusive and one that the victim does in fact perceive to be so.[347] Unless the conduct is extremely serious, "simple teasing," "offhand comments," and isolated incidences will not, by themselves, support a sexual harassment claim.[348] Whether conduct is severe or pervasive is a fact-specific inquiry and courts will look at the totality of the circumstances to make this determination, including, but not limited to: (1) the frequency of the conduct; (2) its severity; (3) whether it was physically threatening or humiliating or a mere offensive utterance; (4) whether it unreasonably interferes with the employee's work performance; and (5) whether the conduct complained of undermined the victim's workplace competence.[349]

For conduct to be actionable as a "constructive discharge" claim, it must be much worse than severe or pervasive. In other words, a constructive discharge claim is a '"worse case' harassment scenario, harassment ratcheted up to the breaking point."[350] An employee bringing a constructive discharge claim must "show working conditions so intolerable that a reasonable person would

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[342] *See Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998); *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 407 (Tex.App.—El Paso 2002, pet. denied).
[343] TEX. LAB. CODE § 21.202(a-1).
[344] *La Day v. Catalyst Tech. Inc*., 302 F.3d 474, 481 (5th Cir. 2002).
[345] *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).
[346] *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 66); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Ellerth*, 524 U.S. at 786.
[347] *Faragher*, 524 U.S. at 788.
[348] *Id*. (quoting *Oncale*, 523 U.S. at 81).
[349] *Harris*, 510 U.S. at 23; *Butler v. Ysleta Indep. Sch. Dist*. 161 F.3d 263, 270 (5th Cir. 1998).
[350] *Suders*, 542 U.S. 147-48.

have felt compelled to resign."[351]

A city may adopt a policy that provides a lower threshold than federal or state law for what constitutes sexual harassment. In that case, a harasser's conduct could violate city policy without necessarily violating state or federal law.

How is sexual harassment addressed in state law?

In 2021, the state legislature passed two bills, S.B. 45 and H.B. 21, expanding protections to employees who bring sexual harassment claims that occur in the workplace.[352] Codified in Chapter 21 of the Labor Code, the new law states that an employer commits an unlawful employment practice if sexual harassment occurs and the employer or the employer's agents or supervisors know or should have known that the conduct constituting sexual harassment was occurring and failed to take immediate and appropriate corrective action.[353]

Who is considered an "employee" with respect to sexual harassment under Texas law?

Under Chapter 21, an employee is any individual employed by an employer, including a person subject to civil service laws, but does not include elected officials.[354] Texas law also extends sexual harassment protections to unpaid interns.[355]

Who is considered an "employer" with respect to sexual harassment under Texas law?

An employer is a person who employs one or more employees or acts directly in the interests of an employer in relation to an employee.[356] This second qualifier, a person "who acts directly in the interest of an employer in relation to an employee" significantly extends personal liability to agents, managers, human resources staff, and supervisors for both sexual harassment itself and for failing to take immediate and corrective action. Previously, Texas law did not provide for individual liability for sexual harassment in this manner.

These changes do not currently apply to claims based on other protected characteristics such as race, religion, color, etc.

Can a city be held liable for a sexual harassment perpetrated by its officials or employees?

Yes. A city may be held vicariously liable for the actions of its supervisors, which result in a tangible employment action, without regard to whether the city knew about the sexual

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[351] *Id*. 524 U.S. at 147.
[352] TEX. LAB. CODE §§ 21.141-.142, .201-.202; Tex. S.B. 45 (87th R.S. 2021), *available at* https://www.legis.state.tx.us/tlodocs/87R/billtext/html/SB00045F.HTM; Tex. H.B. 21 (87th R.S. 2021), *available at* https://www.legis.state.tx.us/tlodocs/87R/billtext/html/HB00021F.HTM.
[353] *Id*. at § 21.142.
[354] *Id*. at § 21.002(7).
[355] *Id*. at § 21.1065.
[356] *Id*. at § 21.141(1).

harassment.[357] This strict liability standard is triggered only when the harasser is a supervisor with the authority to recommend or take tangible employment decisions that affect an employee.[358]

If sexual harassment by a supervisor does not lead to a tangible employment action, the city may still be liable unless it can show that: (1) it exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to complain to management or to avoid harm otherwise.[359]

A city may be held liable for the conduct of co-workers and nonemployees, such as vendors or customers if the victim can prove that the employer knew or should have known of the sexual harassment and failed to take prompt remedial action to end the harassment.[360]

In addition, Texas law provides that liability for sexual harassment may be imposed if an employer fails to take "immediate and appropriate corrective action."[361] Although this new standard has not been interpreted by a court, it appears to be a more stringent standard than the federal requirement to "take prompt and effective remedial action."[362]

Can an individual city official or employee be held personally liable for sexual harassment?

Until recently, individual city employees and officials in Texas could not be held personally liable for sexual harassment. But, Senate Bill 45, adopted by the 87th Texas Legislature and effective September 1, 2021, fundamentally altered the liability landscape for sexual harassment in Texas.[363] The bill expanded the definition of "employer" to include "any person who acts directly in the interests of an employer in relation to an employee."[364] Under this new definition, it is possible that elected officials, supervisors, managers, human resource professionals, and other employees may be subject to individual liability for sexual harassment if they: (1) know or should have known that the conduct constituting sexual harassment was occurring; and (2) fail to take immediate and appropriate corrective action.[365] At this time three federal courts have held that the new definition is "sufficiently broad" to apply to individual managers.[366]

What defenses to sexual harassment liability are available to a city?

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[357] *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.
[358] *Ellerth*, 524 U.S. at 761; *Vance v. Ball State Univ*., 570 U.S. 421, 431 (2013).
[359] *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. at 807.
[360] 29 C.F.R. § 1604.11(d); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998); *Lockard v. Pizza Hut, Inc*., 162 F.3d 1062 (10th Cir. 1998).
[361] TEX LAB. CODE § 21.142
[362] See 42 U.S.C. § 2000e-2(a); 29 C.F.R. § 1604.11(d).
[363] TEX. LAB. CODE §§ 21.141-.142.
[364] *Id*. § 21.141(1).
[365] *Id*. § 21.142.
[366] See *Morgan v. Dyba*, No. 3:24-CV-0557-X, 2024 WL 3345837, at *2 (N.D. Tex. July 8, 2024); *Brown-Steffes v. Avis Budget Group, Inc.*, No. 3:23-CV-1747-D, 2023 WL 6386510, at *1 (N.D. Tex. Sept. 29, 2023); *Siegel v. BWAY Corp.*, No. CV H-24-0411, 2024 WL 1639916, at *7 (S.D. Tex. Apr. 12, 2024); *Quinonez v. Perez*, No. EP-23-CV-291-KC, 2024 WL 176601 (W.D. Tex. Jan. 16, 2024).

If, as a result of sexual harassment, an employee experiences a "tangible employment action," the city does not have the option of proving any defense and is strictly liable for the harassment even if the city did not know about the harassing conduct. If no tangible employment action resulted from the harassment; the city may raise an affirmative defense to avoid liability by showing that: (1) that the city exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the city or to avoid harm otherwise.[367]

For example, to avoid liability, a city can show that it had an adequate sexual harassment policy that included a complaint process, and the victim failed to take advantage of the policy to stop the harassment.[368] However, if an employee reports harassment to a supervisor, or a supervisor knows or notices anything that might be considered harassment, the city must take prompt action to stop the harassment and prevent it from occurring. If the city fails to take such necessary actions to stop the harassment, the city could be held liable.

What are the possible penalties for sexual harassment and retaliation?

Penalties for sexual harassment and retaliation may include civil damages such as compensatory money damages, injunctive relief, back pay, front pay, or job reinstatement.[369]

In addition to such civil penalties, there may be criminal penalties that arise out of official misconduct. Under the Texas Penal Code, a public servant commits the offense of "official oppression" if, while acting or purporting to act in an official capacity, the servant: (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that the servant knows is unlawful; (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing such conduct is unlawful; or (3) intentionally subjects another to sexual harassment.[370] An offense under this section is a Class A misdemeanor, punishable by a fine of up to $4,000 or up to one year in jail, or both.

How can a city prevent sexual harassment and retaliation in its workplace and limit its liability?

Although a city cannot fully prevent sexual harassment in the workplace, it can take the following preventive measures to protect its employees and limit its liability:

(1) ***Establish a sexual harassment policy.*** The policy should clearly provide that the city does not tolerate sexual harassment or retaliation. The policy should be distributed to all employees, including seasonal, temporary, and contract employees, and should be enforced uniformly. The city's policy should send a message from top city officials that harassment and retaliation will not be tolerated.

[367] *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807.
[368] *See Watts v. Kroger Co*., 170 F.3d 505, 510 (5th Cir. 1999).
[369] TEX. LAB. CODE §§ 21.258-.2585
[370] TEX. PEN. CODE § 39.03.

(2) ***Create a procedure for making complaints.*** The procedure should provide a mechanism for employees to report sexual harassment and should include multiple avenues for employees to do so. Employees should not be limited to reporting complaints to their immediate supervisor as this individual may be the harasser; thus, the city should designate more than one individual to whom employees can make a complaint. The city should also mandate supervisors report all complaints of harassment, even if the complainant requests that the supervisor not tell anyone else or does not wish to pursue the complaint.

(3) ***Promptly and thoroughly investigate all complaints.*** The complainant, alleged harasser, and all pertinent witnesses and others who may have relevant information should be interviewed. Additionally, the alleged harasser should not have any direct or indirect control over the investigation.

(4) ***Take swift and appropriate remedial action.*** The city should take appropriate action if the complaint is found to be justified.

(5) ***Appropriately train employees and supervisors.*** The city should conduct, on a regular basis, mandatory training for all supervisors and employees on the city's sexual harassment and anti-retaliation policy.

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
- More than 200 but fewer than 501-$200,000
- More than 500 employees- $300,000[371]

A plaintiff cannot recover punitive damages from a city.[372]

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

Yes, under Sections 1981 and 1983, the federal statutes providing a cause of action for the violation of federal rights, a city official could be liable for damages for employment discrimination.[373]

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

[371] 42 U.S.C. § 1981a(b)(2)-(3).
[372] *Id.* § 1981a(b)(1).
[373] 42 U.S.C. § 1981; 42 U.S.C. § 1983.

> 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.[374]

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.).[375]

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 in regards to the complained-of conduct.[376] Thus, a city official could be individually liable for a suit where the official has purposely discriminated against an employee based on race, with respect to hiring, firing, compensation, or the terms, conditions, or privileges of employment.[377]

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.[378]

Both 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.[379]

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

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[374] *Id*.
[375] *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993).
[376] *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337-38 (5th Cir. 2003).
[377] *Hamilton v. Dallas Cnty*., 79 F.4th 494, 506 (5th Cir. 2023) (removing the requirement that an employee show some "ultimate adverse employment action.").
[378] 42 U.S.C. § 1983.
[379] *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 550 (5th Cir. 1997).

them for the claim.[380] The applicable administrative remedies that must be exhausted commence on the date the employee gives notice of his resignation.[381]

A city official could assert a qualified immunity defense 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.'"[382] 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.[383]

Do cities need to post information for employees about reporting workplace violence?

Yes. The Texas Legislature in 2023, passed a bill requiring all Texas employers, regardless of the number of employees, to post a notice informing employees of the contact information for reporting instances of workplace violence or suspicious activity to the Department of Public Safety (DPS).[384] The notice must be posted: (1) in a conspicuous place in the employer's place of business; (2) in sufficient locations to be convenient to all employees; and (3) in English and Spanish, as appropriate. The notice must include contact information for reporting workplace violence or suspicious activity as well as informing employees of their right to make a report to DPS anonymously. The notice can be found on the Texas Workforce Commission's website here: https://www.twc.texas.gov/sites/default/files/fdcm/docs/workplace-violence-poster-twc.pdf.

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:
https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination

Race/Color Discrimination:
https://www.eeoc.gov/laws/guidance/facts-about-racecolor-discrimination

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[380] *Harris County Hospital District v. Parker*, 484 S.W.3d 182, 188 (Tex. App. 2015).
[381] *Green v. Brennan*, 578 U.S. 547 (2016).
[382] *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)).
[383] *Lauderdale v. Texas Dept. of Crim. Justice*, 512 F.3d 157, 166-67 (5th Cir. 2007).
[384] TEX. LAB. CODE § 104A.003; Tex. H.B. 915 (88th R.S. 2023), *available at* https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB00915F.pdf#navpanes=0.

Religious Discrimination:
https://www.eeoc.gov/laws/guidance/fact-sheet-religious-discrimination

National Origin Discrimination:
https://www.eeoc.gov/laws/guidance/fact-sheet-national-origin-discrimination

EEOC Enforcement Guidance on Retaliation
https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues

Texas Workforce Commission:
http://www.twc.state.tx.us/about-texas-workforce

CHAPTER 9—Disability Discrimination and Accommodations

What laws protect individuals with disabilities in the employment context?

Title I of the Americans with Disabilities Act (ADA) is a federal law that protects qualified individuals who have a disability from employment discrimination and retaliation on the basis of that disability.[385] Similarly, the Texas Commission on Human Rights Act (TCHRA) makes it unlawful for an employer to discriminate and retaliate against an individual with a disability.[386] Both state and federal law prohibit discrimination in all employment practices against including hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment.[387] Additionally, unlawful discrimination includes an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of its business.[388]

The ADA applies to all city employers with 15 or more employees.[389] However, the disability discrimination provisions under State law apply to all city employers regardless of the number of employees a city has.[390]

What is a disability under the ADA?

A disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual."[391] It also includes individuals who have a record of such an impairment or are "regarded as" having such an impairment.[392] A physical or mental impairment includes, but is not limited to: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[393] The federal 2008 ADA Amendments Act construed the term "substantially limits" broadly, in effect, expanding the definition of disability to include more individuals.[394]

Certain conditions are expressly excluded from the ADA's coverage and are not considered disabilities. Such conditions include hair color or left-handedness or height, weight, or muscle

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[385] 42 U.S.C. § 12101.
[386] TEX. LAB. CODE §§ 21.051; 21.055.
[387] 42 U.S.C. § 12112.
[388] *Id.* § 12112(b)(5)(A).
[389] *Id.* § 12111(5)(A).
[390] TEX. LAB. CODE § 21.002(8).
[391] 42 U.S.C. § 12102.
[392] *Id.*; *see also* TEX. LAB. CODE § 21.002(6)
[393] 29 C.F.R. § 1630.2(h)
[394] 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.

tone that are within "normal range." Similarly, age by itself is not an impairment, unless it's associated with hearing or vision loss.

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."[395] It also includes "major bodily functions" which includes correct functioning of the digestive, immune, neurological, respiratory, circulatory, and reproductive systems.[396] 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 falling on the side of the individual having a disability.

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.[397] Subsequently, an impairment that is limited in duration and has no long term effect does not substantially limit a major life activity and is not protected by the ADA.

Is pregnancy considered a disability?

The Pregnancy Discrimination Act (PDA), which amends Title VII of the Civil Rights Act, provides that pregnancy by itself is not a "disability" but, depending on the situation, certain pregnancy-related impairments (e.g. gestational diabetes) may be considered disabilities under the ADA. The Pregnancy Workers Fairness Act (PWFA), adopted by Congress in 2023 is modeled after the ADA, and expands the protections for pregnant employees and applicants. Under the PWFA, a pregnancy need not be deemed a "disability" to be covered under the PWFA, and an employer is required to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions. (See Chapter 12 for further information on the PWFA).

Does the ADA protect an individual using illegal drugs?

The ADA does not protect individuals who are currently using illegal drugs and any resulting disorders from such use.[398] Illegal use of drugs under the ADA is defined as "the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act."[399]

Current illegal use of drugs is use "that occurred recently enough to justify a reasonable belief

[395] 29 C.F.R. § 1630.2(i).
[396] *Id*.
[397] *Id*. § 1630.2(j)(4)(ii).
[398] *Id*. § 1630.3.
[399] 42 U.S.C. § 12111(6); 29 C.F.R. § 1630.3(a).

that a person's drug use is current or that continuing use is a real and ongoing problem."[400] However, an individual who has successfully completed or is currently in a rehabilitation program and is no longer illegally using drugs is protected by the ADA.[401] Whether an individual has been drug-free for a significant time to be protected by the ADA is a fact-based issue, but one court has found an employee's entry into a rehabilitation facility does not automatically bring the employee under the ADA's protection.[402]

The city may also hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.[403]

(See Chapter 7 for additional questions related to drug testing).

Does the ADA protect individuals with an opioid use disorder?

An individual in treatment or recovery from opioid use has a disability under the ADA provided that the individual is not engaged in the illegal use of drugs.[404] Under the ADA, an individual's use of prescribed medication is not an "illegal use of drugs" if the individual uses the medication under the supervision of a licensed health care professional.[405]

The EEOC recently adopted a technical guidance regarding the ADA and the use of opioids, which can be found here: https://www.eeoc.gov/newsroom/eeoc-releases-technical-assistance-documents-opioid-addiction-and-employment.

Does the ADA or state law protect individuals using CBD or medical marijuana?

Although the ADA does not protect individuals who are currently using illegal drugs, it does contain a safe-harbor provision. Under the ADA, the term *illegal use of drugs* does not include the use of a drug (a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act) taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act (CSA) or other provisions of federal law.[406]

Under the CSA, marijuana is a Schedule 1 narcotic.[407] However, the federal Farm Bill, enacted

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[400] *Id.*
[401] *Id.* § 35.131.
[402] *Zenor v. El Paso Healthcare Sys*., 176 F.3d 847 (5th Cir. 1999); *cf. Mauerhan v. Wagner Corp*., 649 F.3d 1180 (10th Cir. 2011) (finding that an employee who was terminated one day after completing a 30-day inpatient drug rehabilitation program was still a "current drug user" even though he had remained drug-free throughout his 30-day rehabilitation period).
[403] *Id.*
[404] 42 U.S.C. § 12210(b)(2); 28 C.F.R. §§ 35.131(a)(2)(ii), 36.209(a)(2)(ii).
[405] 29 C.F.R § 1630.3.
[406] 28 C.F.R. § 35.104.
[407] 21 U.S.C. § 812(c).

in 2018, among other things, removed hemp from the CSA.[408] The bill defines hemp as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids [CBD], isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC[409]] concentration of not more than *0.3 percent* on a dry weight basis."[410] By passing the bill and updating the definition of hemp, cannabis plants and derivatives, including cannabidiol (CBD), containing less than 0.3 percent THC are no longer illegal under federal law.[411] However, the Farm Bill does not protect employees and applicants from adverse employment action for the use of CBD.

Under the Texas Compassionate Use Act, registered physicians can prescribe low-THC cannabis (referred to as medical marijuana) to individuals suffering from specific medical disorders – incurable neurogenerative disease, cancer, seizure disorder, multiple sclerosis, spasticity, amyotrophic lateral sclerosis, autism, post-traumatic stress disorder, or certain medical conditions approved for research by a compassionate-use institutional review board under rules approved by the Health and Human Services Commission.[412] Low-THC cannabis is defined as "the plant Cannabis sativa L., and any part of that plant or any compound, manufacture, salt, derivative, mixture, preparation, resin, or oil of that plant that contains not more than *one percent* by weight of [THC]." However, the Compassionate Use Act does not protect employees and applicants from adverse employment action for use of medical marijuana.

Whether an employee or applicant who has a disability and uses CBD or medical marijuana under the supervision of a healthcare provider would be protected from an adverse employment action has not been addressed by a Texas federal or state case. But other federal courts have found that the use of marijuana for treatment of a disability even under the supervision of a healthcare provider is not protected by the ADA.[413] For example, in 2024, a non-Texas federal district court in Vermont (10th Circuit) found that the safe-harbor provision does not protect a disabled employee taking marijuana under the supervision of a licensed health care provider.[414] In that case, the plaintiff was fired by his employer for failing a random drug test by testing positive for marijuana despite having a valid, state-issued medical marijuana card and being prescribed medical marijuana to treat his chronic pain and depression. The employer argued that the employee was not protected by the ADA because he was terminated for his use of marijuana and not his disability. The employee argued that the safe-harbor provision under the ADA protects him as a qualified individual with a disability because he uses marijuana to treat his disability as prescribed by his licensed health care provider. The court determined that although

[408] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018) (2018 Farm Bill).
[409] THC is the substance in marihuana that causes psychoactive effects. *See* FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), FDA.GOV, *available at* https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#whatare.
[410] *See* 85 Fed. Reg. 51639, 51640 (2020) (addressing change in definition of hemp under 2018 Farm Bill).
[411] *Id*.
[412] TEX. OCC. CODE §§ 169.002, .003.
[413] *Skoric v. Marble Valley Regional Transit Dist*., No. 2:23-cv-00064-gwc (D. Vt. 2024); see also *James v. City of Costa Mesa*, 700 F.3d 394 (10th Cir. 2012) (the court held that even marijuana use under a doctor's supervision in accordance with state law was not protected under the ADA).
[414] *Skoric,* No. 2:23-cv-00064-gwc.

the employee was using marijuana under the supervision of his physician, such use was an illegal use of drugs under the ADA because under the CSA, marijuana is an illegal drug that has "no currently accepted medical use in treatment in the treatment in the United States."[415]

While the above decision is not binding in Texas, it is illustrative of the complexities of this issue. A city looking to adopt a drug use policy should consult with its city attorney.

With respect to CDL holders subject to the U.S. Department of Transportation's mandatory drug testing requirements, the Department has issued clear guidance on the topic of CBD use.[416] Specifically, DOT provides that "CBD use is not a legitimate medical explanation for laboratory-confirmed marihuana positive result. Therefore, Medical Review Officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product."[417]

Is alcoholism considered a disability under the ADA?

Although a current illegal user of drugs is not protected under the ADA, a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of an accommodation, if he or she is qualified to perform the essential functions of a job. However, an employer may discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that she or he is not a "qualified person with a disability."[418]

Is obesity considered a disability?

The Texas Supreme Court recently determined that morbid obesity, unconnected to an underlying physiological disorder or condition, does not qualify as a disability under state law.[419]

Who is a "qualified individual with a disability"?

A "qualified individual with a disability" is an individual who can perform the "essential functions" of the job with or without a reasonable accommodation.[420] The city as employer determines the "essential functions" of a job, which are the fundamental functions of a position, and may include educational background, employment experience, skills, licenses, and other

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[415] *Id.*; 21 U.S.C. § 812(b)(1)(B).
[416] 49 U.S.C. §31306; 49 C.F.R. Part 382.
[417] DOT "CBD" Notice, U.S. Dep't of Transp., *available at* https://www.transportation.gov/odapc/cbd-notice#:~:text=The%20Department%20of%20Transportation's%20Drug,laboratory%2Dconfirmed%20marijuana%20positive%20result.
[418] EEOC Technical Assistance Manual on the ADA 8.4, *available at* https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act.
[419] *Tex. Tech Univ. Health Scis. Ctr. - El Paso v. Niehay*, 671 S.W.3d 929, 936 (Tex. 2023).
[420] 42 U.S.C. § 12111.

job-related qualifications.[421] The term "essential functions" does not include marginal functions of the job.[422]

Can attendance be considered an essential job function?

Yes. One federal court of appeals has determined that attendance *is* an essential function of the job for *all* employees who work at a place of business.[423] Additionally, the Fifth Circuit Court of Appeals found that an employer was not obligated by the ADA to give an employee discipline-free time off to receive medical care and to recover from a seizure as a reasonable accommodation because regular worksite attendance was an essential job function.[424]

A recent Fifth Circuit court opinion touched on whether a disabled employee's request for an accommodation to work from home in the mornings was a reasonable accommodation.[425] The employee, who worked as a Communication Programs Specialist for the United States Postal Service in the Houston area, from 2009 suffered from peripheral neuropathy, a nerve condition that often flares up in the morning. She asked the Postal Service to let her work mornings from home as needed and report to the office each afternoon. The Postal Office denied her request, and she sued for failure to accommodate under the ADA. The court found that while regular on-site attendance is generally an essential function of most jobs, it may be reasonable based on the nature of some jobs to work part of the day at home.

What is a reasonable accommodation?

A reasonable accommodation is a change or adjustment to a job or work environment that allows a qualified individual with a disability to perform the essential functions of the job.[426] For example, this could include changing the job site in some way to make it more accessible for an individual or allowing additional break periods for an individual with a disability.

A city is only required to accommodate a "known" disability.[427] But if a disability is obvious, such as the employee is using a wheelchair, the city employer "knows" of the disability even if applicant or employee does not inform the city, and the city is required to provide a reasonable accommodation in such instances.

Employers are required to engage in an interactive process with employees to meet their obligations to provide reasonable accommodations under the ADA. Usually, an applicant or employee will inform the city of his or her disability and suggest an appropriate accommodation. However, an employer is not required to provide the accommodation the individual wants, provided that the employer provides an effective reasonable

[421] 29 C.F.R. § 1630.2(n).
[422] *Id*.
[423] *Samper v. Providence St. Vincent Med.Ctr.,* 675 F.3d 1233 (9th Cir. 2012).
[424] *Weber v. BNSF Ry. Corp.,* 989 F. 3d 320 (5th Cir. 2021).
[425] *Montague v. United States Postal Serv*., No. 22-20113, 2023 WL 4235552 (5th Cir. June 28, 2023).
[426] 42 U.S.C. § 12111.
[427] 42 U.S.C. § 12112(b)(5)(A).

accommodation.[428] If the appropriate accommodation is not readily known, the city must make an effort to identify one. The city may consult with the applicant or employee to identify an appropriate reasonable accommodation. Also, under limited conditions, the city may be able to ask the applicant or employee for medical information when the city and employee are trying to formulate a reasonable accommodation.[429] 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.

If no reasonable accommodation is identified, the city can also contact the EEOC or State or local vocational rehabilitation agencies, such as the Texas Workforce Commission Vocational Rehabilitation Program. Cities can also reach out to The Job Accommodation Network (JAN), which provides free, expert and confidential guidance on workplace accommodations here: https://askjan.org/.

When is a reasonable accommodation an undue hardship?

A city must provide a reasonable accommodation to a qualified individual with a disability unless doing so would be an "undue hardship" to the city.[430] An "undue hardship" means that the accommodation would require "significant difficulty or expense."[431] The factors used in determining whether an accommodation is "reasonable" include: (1) the cost of the accommodation; (2) the size of the employer and its financial resources when compared to the suggested accommodation; (3) the number of employees; and (4) the type of position involved.[432] 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." The EEOC provides that if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost which would constitute an undue hardship.[433] If a particular accommodation would be an undue hardship, the employer would be required to identify another accommodation that will not be an undue hardship.[434]

Whether a particular accommodation is a reasonable accommodation is a fact question that should be reviewed by local counsel or city attorney before a final determination is made.

Is a transfer to a vacant position a reasonable accommodation under the ADA?

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[428] EEOC Disability Discrimination and Employment Decisions, available at, https://www.eeoc.gov/disability-discrimination-and-employment-decisions
[429] 29 C.F.R. pt. 1630 app. §1630.9 (1998).
[430] 42 U.S.C. § 12112.
[431] *Id.* § 12111; 29 C.F.R. § 1630.15.
[432] 42 U.S.C. § 12111(10)(B).
[433] EEOC Technical Assistance Manual on the ADA 3.1, *available at* https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act.
[434] *Id*. at 3.9.

Generally, an employer is not obligated under the ADA to reassign an employee to a vacant position, but in some instances it may be reasonable to do so.[435] In *EEOC v. Methodist Hospitals of Dallas*, the EEOC sued the Methodist Hospitals asserting that it failed to reasonably accommodate Cook, a disabled employee, who was not reassigned to a vacant position for which she applied.[436] The EEOC argued that Methodist's categorical policy of hiring the most qualified candidate violated the ADA when a qualified disabled employee requests reassignment to a vacant role, even if he or she is not the most qualified applicant.[437] The Fifth Circuit Court of Appeals determined that mandatory reassignment in violation of Methodist's most-qualified-applicant policy was not reasonable in most cases, but remanded to the lower court to determine whether there are special circumstances such that "in th[is] particular case, an exception to [Methodist's most-qualified-applicant] policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot."[438]

The Supreme Court has also held that reassignment is not a reasonable accommodation when an employer has established a seniority system.[439]

Can a city require job applicants to undergo a medical examination?

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.[440] An employer can condition the job on the results of a medical examination provided the decision to not hire is not based on genetic information obtained from such exam.

Additionally, a city should exercise caution 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 impairment.

Can a city require an employee to undergo a medical examination?

Once an individual becomes an employee of the city, any request to undergo a medical examination must be job related and necessary for city business.[441]

The EEOC has determined that the following are valid disability-related inquiries and medical examinations to be "job-related and consistent with business necessity:" (1) where disability-related inquiries and medical examinations follow up on an employee's request for reasonable accommodation and the disability or need for accommodation is not known or obvious; (2)

[435] *EEOC v. Methodist Hosps. of Dallas,* 62. F.4th 938 (March 17, 2023).
[436] *Id*.
[437] *Id*.
[438] *Id*. at 947.
[439] *US Airways, Inc. v. Barnett,* 535 U.S. 391 (2002).
[440] 29 C.F.R. § 1630.14(b).
[441] *Id*. § 1630.14(c).

periodic examinations and other monitoring under specific circumstances; (3) when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition; (4) where the employer is given reliable information by a credible third party that an employee has a medical condition; or (5) the employer observes symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.[442]

Can a city require that job applicants take a physical agility test?

A city can give job applicants physical fitness tests that assess an applicant's ability to perform the essential functions of the job before any job offer is made. Such tests must be job related and consistent with a 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 an employee with a disability 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 essential functions of the job, then that individual does not need to be hired or retained by the city. The best way to show what the essential functions of a job are 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 these functions, a city should consult with local counsel or its city attorney.

What happens if the city violates an individual's rights under the ADA?

A city may be liable for compensatory damages for discriminating or retaliating against an individual with a disability.[443] A court may also award back pay, front pay, or require that an individual be reinstated.[444]

Is there individual liability for supervisors for violations of the ADA?

Not currently in Texas. Federal courts in Texas have held there is not individual liability for supervisors for violations of the ADA.[445] However, the specific issue has not been decided

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[442] Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees

[443] 42 U.S.C. § 1981a(a)(2).

[444] *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 732 (5th Cir. 2007).

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

by the Fifth Circuit, the federal court of appeals covering Texas, so each supervisor in Texas should be careful to avoid violating the ADA 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.

Does the ADA require employers to take any other action?

Every city employer must post notices at locations where job applicants and employees can access the notices. These notices can be found at: https://www.eeoc.gov/poster.

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

Cities must comply with Title II of the ADA 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

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

EEOC Technical Assistance Documents on Opioid Addiction and Employment:
https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees

The ADA and Opioid Use Disorder: Combating Discrimination Against People in Treatment or Recovery: https://www.ada.gov/resources/opioid-use-disorder/

Technical Assistance Manual on the Employment Provisions (Title I) of the ADA:
https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA: https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees

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.[446] The ADEA's protections apply to both employees and job applicants.[447] 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.[448]

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.[449] The ADEA applies to all cities regardless of the number of employees the city has.[450]

- 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.[451]

- 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.[452]

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[446] 29 U.S.C. § 631.
[447] *Id.* §§ 623(a); 623(b).
[448] *Id.* § 623(i).
[449] *Id.* § 623(d).
[450] *Id.* § 630; *Mount Lemmon Fire District v. Guido, 586 U.S. 1* (2018).
[451] *Id.* § 623(f)(1); *also see* TEX. LAB. CODE §§ 21.101-.104.
[452] *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.[453]

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 provides that a city "does not commit an unlawful employment practice by imposing a minimum or maximum age requirement for peace officers or fire fighters."[454] 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.[455] A recent change in the law allows a city that has adopted civil service to hire individuals to a beginning position in a police department who are 45 years or older.[456]

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.[457]

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

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[453] J*ulian v. City of Houston,* 314 F.3d 721 (5th Cir. 2002).
[454] TEX. LAB. CODE § 21.104.
[455] 29 U.S.C. § 623(i).
[456] TEX. LOC. GOV'T CODE § 143.023(c) (repealed by H.B. 1661 of the 88th Leg., R.S., eff. Sep. 1, 2023).
[457] *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674 (5th 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 (5th Cir.1996). *See* TEX. LAB.CODE §§ 21.002(8), 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."[458]

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."[459] Some courts have opined that reprimands or severe harassment may be enough to trigger the Act.[460] The Supreme Court of Texas has held that removing unpaid duties from an employee was not an adverse personnel action.[461]

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.[462] 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.[463] Also, the Supreme Court of Texas has ruled that someone who has the managerial authority to ensure compliance with a "law" such as university president, is not necessarily a "law enforcement authority" as required by the statute.[464] Similarly, an in-house legal department that does not have the authority to investigate, enforce or prosecute violations of law against third parties is not an appropriate law enforcement entity.[465] The key is who has the authority to investigate or enforce the law. In contrast, there are instances in which an internal report can be protected as a report to an "appropriate law enforcement authority" under the Act, such as in an internal complaint made by a police department employee about drug usage within the department.[466]

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[458] TEX. GOV'T CODE § 554.002(a).
[459] *Id.* § 554.001(3).
[460] *See Univ. of Houston v. Barth*, 178 S.W.3d 157, 163-64 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
[461] *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007).
[462] TEX. GOV'T CODE § 554.002(b).
[463] *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 (5th Cir. 2003).
[464] *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).
[465] *Reding v. Lubbock Cnty. Hosp. Dist.,* No. 07-18-00313-CV, 2020 WL 1294912, at *1 (Tex. App.—Amarillo Mar. 18, 2020, no pet.).
[466] *See Gentilello*, 398 S.W. 3d at 686.

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."[467] A charter provision can also supply the law in these situations.[468] 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.[469] A city should ensure that 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 is considered an employing public entity or a public employee?

The Act protects reports of unlawful acts by either an employing public entity or a public employee. In *City of Denton v. Grim*, an appellate court considered whether an elected unpaid councilmember was an employing entity or public employee when city employees reported to the city attorney that a sole councilmember had leaked confidential vendor information in violation of the Public Information Act and the Open Meetings Act.[470] The court determined that the employees were not entitled to protection under the Act because the councilmember as a member of the governing body did not have the authority to independently act on behalf of the city and her actions could not be imputed to the city council as the council had not designated her with any authority, formally or implied.[471]

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.[472] 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.[473] Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter.[474] 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.[475] The penalty shall be paid by the supervisor, not the city, and shall be deposited in the state treasury.[476]

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[467] TEX. GOV'T CODE § 554.001(1); *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854-55 (Tex. 2013).
[468] *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.
[469] *City of Waco v. Lopez*, 183 S.W.3d 825, 829 (Tex. App.–Waco 2005).
[470] *City of Denton v. Grim*, No. 22-1023, 2024 WL 1945118 (Tex. May 3, 2024).
[471] *Id.*
[472] TEX. GOV'T CODE § 554.003(a).
[473] *Id.* § 554.003(b).
[474] *Id.* § 554.0035.
[475] *Id.* § 554.008(a).
[476] *Id.* §§ 554.008(c) & (d).

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.[477] However, there are different statute of limitations and procedures for cities and city employees where the city has a grievance procedure in place.[478]

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.[479] A copy of the required poster can be found here: https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/WhistleblowerPoster.pdf.

Resources

Texas Whistleblower Act:
http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.554.htm.

[477] *Id.* § 554.005; *see White v. Phillips*, No. 03-22-00375-CV, 2024 WL 3381279, at *5–6 (Tex. App.—Austin July 12, 2024, pet. filed) (holding that the 90-day time limit started to run when the employee received notice of the employer's decision not when the decision took effect).
[478] *Id.* § 554.006(a).
[479] *Id.* § 554.009.

CHAPTER 12—Pregnancy Discrimination and Accommodations

Which federal and state laws apply to employees who are pregnant or who are affected by pregnancy?

Employees who are pregnant or affected by pregnancy are protected by a number of federal and state employment laws. In some cases, a pregnant employee may be covered by all or some laws simultaneously. With respect to discrimination the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII of the Civil Rights Act of 1964, prohibits employers from discriminating against employees (and applicants) on the basis of pregnancy, childbirth, or related medical conditions as it relates to employment actions such as hiring, firing, pay, promotions, training, among others.[480] Texas state law provides for similar protections as well.[481]

The Americans with Disabilities Act (ADA), enacted in 1990, also provides protections to some workers who develop a disability due to pregnancy. Under the ADA, employers are prohibited from discriminating against an employee (or applicant) based on a disability, including a disability as a result of pregnancy. The ADA also requires covered employers to provide an accommodation for workers with disabilities, unless doing so would result in undue hardship.[482] (More information on the ADA can be found in Chapter 9.).

State law also requires city and county employers 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.[483]

The Pregnant Workers Fairness Act (PWFA), passed by Congress in December 2022 and modeled after the ADA, provides the broadest accommodation rights to employees affected by pregnancy. This new law requires covered employers to provide a reasonable accommodation to a worker's known limitation related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an undue hardship.[484]

In addition to these laws, the Fair Labor Standards Act, as amended in 2023 by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), requires most employers to provide nursing employees with reasonable breaks and a private space to pump breast milk for one year after their baby's birth.[485] Texas law also provides similar rights to nursing employees who work for public employers.[486] (More information on the PUMP Act can be found in Chapter 3.).

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[480] 42 U.S.C. § 2000e(k).
[481] TEX. LAB. CODE §§ 21.051 and 21.128.
[482] 42 U.S.C. § 12101.
[483] TEX. LOC. GOV'T CODE § 180.004.
[484] *Id.* § 20000gg, *et seq.;* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29, 906 (Apr. 19, 2024) (to be codified at 29 C.F.R. pt. 1636), *available at* https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.
[485] Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328; 29 U.S.C.A. § 218d (West).
[486] TEX. GOV'T CODE ch. 619.

The Family and Medical Leave Act (FMLA) also provides a right to unpaid, job-protected leave for covered employees for their child's birth or adoption.[487] Leave under the FMLA is also afforded to covered employees to bond and care for their child within the first year after birth or adoption.[488] (More information on FMLA can be found in Chapter 5.).

How are employees who are pregnant or who are affected by pregnancy protected from discrimination under Title VII?

Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act, protects employees from discrimination on the basis of pregnancy in all aspects of employment.[489] This means that employers must treat employees affected by pregnancy in the same manner as they would other employees with similar abilities or limitations. "On the basis of pregnancy" doesn't just include current pregnancy, discrimination on the basis of pregnancy can also include past pregnancy,[490] potential or intended pregnancy,[491] medical conditions related to pregnancy or childbirth,[492] and having or choosing not to have an abortion.[493] Discriminating against employees who are lactating or expressing breast milk is also prohibited under Title VII.[494]

Moreover, Title VII covers employment discrimination in all aspects of employment such as: hiring (including the job application and selection process); firing or termination of employment; a reduction in hours; layoffs; pay; job assignments; promotions; training; employee benefits; or other terms or conditions of employment.[495]

Can an employer remove a pregnant employee from her assigned duties?

No, a pregnant employee must be allowed to work as long as she is able to perform her job. Removing a pregnant employee from her assigned duties if she is able and willing to perform her job could be a violation of Title VII.[496] 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 indicates that a concern for the safety of a pregnant employee is not a defense to unlawful

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[487] 29 U.S.C. §§ 2601-2654.
[488] *Id*.
[489] 42 U.S.C. § 2000e(k).
[490] *Donaldson v. Am. Banco Corp., Inc*., 945 F. Supp. 1456, 1464 (D. Colo. 1996)*; Piraino v. Int'l Orientation Res., Inc*., 84 F.3d 270, 274 (7th Cir. 1996); *Pacourek v. Inland Steel* Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994).
[491] *S. Tex. Coll. v. Arriola*, 629 S.W.3d 502, 505 (Tex. App.—Corpus Christi–Edinburg 2021, pet. denied)(concluding the Texas Commission on Human Rights Act, like Title VII, prohibits discrimination against women who have expressed an intent to become pregnant.); *Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007); *Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996); *Poucher v. Automatic Data Processing, Inc.*, No. CIV. A. 3:98-CV2669P, 2000 WL 193619, at *4 (N.D. Tex. Feb. 17, 2000); *Pacourek*, 858 F. Supp. at 1401.
[492] *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013).
[493] *Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996).
[494] 29 U.S.C. § 207(r); *E.E.O.C.,* 717 F.3d at 428.
[495] 42 U.S.C. § 2000e-2(a).
[496] *Id*.; 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. 1st Cir. 1995) (holding that it was discrimination to automatically place pregnant employee on light duty without a finding of a disability).

discrimination.[497] For example, if a pregnant employee is willing and able to perform the duties of a first responder, she should be allowed to continue doing so.

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.[498] 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.

May an employer transfer a pregnant employee to light or alternate duty if the employee requests it?

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.

Employers should keep in mind that under the PDA, employees affected by pregnancy must also be given equal access to benefits.[499] For example, 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.[500] Therefore, if the employer allows other temporarily disabled employees to take a lighter or alternative duty (such as lifting limitations), the employer also must give an employee who is pregnant the same accommodations, if needed.

Can an employer require a pregnant employee to remain on leave until she has given birth or for a period after birth?

No, 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.[501] 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.[502] An employer also may

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[497] *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
[498] *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. App. 1 Dist. 1991).
[499] 42 U.S.C. § 2000e(k).
[500] 29 C.F.R. § 1604.10; *Young v. United Parcel Serv., Inc*., 575 U.S. 206, 230-32, 135 S. Ct. 1338, 1355-56, 191 L. Ed. 2d 279 (2015).
[501] *Maldonado v. U.S. Bank,* 186 F.3d 759, 767 (7th Cir. 1999).
[502] *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987); Enforcement Guidance on Pregnancy Discrimination and Related Issued, EEOC.GOV, *available at*

not have a rule or policy that prohibits an employee from returning to work for a predetermined length of time after childbirth.[503]

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.[504] 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."[505] 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.[506]

Does the ADA cover pregnant employees?

Title I of the Americans with Disabilities Act (ADA) is a federal law that protects qualified individuals who have a disability from employment discrimination and retaliation on the basis of that disability.[507] While pregnancy in itself is not a disability under the ADA, some pregnancy-related impairments may qualify as disabilities under the ADA.[508] A pregnancy-related impairment qualifies as a disability under the ADA if it substantially limits one or more major life activities or substantially limited major life activities in the past.[509] Thus, a pregnant employee with a pregnancy related disability would be protected from employment discrimination under Title VII and the ADA. Like Title VII, the ADA covers employment discrimination in all aspects of employment including hiring (including the job application and selection process); firing or termination of employment; a reduction in hours; layoffs; pay; job assignments; promotions; training; employee benefits; or other terms or conditions of employment.[510]

In addition to protection from discrimination, the ADA requires that a covered employer provide reasonable accommodations to an employee for a pregnancy-related disability, unless doing so would create an undue hardship for the employer.[511]

A city that violates an individual's rights under the ADA may be liable for compensatory

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https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftn87.
[503] *Id*.
[504] *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 197 (1991).
[505] *Id*. at 204.
[506] *Id*. at 205.
[507] 42 U.S.C. § 12101.
[508] *Tomiwa v. PharMEDium Services, LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018); *Walker v. Fred Nesbit Distrib. Co*., 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004); *Gover v. Speedway Super America, LLC*, 254 F. Supp. 2d 695, 705.
[509] 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).
[510] *Id*. § 1630.4.
[511] 42 U.S.C. § 12111(10).

damages for discriminating or retaliating against an individual with a disability.[512] A court may also award back pay, front pay, or require that an individual be reinstated.[513] More information on the Americans with Disabilities Act can be found in Chapter 9.

Does Texas law require employers to accommodate pregnant employees?

Yes. 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.[514] Also, a city must provide a temporary work assignment if one is available and the pregnant employee's doctor has determined that the employee cannot perform her permanent work assignment.[515]

Similar to Title VII, the Texas Commission on Human Rights Act (TCHRA) makes it unlawful for an employer to discriminate and retaliate against an individual with a disability, including on the basis of sex which includes pregnancy, childbirth, or related medical condition.[516] This state law prohibits discrimination in all employment practices against including hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment.[517] Additionally, unlawful discrimination includes an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrated the accommodation would impose an undue hardship on the operation of its business.[518]

Under state law the disability discrimination provisions apply to all city employers regardless of the number of employees a city has.[519]

What is the Pregnant Workers Fairness Act, and what does it require an employer to do?

The Pregnant Workers Fairness Act (PWFA) is a new federal law that requires a covered employer to provide a reasonable accommodation to a qualified employee or job applicant for a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an undue hardship.[520]

Similar to ADA requirements, employers must engage in an interactive process with the employee to identify the limitation and an accommodation that may be appropriate.[521] This new

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[512] *Id*. § 1981a(a)(2).
[513] *E.E.O.C.*, 480 F.3d at 732.
[514] TEX. LOC. GOV'T CODE § 180.004.
[515] *Id*.
[516] TEX. LAB. CODE §§ 21.051; 21.055; 21.106.
[517] *Id*. § 21.051.
[518] *Id*. § 21.128.
[519] *Id*. § 21.002(8).
[520] 42 U.S.C. § 20000gg, *et seq.;* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29, 906 (Apr. 19, 2024) (to be codified at 29 C.F.R. pt. 1636), *available at* https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.
[521] Summary of Key Provisions of EEOC's Final Rule to Implement the Pregnant Workers Fairness Act (PWFA),

law went into effect in June 2023 and authorizes the Equal Employment Opportunity Commission (EEOC) to issue a regulation to enforce the law.[522] The EEOC's final regulation has now been issued and is effective as of June 18, 2024.[523]

Does the PWFA apply to all city employers?

No. The PWFA only applies to employers with 15 or more employees.[524] Cities with less than 15 employees are not subject to the requirements but have the discretion to adopt policies that mirror the PWFA.

Who is a "qualified" employee or job applicant under the PWFA?

Under the PWFA, an employee or job applicant can be "qualified" if she can perform the essential functions of the job with or without an accommodation.[525] Essential job functions are job duties that are fundamental to the position.[526]

In many cases, an employee or applicant will be "qualified" if she can perform the essential functions of the job or apply for the position with a reasonable accommodation. The EEOC provides the following examples of instances in which an employee or applicant may qualify: (1) a cashier who regularly stands but may now need a stool; (2) a production worker who needs extra bathroom breaks; and (3) a retail worker who needs to carry a bottle of water with her throughout her workday.[527]

Employees or applicants that cannot perform an essential function of the job with or without a reasonable accommodation may still be considered qualified under the PWFA if: (1) the inability to perform the essential function is temporary; (2) the essential function could be performed in the near future; and (3) the inability to perform the essential function can be reasonably accommodated.[528] For example, if an employee or applicant cannot perform one or more of the essential functions of the job, she could still qualify for an accommodation such as light duty or a change in work assignment if the abovementioned three factors are true.[529]

Factors in determining whether the inability is temporary include: (1) the length of time the employee or applicant would be unable to perform the essential function; (2) whether there are other duties or work the employee or applicant can accomplish; (3) the nature of the essential functions and the frequency; (4) whether there are other employees or temporary employees

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EEOC.GOV, *available at* https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa.

[522] 42 U.S.C. § 2000gg-3(a).

[523] *Id*.

[524] *Id*. § 2000gg(2).

[525] 29 C.F.R.§ 1636.3(f)(1).

[526] *Id*. § 1636.3(g).

[527] What You Should Know About the Pregnant Workers Fairness Act, EEOC.GOV, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

[528] *Id*.

[529] *Id*.

who can perform the essential function; and (5) whether the essential function could be postponed or remain unperformed for a certain period of time, and if so, for how long.[530]

The EEOC doesn't define "in the near future" in its final rule and instead states that the determination will need to be made on a case-by-case basis.[531]

Is there a certain period of time that an employee must work for the city to be eligible for a reasonable accommodation?

No. Unlike the Family Medical Leave Act (FMLA), the PWFA does not require an employee to work for an employer for a certain period of time before being eligible.[532]

Is a city required to extend reasonable accommodations to an employee or applicant when a spouse or family member and not the employee has a limitation related to pregnancy, childbirth, or related medical conditions?

No. The PWFA only applies to the employee or applicant with a limitation and does not require a city to accommodate an employee based on his or her association to a person with a covered limitation.[533] For example, a city employer would not be required to provide an employee with an accommodation, such as leave, under the PWFA to attend medical appointments with his or her pregnant spouse.

What is a "known limitation" under the PWFA?

The EEOC rule defines "known" as when the employee or applicant (or their representative) communicates a limitation to the employer.[534] A "limitation" is defined as "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."[535]

It's important to note that unlike the ADA, a limitation does not need to rise to the level of a disability.[536] Rather, a limitation can be a condition that is minor or episodic (i.e., migraines or morning sickness).[537]

What conditions are covered by the PWFA?

The definition of "pregnancy, childbirth, or related medical conditions" is expansive and includes current pregnancy, past pregnancy, potential or intended pregnancy (such as infertility, fertility

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[530] 29 C.F.R. § 1636.3(f)(2)(i).
[531] *Id*. § 1636.3(f)(2)(ii).
[532] EEOC, *Pregnant Workers Fairness Act – An Overview for Workers*, YouTube (May 21, 2024), https://www.youtube.com/watch?v=Vs7WNE4DNew&t=1131s.
[533] *Id*.
[534] *Id*. § 1636.3(a)(1)-(a)(2).
[535] *Id*.
[536] *Id*.
[537] *Id*.

treatment, and the use of contraception), labor, and childbirth.[538] For "related medical conditions" the list is non-exhaustive, but includes conditions such as:

- ectopic pregnancy;
- preterm labor;
- gestational diabetes;
- preeclampsia;
- anemia;
- endometriosis;
- chronic migraines;
- dehydration;
- nausea or vomiting;
- postpartum depression, anxiety, or psychosis;
- frequent urination;
- lactation and conditions related to lactation.[539]

Preexisting conditions that are exacerbated by pregnancy or childbirth could also be covered under the PWFA.[540]

What is a "reasonable accommodation" under the PWFA?

A reasonable accommodation is an adjustment or modification in the work environment or to policies or procedures that allow a worker or an applicant with a known limitation to be considered for an employment position or to be able to perform the essential functions of the job.[541] Examples of reasonable accommodations the EEOC provides include:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;
- Temporary reassignment;
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; or

[538] *Id*. § 1636.3(b).
[539] *Id*.
[540] *Id*.
[541] *Id*. § 1636.3(h).

- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.[542]

The list is non-exhaustive, and the EEOC encourages employers to explore other options that may be appropriate.[543] It's also important to note that if there is more than one accommodation that will meet the needs of the employee or applicant, the employer may choose between the accommodations.[544] However, requiring an employee to take leave, whether paid or unpaid, when another reasonable accommodation could be provided without an undue hardship, is prohibited and may be a violation of the PWFA.[545] Therefore, cities should use leave as a last resort when considering reasonable accommodations.

What is an "undue hardship" under the PWFA?

An undue hardship means significant difficulty or expense that would be incurred by an employer.[546] An employer may be able to show undue hardship if the provision of a particular accommodation results in an impact that is unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[547] When considering whether a particular accommodation would create an undue hardship, a city should conduct an individualized assessment considering the following factors:

(1) the nature and net costs of the accommodation;
(2) the overall financial resources to the city;
(3) the number of employees;
(4) number, type, and location of city facilities; and
(5) the impact of the accommodation upon the operation of the city, including the impact on the ability of other employees to perform their duties and the impact on the city's ability to conduct business.[548]

Also keep in mind that past practice and current policies could affect whether a city's determination that an accommodation would be an undue burden is reasonable. For instance, if a city policy already allows employees to take leave for the same length of time but for other reasons;[549] approval of the employee's past leave without issue;[550] or past successful coverage by co-workers[551] or temporary employees[552] could negate a city's argument that a similar accommodation for a qualified employee under the PWFA would be an undue burden.

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[542] What You Should Know About the Pregnant Workers Fairness Act, EEOC.GOV, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.
[543] EEOC, *Pregnant Workers Fairness Act – An Overview for Workers*, YouTube (May 21, 2024), https://www.youtube.com/watch?v=Vs7WNE4DNew&t=1131s.
[544] *Id*.
[545] 42 U.S.C. § 2000gg-1(4).
[546] 29 C.F.R. § 1636.3(h).
[547] *Id*.
[548] 29 C.F.R.§ 1636.3(j)(2).
[549] *Nunes v. Wal-Mart Stores, Inc*., 164 F.3d 1243, 1247 (9th Cir. 1999).
[550] *Haschmann v. Time Warner Entertainment Co*., 151 F.3d 591, 601 (7th Cir. 1998).
[551] *Haschmann*, 151 F.3d at 602; *Rascon v. U.S. West Communications, Inc*., 143 F.3d 1324, 1335 (10th Cir. 1998).
[552] *Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F.3d 638, 649 (1st Cir. 2000); *Nunes*, 164 F.3d at 1247.

How must a reasonable accommodation be requested by an applicant or employee?

The PWFA does not outline a formal process, and, instead, contemplates the process to be simple and even informal.[553] A request can be communicated verbally or in writing, and the applicant or employee does not need to use specific language or magic words to begin the interactive process.[554] The applicant or employee must only communicate that she: (1) has a limitation related to or arising out of pregnancy, childbirth, or a related medical condition, and (2) needs an adjustment or change in her current working conditions or the application process because of the limitation.[555]

Once communicated, the city is on notice and should engage in the interactive process to determine whether a reasonable accommodation can be granted.[556] This interactive process should also be simple, and cities are expected to promptly respond to accommodation requests.[557]

Can a city request medical documentation to support the accommodation request?

In limited instances, a city may request documentation from the applicant or employee when reasonably necessary.[558] Under the PWFA, it is not reasonable to request documentation:

- when the limitation and need for an adjustment or change due to the limitation is obvious (i.e., an obviously pregnant employee seeks a bigger uniform because of her pregnancy);
- when the city already knows about the limitation and the adjustment or change (i.e., requiring documentation for each instance an employee has morning sickness and has already been granted an accommodation for a later start time and has already provided enough information);
- for "predictable assessments" or specific accommodations that are per se reasonable, including the need to carry water to drink in the employee's work area as needed; additional restroom breaks or breaks to eat or drink; and standing or sitting as needed;559
- when the employee is lactating and needs modifications to pump at work or nurse during work hours; and
- where the city would not normally ask an employee for documentation (i.e., if the city's policy is that employees only need a note from a health care provider for absences if they are missing three or more days in a row).560

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[553] *Id*. §§ 1636.3(d) and 1636.3(h)(2).
[554] *Id*. § 1636.3(d).
[555] *Id*. § 1636.3(h)(2).
[556] *Id*. § 1636.3(k).
[557] *Id*.
[558] *Id*. § 1636.3(l).
[559] *Id*. § 1636.3(j)(4).
[560] What You Should Know About the Pregnant Workers Fairness Act, EEOC.GOV, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

If a city requests medical documentation, it is limited to information that: (1) confirms the physical or mental condition; (2) confirms that the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) describes the adjustment or modification that is needed because of the limitation.[561] Any medical information or other documentation gathered as part of the process must be kept confidential.[562]

What happens if the city violates an individual's rights under the PWFA?

The remedies provided under the PWFA are identical to those under Title VII and the ADA.[563] A city may be liable for compensatory damages for discriminating or retaliating against an individual with a disability. A court may also award back pay, front pay, or require that an individual be reinstated.[564]

Is the PWFA being challenged and will that affect whether cities must comply?

Since its passage, lawsuits have been filed, including from the Texas Attorney General's Office, challenging the validity of the vote with which the bill was passed as part of an overall appropriations act. On February 27, 2024, a United States District Judge ruled in favor of the attorney general blocking the enforcement of the PWFA as it applies to Texas state employers. The ruling, however, does not affect city or other governmental employers in Texas.[565]

Where can a city find more information on the PWFA?

The EEOC has published more information and links to webinars on its website here: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act. For specific questions about the PWFA and assistance in determining whether a particular accommodation is reasonable, a city should consult with its legal counsel before proceeding.

Resources

U.S. Department of Labor Information on Pregnancy Related Laws:
https://www.dol.gov/agencies/whd/maternal-health

U.S. Department of Labor Job Accommodation Network (JAN):
https://askjan.org/disabilities/Pregnancy.cfm

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[561] *Id*.
[562] *Id*. § 1636.7(a)(1).
[563] 42 U.S.C. § 2000gg-2(a) and(e); 29 C.F.R. § 1636.5(a).
[564] *Id*.
[565] Press Release, Office of the Attorney General, Attorney General Ken Paxton Wins Case Challenging $1.7 Trillion Federal Funding Bill Passed Unconstitutionally with Less Than Half of U.S. Congress Physically Present (Feb. 27, 2024); *available at* https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-wins-case-challenging-17-trillion-federal-funding-bill-passed.

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues:
https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftn148

Title VII of the Civil Rights Act of 1964:
https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964

Chapter 21 of the Texas Labor Code:
https://statutes.capitol.texas.gov/Docs/LA/htm/LA.21.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 such as city council be properly posted and open to the public.[566] However, the Act provides some exceptions that allow the city council to go into executive session, sometimes referred to as closed session, to discuss certain sensitive or confidential matters. One of the exceptions allows a city council 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.[567]

What issues can be discussed in an executive session?

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 city council hold the discussion in open session.

May the city council discuss giving raises to all city employees or all employees in one department in executive session?

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.[568]

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

[566] TEX. GOV'T CODE § 551.041.
[567] Id. § 551.074.
[568] Tex. Att'y Gen. Op. No. H-496 (1975).

interested members of the public will know the subject to be discussed. The more senior or executive the employee, the more information should be on the agenda.[569] The agenda posting should 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 time the employee is correctly terminated.[570] The same potential for liability for wages would occur if the city discussed an employee's termination in executive session when the employee has requested 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.[571] 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.[572]

- A current or former employee's or city official'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.[573] 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 disclosed.[574]

- 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."[575] 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."[576] This information typically includes personal financial

[569] *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).
[570] *Ferris v. Tex. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App.—Austin 1991, writ denied).
[571] TEX. GOV'T CODE § 552.002(a).
[572] *Id.* § 552.147
[573] *Id.* §§ 552.024 and 552.117.
[574] *Id*. § 552.024 (b).
[575] *Id.* § 552.102(a).
[576] *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)).

information, certain medical information, or certain information relating to a sexual harassment investigation.

- Certain tax documents and documents relating to consultation with a physician also would be considered confidential and must be withheld from disclosure.[577]

Additionally, it is 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.[578]

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.[579] It is recommended that a city adopt a written policy regarding how a member of city council or city official can access an employee's personnel file and the protection of the information. A member of council should be careful when handling confidential information accessed in his or her official capacity as the member could be criminally or civilly liable for releasing confidential information in a personnel file to the public.[580]

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.[581] 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.[582] However, to invoke the protections of Section 552.1175, a peace officer must notify the city.

May an employee have access to his or her 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 if a current or former employee requests access or copies to his or her personnel file.

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[577] TEX. OCC. CODE § 159.002(b); 42 U.S.C. § 12112; 26 U.S.C. § 6103(a).
[578] TEX. PENAL CODE § 36.06(a-1).
[579] Tex. Att'y Gen. Op. No. JM-119 (1983).
[580] TEX. GOV'T CODE § 551.352.
[581] *Id*. § 552.117(a).
[582] *Id*. § 552.1175.

(Note: In a civil service city, different rules may apply to personnel files).[583]

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 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://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/publicinfo_hb.pdf

Open Meetings Act
https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf

Open Government Training
https://www.texasattorneygeneral.gov/og/open-government-training

Open Records Decisions
https://www.texasattorneygeneral.gov/og/open-records-decisions-ords

[583] *See e.g.* TEX. LOC. GOV'T CODE §143.089.

CHAPTER 14— Benefits

What is the Patient Protection and Affordable Care Act?

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (ACA) frequently referred to as "Obamacare" or the ACA. The ACA enacted various health coverage reforms, most of which were implemented by 2014. The stated purposes of the ACA 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.

Does the ACA require that each person have health insurance?

The ACA implemented new programs and regulations to ensure that every person has health 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 ACA 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 less than 50 full-time 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 as Texas declined to open its own exchange: for individuals: https://www.healthcare.gov/marketplace/individual/ and small businesses https://www.healthcare.gov/small-businesses/

Pre-Existing Conditions

The ACA'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 ACA prohibits all providers from discriminating against all consumers

with pre- existing conditions.[584]

Young Adult Coverage

The ACA 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.[585]

Improved Options for Small Businesses

The ACA 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. Employers with fewer than 50 employees are exempt from "new employer responsibility policies," which 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 don't have to pay a penalty if their employees get tax credits through an exchange.

Medicaid Expansion

The Supreme Court of the United States struck down the ACA's mandate that States expand Medicaid to cover individuals up to a certain federal poverty level or lose all their existing Medicaid funding, holding that the mandate was in violation of the Tenth Amendment and Congress's spending power.[586]

Is a city required to offer health benefits to its employees?

The ACA does not require that all city employers provide health benefits to their employees. But "applicable large employers" (including cities) are required to either offer health coverage that provides "minimum value" and that is "affordable" to their full-time employees, or potentially pay a penalty to the IRS if at least one of their full-time employees receives a premium tax credit for purchasing individual coverage on the healthcare exchange.[587] Nonetheless, all cities must provide notice of Affordable Care Act healthcare exchanges whether the employee is eligible for health benefits or not.[588]

Applicable large employers (ALEs) are those who have 50 or more full-time employees,

[584] 42 U.S.C. § 18001.
[585] 42 U.S.C. § 300gg-14.
[586] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[587] 26 U.S.C. § 4980H.
[588] https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

including full-time equivalent employees (i.e. part-time employees that count as one or more full-time employees).[589] A full-time employee is one who, with respect to any month, is employed on average at least 30 hours per week.[590]

Cities with fewer than 50 employees are not required to provide health coverage to their employees but if they do, the coverage must meet the minimum essential coverage requirements of the ACA. Resources for small cities exploring health coverage options can be found here: https://www.healthcare.gov/small-businesses/learn-more/explore-coverage/.

The federal Department of the Treasury and the Internal Revenue Service has detailed ACA information for governmental entities: https://www.irs.gov/government-entities/federal-state-local-governments/affordable-care-act-aca-information-for-government-entities.

Is a city required to offer health benefits to an employee's family members?

The ACA requires ALEs to also offer group health insurance to employees' dependents or pay a penalty.[591] A dependent under the ACA means a child of the employee who is under the age of 26, whether married or unmarried, but does not include a spouse of the employee.[592] Thus, a large employer is required to offer health benefits to its full time employees and their dependent children, but not spouses. However, if the city does offer spousal benefits, same-sex spouses must also be offered the same benefits.[593]

Are there reporting requirements under the ACA?

Applicable large employers are required to report, to the IRS, information about whether they offered coverage to employees and if so, information about the offer of coverage. ALEs are also required to send Form 1095-C for each employee to that employee. The information provided to the IRS is used to determine whether an employee owes a payment under the employer shared responsibility provisions of the ACA.

Also, an employer that sponsors self-insured health coverage – whether or not the employer is an ALE – has information reporting responsibilities as a provider of minimum essential coverage.

What is the Consolidated Omnibus Budget Reconciliation Act?

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a health benefit program that was enacted by the federal government in 1986.[594] COBRA provides temporary continuation of employer-provided health coverage that would otherwise be lost due to certain life events.

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[589] 26 U.S.C. § 4980H.
[590] *Id.*
[591] *Id.*
[592] 26 U.S.C. § 152.
[593] *Obergefell v. Hodges*, 14-556 (2015) *available at* http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.
[594] 29 U.S.C. § 1161 *et seq*; 42 U.S.C. § 300bb-1 *et seq*.

Does COBRA apply to cities?

COBRA applies to all group health plans maintained by government entities, including cities, if the city employs 20 or more full-time equivalent employees.[595] 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. COBRA does not apply to a city that does not offer health care coverage to its employees or their dependents.

What events triggers COBRA?

COBRA is triggered when a "qualifying event" occurs. A "qualifying event" is an event that causes an individual to lose group health coverage, and 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.[596] 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 an employee, a spouse of the employee, a former spouse of the employee, or the employee's dependent child.

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

If a city provides group health coverage 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.

With certain types of qualifying events, such as discharge, reduction in hours, or an employee's death, 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 city of the qualifying event.

If the city receives notice of an employee's qualifying event, it should work with the employee to provide 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

[595] 42 U.S.C. § 300bb-1 *et seq*.
[596] 42 U.S.C. § 300bb-3.

in question. If the city has questions regarding who administers its COBRA coverage, it should contact its health benefits plan or its city attorney.[597]

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

An employee and the employee's dependents will generally be eligible for continuation of health coverage under COBRA even if the employee is discharged for cause. However, an employee who is discharged 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 discharged employee has engaged in gross misconduct will depend on the specific facts and circumstances. Generally, it can be assumed that being discharged 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.[598] The "gross misconduct" exception to COBRA continuation coverage would not apply in the instance where the employee is allowed to resign in lieu of termination.[599]

Does COBRA apply if the employee resigns?

Resigning, retiring, or being laid off all count as qualifying events for COBRA continuation coverage.[600]

Does COBRA apply if an employee's hours are reduced?

An employee who would lose health coverage due to reduce work hours, whether because the employee chooses to go part time or the city requires it, would be eligible for COBRA continuation coverage. This includes instances where an 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.

What happens if an employee who is on FMLA leave becomes ineligible for health coverage under a city's group health plan?

Usually, a qualifying event occurs if an employee's absence from work would cause the employee and his or 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

[597] 42 U.S.C. § 300bb-6.
[598] *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).
[599] 42 U.S.C. § 300bb-3.
[600] 42 U.S.C. § 300bb-3.

an employee is on FMLA 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).[601] 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 the employee was required to pay before taking FMLA leave. However, if an employee is unable to return to work after the 12 weeks of mandated FMLA leave, the extended absence would likely be a qualifying event that would require continuation coverage under COBRA.

Who pays for COBRA coverage?

The city can choose to pay for part or all of the COBRA continuation coverage or can require qualified beneficiaries to pay for the coverage. The maximum amount charged to qualified beneficiaries cannot exceed 102 percent of the cost of the plan for coverage of similarly situated individuals who have not incurred a qualifying event.

A city must allow a qualifying beneficiary to pay the required premiums on a monthly basis if the beneficiary desires to do so and may allow payments at other intervals. either reimburse the city or pay the health benefits plan.[602] Also, the city must give the beneficiary at least 45 days after the beneficiary elects to have the coverage to pay the first premium payment. But the plan can terminate coverage if the beneficiary does not pay within the 45-day time frame.

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 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.[603]

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.

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[601] 29 C.F.R. § 825.209.
[602] 42 U.S.C. § 300bb-2.
[603] 42 U.S.C. § 300bb-2.

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.[604]

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.[605] 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.[606] Cities over 25,000 must provide written notice to retirees of his right to purchase continued coverage from the city.[607]

What benefits are available to family members of employees who die in the course and scope of city employment?

State and federal laws provide a variety of benefits to spouses, especially when an employee is killed in the course and scope of employment. Here are some examples (not all inclusive):

Social Security Benefits		Surviving spouse is entitled to one-time death benefit payment plus monthly death benefits	

[604] 42 U.S.C. § 300bb-2.
[605] TEX. GOV'T CODE §§ 615.071-.123.
[606] TEX. LOC. GOV'T CODE § 175.002.
[607] *Id.* § 175.005.

Federal Public Safety Officers' Benefits (PSOB)		Death and education benefits to survivors of fallen law enforcement officers, firefighters, and first responders; and disability benefits to officers catastrophically injured in the line of duty.	
Deceased First Responders Monetary Benefits	Tex. Labor Code §408.183 (b-1)	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	http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.408.htm#408.183
Deceased Peace Officers Monetary Benefits	Tex. Const. Sec. 51-d; Tex. Gov't 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	http://www.ers.state.tx.us/employees/life-events/chapter615/; 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; http://www.dol.gov/ebsa/faqs/faq-consumer-cobra.html
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	www.twc.state.tx.us
Unemployment Benefits	Tex. 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[608]	http://www.twc.state.tx.us/jobseekers/eligibility-benefit-amounts

[608] *Tex. Workforce Comm'n v. Wichita County,* No. 17-0130 (Tex. May 25, 2018).

Workers Compensation	Tex. 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	www.twc.state.tx.us

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.[609] (Benefits required for injured or deceased peace officers and their spouses are listed in the question above.)

Resources

Department of Labor:
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

[609] *See, e.g.*, TEX. LOC. GOV'T CODE § 142.0013.

CHAPTER 15—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.[610]

Does USERRA apply to my city?

The provisions of USERRA apply to all employers, including cities, regardless of size.[611] 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.[612] 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.[613]

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.[614] 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.[615]

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.[616] 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.[617]

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[610] 38 U.S.C. §§ 4301; 4311(b).
[611] 20 C.F.R. §§ 1002.34(a); 1002.39.
[612] 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18.
[613] 20 C.F.R. §§ 1002.41; 1002.43.
[614] *Id*. §§ 1002.5(o); 1002.5(l); 1002.59.
[615] *Id*. § 1002.57 (b); TEX. GOV'T CODE § 431.017.
[616] 20 C.F.R. § 1002.5(l).
[617] *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.[618] This notice can be either verbal or written.[619] 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.[620]An employee does not need to provide notice to the employer of intent to return to work after completing uniformed service.[621] 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.[622]

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.[623] 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.[624] 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.[625] 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.[626]

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[618] *Id*. § 1002.85(a).
[619] *Id*. §1002.85(c).
[620] *Id.* § 1002.86.22
[621] *Id*. § 1002.88.
[622] *Id*.
[623] *Id*. § 1002.32.
[624] *Id.* § 1002.115(c).
[625] *Id.* § 1002.115(b).
[626] *Id.*§ 1002.115(a).

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.[627] Those individuals have an additional two years from the date of completion of service to apply for reemployment.[628] This time can be extended to accommodate circumstances beyond the employee's control that make reporting impossible or unreasonable.[629]

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.[630] 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.[631]

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").[632] 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.[633]

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."[634] 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.[635] 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

[627] *Id*. § 1002.116.
[628] *Id*.
[629] *Id.*
[630] *Id*. § 1002.180.
[631] *Id*. § 1002.181.
[632] *Id*. §§ 1002.191; 1002.193.
[633] *Id.* § 1002.198.
[634] *Id*. § 1002.225.
[635] *Id*.

after the employee's date of reemployment.[636] 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.[637] Discharge "for cause" includes discharge based on an employee's conduct or for other legitimate nondiscriminatory reasons, such as the elimination of an employee's position or laying off an employee.[638]

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.[639]

How does USERRA protect health care benefits?

USERRA does not require a city to establish a health plan or provide any particular health coverage.[640] 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.[641] Also, when an employee is reemployed, coverage generally must be reinstated without a waiting period or pre- existing condition exclusions.[642] 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.[643] For longer tours, the city is permitted to charge the employee up to 102 percent of the entire premium.[644]

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

The National Defense Authorization Act of FY 2008 (NDAA) grants family and temporary medical leave for certain employees who have relatives in the military.[645] This legislation amended 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.[646] 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

[636] *Id*. § 1002.247(a).
[637] *Id*. § 1002.247.
[638] *Id*. § 1002.248.
[639] *Id*. § 1002.151.
[640] *Id*. § 1002.164(b).
[641] *Id*. § 1002.164(a).
[642] *Id*. § 1002.168.
[643] *Id*. § 1002.166(a).
[644] *Id*. § 1002.166(b).
[645] H.R. 4986, 110th Cong. (2008).
[646] 29 U.S.C. § 2612(a).

a twelve-month period to care for the service member.[647] The U.S. Department of Labor has published a fact sheet on this leave.

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 days for authorized training or duty.[648] 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."[649] Military leave pay cannot be subject to lost time, loss of an efficiency rating, or a loss of vacation, personal, or sick leave. Also, a city has recordkeeping and notice requirements.[650] Additionally, 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.[651] However, this provision is limited to cities with five or more employees.

In addition to the 15 working days military leave, a member of the state military forces called to active duty by the governor or another appropriate authority in response to a disaster is entitled to a paid leave of absence from the person's duties for each day the person is called to active duty during the disaster, not to exceed seven workdays in a fiscal year.[652] During the leave of absence, the person may not be subject to loss of time, efficiency rating, personal time, sick leave, or vacation time.[653]

Resources

Department of Labor:
https://www.dol.gov/agencies/vets/programs/userra/compliance

USERRA Statute:
https://www.govinfo.gov/content/pkg/USCODE-2011-title38/html/USCODE-2011-title38-partIII-chap43.htm

USERRA Poster:
https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Poster.pdf

Texas Workforce Commission:
https://efte.twc.texas.gov/legal_issues_for_military_leave.html

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[647] *Id*.
[648] TEX. GOV'T CODE § 437.202.
[649] *Id*. § 437.001.
[650] *Id.* § 437.202(e).
[651] *Id*. § 437.202(d).
[652] *Id*. § 437.202(a-1).
[653] *Id.*

CHAPTER 16—Workers' Compensation

What is workers' compensation insurance?

Workers' compensation insurance is a state-regulated program that provides covered employees with temporary income and medical benefits if they sustain a work-related injury or illness. Except in cases of gross negligence or an intentional act or omission of the employer, workers' compensation insurance limits an employer's liability if an employee brings a lawsuit against the employer for damages.[654]

The Workers' Compensation Act, which governs the insurance program, outlines the duties and responsibilities of each party and provides for very specific processes and procedures for awarding benefits, handling disputes, as well as other aspects of administering the program. Many of these processes and procedures are very nuanced and require specialized assistance, so a city should always consult with its insurance provider and legal counsel when handling workers' compensation claims. The information in this chapter is intended to provide a general high-level overview of the workers' compensation program.

Are cities required to provide workers' compensation coverage for their employees?

Yes, cities are required to provide workers' compensation insurance coverage for employees and are subject to the Workers' Compensation Act.[655]

Cities must also notify the Division of Workers' Compensation (DWC) of the Texas Department of Insurance (TDI) of the method by which their employees will receive benefits and the effective date of the coverage.[656] Under the Workers' Compensation Act, city employees are conclusively considered to have relinquished their right to sue the city for injuries received or death resulting from injuries received in the course of employment with the city.[657]

What is the role of the Division of Workers' Compensation?

The DWC administers and operates the workers' compensation system in Texas and is responsible for monitoring compliance of all the parties involved in the system, including injured employees, employers, health care providers, insurance carriers, and attorneys. Under the Workers' Compensation Act, the DWC is also required to provide education to promote safe and healthy workplaces, inform parties of their rights and responsibilities under the system, promote communication between the parties to minimize disputes, and resolve disputes promptly and fairly when identified.[658]

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[654] TEX. LAB. CODE § 408.001(b); see *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551, 555 (Tex. 2022); *Wausau Underwriters Ins. Co. v. Wedel*, 557 S.W.3d 554, 556 (Tex. 2018); *City of Bellaire v. Johnson*, 400 S.W.3d 922, 922-23 (Tex. 2013) (per curiam).
[655] *Id.* § 504.011.
[656] *Id.* § 504.018.
[657] *Id.*
[658] *Id.* §§ 402.021, 402.076-.077.

Workers' compensation insurance carriers (such as self-insured cities, licensed insurance companies, and group self-insured cities) as opposed to the DWC pay benefits on workers' compensation claims.

How can cities obtain workers' compensation insurance coverage for their employees?

State law provides three ways in which cities can obtain workers' compensation benefits for their employees. A city may either: (1) become a self-insurer; (2) purchase workers' compensation insurance from an insurance company; or (3) enter into an interlocal agreement with other political subdivisions that self-insure (like the Texas Municipal League Intergovernmental Risk Pool).[659]

Which city employees are entitled to workers' compensation insurance coverage?

All city employees, including full-time, part-time, seasonal, and temporary employees must be covered under state law.[660] Individuals who provide a service to the city but are paid on a piecework basis or on a basis other than by the hour, day, week, month, or year are not considered to be employees of the city.[661] Similarly, independent contractors or individuals who perform a specific task, provide their own equipment, and control the details of the work and work product, are not employees for purposes of workers' compensation. [662]

Are cities required to provide workers' compensation coverage for volunteer police force members that are called upon at the request of the city?

Yes, state law requires cities to provide each volunteer police force member workers' compensation coverage against any injury suffered by the police force member in the course and scope of performing his or her duties at the request of the city.[663] Cities are permitted to satisfy this requirement by either providing insurance coverage or entering into an interlocal agreement with another political subdivision providing for self-insurance.[664]

"Volunteer police force members" are: (1) individuals summoned to serve on a special police force by the mayor of a Type A general law city under Texas Local Government Code Section 341.011; (2) police reserve force members appointed under Texas Local Government Code Section 341.012; or (3) any other person assigned by the city to perform, without compensation, any duties typically performed by a peace officer.[665] Volunteer police force members are not

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[659] *Id*. § 504.011.
[660] See TEX. LAB. CODE § 504.001(2))("'employee' means a person in the service of a [city] who has been employed as provided by law"); *see also Bliss v. NRG Indus*., 162 S.W.3d 434, 436–37 (Tex. App.—Dallas 2005, pet. denied) (holding that a temporary employee could fit the definition of "employer" under the Labor Code.).
[661] *Id*. § 504.014(1).
[662] *Id*. § 406.122; *see also City of Bellaire v. Johnson*, 400 S.W.3d 922, 923 (Tex. 2013) (concluding contract worker assigned to the city by staffing services company was a city employee, not an independent contractor, where the city controlled the details of the worker's job including setting worker's schedule, giving him work assignments, and supervising his work.)
[663] *Id*. § 614.192.
[664] *Id*.
[665] *Id*. § 614.191.

required to be certified peace officers under Article 2A.001 of the Code of Criminal Procedure.

Can a city extend workers' compensation coverage to others?

Yes, a city may cover volunteers such as volunteer police officers, fire fighters, emergency medical personnel, and any others.[666] Providing workers' compensation insurance coverage to volunteers does not jeopardize an individual's volunteer status as it is considered to be a "reasonable benefit" under federal law.[667] A covered person is entitled to full medical benefits and the minimum compensation payments under the law.[668] The council may also choose to provide greater than the minimum benefits provided under state law to covered persons.[669]

The city council, by majority vote, may also choose to cover as employees elected officials, jurors, and election workers.[670]

When are injuries covered under the Workers' Compensation Act and what types of injuries are covered?

Workers' compensation covers compensable injuries, or injuries or illnesses that are sustained in the course and scope of employment. "Course and scope of employment" includes any activity that is performed in furtherance or to carry out an employer's business and includes injuries sustained during work-related travel.[671] In addition, the travel of a firefighter, peace officer, or emergency medical personnel en route to an emergency call is considered to be in the course and scope their employment.[672]

Injuries are those in which "damage or harm to the physical structure of the body occur or a disease or infection naturally resulting from the damage or harm."[673] Workers' compensation injuries can also range in severity (i.e., sprains, bone fractures, falls).

However, injuries are not covered if they were the result of horseplay, willful criminal acts or self-injury, intoxication from drugs or alcohol, voluntary participation in an off-duty recreational activity, a third party's criminal act if directed against the employee for a personal reason unrelated to the work, or acts of God (i.e., lightning, storms, catastrophic weather event, extreme heat or cold).[674]

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[666] *Id*. § 504.012.
[667] 29 C.F.R. § 553.106.
[668] TEX. LAB. CODE § 504.012.
[669] *Id*.
[670] *Id*.
[671] *Id*. § 401.011(10).
[672] *Id*. § 401.026.
[673] *Id*. §§ 401.011(26), (34).
[674] *Id*. § 406.032; *see Bewley v. Tex. Employers Ins. Ass'n*, 568 S.W.2d 208, 210 (Tex. App.—Waco 1978, writ ref'd n.r.e.); *Cont'l Cas. Co. v. Smith*, 227 S.W.2d 363, 365 (Tex. App.—Dallas 1950, no writ); *Weicher v. Ins. Co. of N. Am.*, 434 S.W.2d 104, 108 (Tex. 1968)(concluding that injuries as a result of acts of God are not compensable if the employee's work did not expose him or her to a greater risk of injury than what ordinarily applies to the general public).

What medical conditions are presumed to be work-related and compensable under the Workers' Compensation Act?

For purposes of workers' compensation benefits, public safety employees who suffer from certain medical conditions are presumed to have contracted the condition as a result of and during the course and scope of their employment.[675] Public safety employees include peace officers, firefighters,[676] and certified emergency medical technicians.[677] The presumption applies only to certain medical conditions including acute myocardial infarctions or strokes, certain cancers, smallpox,[678] and tuberculosis or other respiratory illnesses that have a statistically positive correlation with service as a public safety employee other than coronavirus 2 (SARS-CoV-2) or coronavirus disease 2019 (COVID-19).[679] State law previously included a disease presumption for public safety employees, including detention officers, who suffered from SARS-CoV-2 or COVID-19, but the presumption was not renewed during the 2023 legislative session and expired on August 31, 2023.[680]

For the presumption to apply: (1) the employee must have received a physical examination during or upon his or her employment that did not reveal evidence of the illness or disease; (2) the employee must have been employed for five or more years as a firefighter, peace officer, or certified emergency medical technician; and (3) the disease or illness must have been discovered during his or her employment as a firefighter, peace officer, or certified emergency medical technician.[681]

Some medical conditions include specific requirements that must be met for the presumption to apply, and some apply only to certain public safety employees. For instance, public safety employees who suffer from an acute myocardial infraction or stroke are covered under the presumption only if the individual suffered the myocardial infarction or stroke while engaging in nonroutine stressful or strenuous physical activity involving fire suppression, rescue, hazardous material response, emergency medical services, or other emergency response activities or similar training exercises while on duty.[682]

Additionally, only firefighters or certified emergency medical technicians who suffer from certain types of cancers are presumed to have developed the cancer as a result of his or her course and scope of employment. These cancers include: (1) stomach, colon, rectum, skin, prostate, testis, or brain cancers; (2) non-Hodgkin's lymphoma; (3) multiple myeloma; (4) malignant

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[675] TEX. GOV'T CODE § 607.057.
[676] This term includes volunteer firefighters who are certified by the Texas Commission on Fire Protection or the State Firemen's and Fire Marshal's Association of Texas. TEX. GOV'T CODE § 607.051(3)(B).
[677] *Id*. § 607.001.
[678] *Id*. § 607.053 (also providing for a presumption for preventative immunizations against smallpox or another disease in which firefighters, peace officers, or certified emergency medical technicians are exposed to during the course and scope of their employment and for which immunization is possible that result in disability or death).
[679] *Id*. §§ 607.053-.056.
[680] Act of June 14, 2021, 87th Leg., R.S., ch. 505, § 5, sec. 607.0545, 2021 Tex. Gen. Laws 999, 1001 (expired Aug. 31, 2023).
[681] *Id*. § 607.052(a).
[682] *Id*. § 607.056.

melanoma; and (5) renal cell carcinoma. For the presumption to apply, the firefighter or certified emergency medical technician must have regularly responded on scene to calls involving fires or firefighting or regularly responded to an event involving a documented release of radiation or a known or suspected carcinogen.[683]

A city may challenge or rebut the presumption that the disease or illness was work-related by providing evidence (that is based on reasonable medical probability) and a detailed statement by a qualified expert explaining that some other risk factor, accident, hazard, or other cause not associated with the employee's service as a firefighter, peace officer, or certified medical technician was a substantial factor in bringing about the employee's disease or illness, without which the disease or illness would not have occurred.[684] At the formal contested case hearing stage, the administrative law judge will review the evidence and make a determination on whether the employee's disease or illness would not have occurred had it not been for the risk factor, hazard, or other cause not associated with the employee's job.[685]

Is post-traumatic stress disorder a compensable injury under the Workers' Compensation Act?

Yes. Post-traumatic stress disorder (PTSD) suffered by a first responder is a compensable injury under workers' compensation if it is based on a diagnosis that: (1) the disorder is caused by one or more events occurring in the course and scope of the first responder's employment with the city; and (2) evidence shows that the event or events were more likely than not a producing cause of the disorder.[686]

A first responder is defined as an individual who is employed by the city as a peace officer, emergency care attendant, emergency medical technician, paramedic, and firefighter subject to certification by the Texas Commission on Fire Protection and whose principal duties are firefighting and aircraft crash and rescue.[687]

For purposes of determining the date of injury for PTSD, state law provides that it is the date on which the first responder first knew or should have known that the disorder may be related to his or her employment with the city.[688]

What benefits does workers' compensation insurance provide to injured employees?

Workers' compensation insurance coverage provides covered employees with four types of benefits: medical benefits, income benefits, burial benefits, and death benefits.[689] These benefits and their limitations are outlined in the Workers' Compensation Act.

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[683] *Id*. § 607.055.
[684] *Id*. § 607.058.
[685] *Id*.
[686] TEX. LAB. CODE § 504.019.
[687] *Id*.
[688] *Id*.
[689] *Id*. §§ 408.081-408.187.

What medical benefits are provided to injured employees?

Medical benefits entitle an employee who has sustained a compensable injury to health care that is reasonably necessary depending on the nature of his or her injury and when needed.[690] More specifically, an employee has a right to health care treatment that cures or relieves the effects naturally resulting from the injury or occupational disease, promotes recovery, or enhances the ability of the employee to return or to retain employment.[691] Except in an emergency, all healthcare must be approved or recommended by the employee's treating doctor.[692] Medical payments are payable from the date of the compensable injury and may not be limited or terminated by agreement or settlement.[693]

Can an injured employee choose his or her treating doctor?

Cities, as governmental employers, have the ability to establish certain rules for the selection of treating doctors.[694] For instance, cities that self-insure either individually or collectively with other political subdivisions, may establish a workers' compensation health care network in which employees must obtain medical treatment for a compensable injury within the network. An injured employee who works for a city that has established a compensation health care network would be entitled to an initial choice of a treating doctor from a list provided by the network of all treating doctors under contract with the network.[695] A city may also choose to contract directly with health care providers or by contracting through a health benefits pool, in which case, employees would be required to select a treating doctor who is under contract with the city or the pool.[696] However, a city must ensure that workers' compensation medical benefits are reasonably available to all injured workers and all necessary health care services are provided in a manner that will ensure availability of and accessibility to adequate health care providers, specialty care, and facilities.[697]

What types of income benefits are provided to employees?

There are four types of income benefits under workers' compensation: temporary income benefits (TIBs), impairment income benefits (IIBs), supplemental income benefits (SIBs), and lifetime income benefits (LIBs).

Temporary income benefits (TIBs) are benefits that are paid directly to the injured employee by the workers' compensation insurance carrier if the employee is required to be off of work or can only work a portion of his or her regularly scheduled hours, as ordered by the employee's treating doctor.[698] TIBs are only paid for an injury that results in a disability lasting for at least one

[690] *Id*. § 408.021.
[691] *Id*. §§ 401.011(31), 408.021.
[692] *Id.*
[693] *Id.*
[694] *Id*. § 504.053.
[695] TEX. INSUR. CODE § 1305.104.
[696] TEX. LAB. CODE 504.053(b)(2).
[697] *Id*. § 504.053(d).
[698] *Id*. § 408.101.

week.[699] If a disability continues for longer than one week, weekly TIBs begin to accrue on the eighth day after the date of the injury. Or, if the employee's disability does not begin immediately after the injury occurs or within eight days but is instead experienced at a later date, the weekly TIBs accrue on the eighth day after the date on which the disability began.[700] A disability for temporary income benefits purposes (not for ADA purposes) is a work-related injury or illness that causes an employee to lose the ability to earn his or her preinjury weekly wages.[701]

Temporary income benefit payments generally cover 70 percent of the employee's lost earnings (calculated as the difference between an employee's average weekly wage and the wage earned after the work-related injury) and continue until either the employee returns to work, or the employee reaches maximum medical improvement.[702] Maximum medical improvement is defined as: (1) the date after which, based on reasonable probability, further material recovery or lasting improvement to an injury can no longer be expected, or (2) the expiration of two years from the date on which benefits began to accrue, whichever occurs sooner.[703] The two-year period may be extended by the DWC Commissioner on application by either the injured employee or insurance carrier if the employee has had spinal surgery or has been approved for spinal surgery in certain cases.[704]

Impairment income benefits (IIBs) are benefits that an injured employee may be entitled to if he or she has a permanent impairment as a result of the work-related injury or illness.[705] Under the Workers' Compensation Act a health care provider must assign the employee an impairment rating once the employee reaches maximum medical improvement, which describes the degree of the permanent impairment to the body as a whole.[706] This rating, which must be based on an objective medical evidence, determines the eligibility of the IIBs.[707] For each percentage of impairment the injured employee is assigned, he or she is entitled to three weeks of IIBs.[708] For example, if an injured employee receives a permanent impairment rating of 10 percent, the employee is entitled to 30 weeks of IIBs. Impairment income benefits generally cover 70 percent of the employee's average weekly wage and are applied on the day after the employee reaches maximum medical improvement.[709] IIBs end after each three-week period for each percentage point has expired.[710] The insurance carrier must pay the impairment income benefits not later than the fifth day after the date on which the insurance carrier receives the doctor's report certifying maximum medical improvement.[711]

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[699] *Id.* § 408.082.
[700] *Id.*
[701] *Id.* § 401.011(16).
[702] *Id.* §§ 408.103, .102.
[703] *Id.* § 401.011(30).
[704] *Id.* § 408.104.
[705] *Id.* §§ 408.121-.122
[706] *Id.* §§ 401.011(24), 408.123.
[707] *Id.* § 401.011(33).
[708] *Id.* § 408.121.
[709] *Id.*
[710] *Id.*
[711] *Id.*

Supplemental income benefits (SIBs) are benefits an injured employee may receive after IIBs have ended and if certain requirements are met. To obtain these benefits, the employee must: (1) have been assigned an impairment rating of 15 percent or more; (2) not have returned to work or not have earned 80 percent or more of the average weekly wage in the employees position because of the injury; (3) show that he or she is actively looking for employment; and (4) not have accepted a lump sum payment for his or her injury.[712] SIBs are calculated quarterly and paid to the injured employee on a monthly basis. The amount of the supplemental income benefits is calculated by subtracting the difference between 80 percent of the employee's average weekly wage and any wages the employee received after the injury was sustained. SIBs are generally 80 percent of this calculated difference.[713] An insurance carrier must start paying SIBs not later than the seventh day after the employee's impairment income benefit period has expired and must continue paying the benefits in a timely manner.[714]

Lifetime income benefits (LIBs) are benefits that are paid for the rest of an employee's life if the employee suffers from a specific injury listed in the Workers' Compensation Act including:

- total and permanent loss of sight in both eyes;
- loss of both feet at or above the ankle;
- loss of both hands at or above the wrist;
- loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
- an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
- a physically traumatic injury to the brain resulting in a major permanent neurocognitive disorder that requires supervision in activities of routine self-care, and causes the person to be permanently unemployable;
- third degree burns that cover at least 40 percent of the body and require grafting, or
- third degree burns covering the majority of both hands, one hand and one foot; or one hand, one foot and the face.[715]

LIBs generally cover 75 percent of the employee's average weekly wage and must be increased by three percent each year.[716] An insurance carrier may pay LIBs through an annuity if the annuity agreement meets the terms and conditions adopted by the DWC Commissioner by rule.[717] However, the establishment of an annuity does not relieve the insurance carrier of the liability for ensuring that the LIBs are paid.[718]

In 2023, the legislature passed H.B. 2468 which provided for lifetime income benefits for certain first responders who sustain serious bodily injury in the course and scope of his or her employment or volunteer service as a first responder which renders the employee permanently

[712] *Id.* §§ 408.1415-.142.
[713] *Id.* § 408.144.
[714] *Id.* § 408.145.
[715] *Id.* § 408.161.
[716] *Id.*
[717] *Id.*
[718] *Id.*

unemployable.[719] First responders include certified peace officers, certified emergency medical technicians, licensed paramedics, firefighters subject to certification by the Texas Commission on Fire Protection whose principal duties include aircraft crash and rescue or firefighting, and volunteer firefighters (regardless of certification) and emergency medical services volunteers providing volunteer services to the city.[720] A first responder employee that receives these lifetime income benefits must annually certify to the insurance carrier that he or she was not employed in any capacity during the preceding year.[721] Under the Workers' Compensation Act, a city, the DWC, and the insurance carrier must accelerate and prioritize an injured first responder's claim for medical benefits. The DWC must additionally accelerate a first responder's request for medical dispute resolution.[722]

What death and burial benefits are provided under the Workers' Compensation Act?

Death benefits are a type of income benefit that are provided to the legal beneficiary of an employee whose death was the result of a compensable injury.[723] This benefit is generally equal to 75 percent of the deceased employee's average weekly wage.[724]

In addition to death benefits, the Workers' Compensation Act provides for burial benefits if the death of an employee is the result of a compensable injury. An insurance carrier must reimburse the person who incurred the expenses for the employee's burial for actual costs or $10,000, whichever is less.[725] If the employee died away from his or her usual place of employment, the insurance carrier must also pay for the reasonable cost of transporting the body, not to exceed the cost of transporting the body to the employee's usual place of employment.[726]

What must an employee do to request benefits under the Workers' Compensation Act?

To start the process for requesting workers' compensation benefits, an employee must first notify the city of his or her work-related injury within 30 days of the injury and must include certain information including: (1) the name, address, and telephone number of the injured employee, (2) the date, time, and place the injury occurred; (3) a description of the circumstances and the nature of the injury; (4) the names of any witnesses, if known; and (6) the name of the person, if any, acting on behalf of the injured employee.[727] For an injury resulting from an occupational disease, the employe must notify the employer not later than the 30th day after the date on which the employee knew or should have known the disease may be related to the employment. If the employee does not notify the city within 30 days, he or she may be denied benefits, except in instances in which the city or the insurance carrier had actual knowledge of the injury, good cause exists for failing to give notice in a timely manner, or the city or insurance carrier chooses

[719] *Id*. § 408.1615.
[720] *Id*.
[721] *Id*.
[722] *Id*. § 504.055.
[723] *Id*. §§ 408.181-.182.
[724] *Id*.
[725] *Id*. § 408.186.
[726] *Id*.
[727] 28 TAC § 122.1.

not to contest the claim.[728]

The employee must also file a written claim for compensation within one year after the date the injury occurred.[729] For an injury resulting from an occupational disease, the employe must file the claim within one year after the date on which the employee knew or should have known the disease may be related to the employment.[730] If the employee does not file the claim within this time frame, he or she may be denied compensation, unless good cause exists for failing to file the claim in a timely manner, or the city or insurance carrier chooses not to contest the claim.[731]

What must a city do when it learns of a workplace injury?

Once a city is notified or becomes aware of an employee's workplace injury or illness resulting in an absence from work for more than one day, the city must file the Employer's First Report of Injury or Illness form (DWC Form-001) with its insurance carrier within eight days or immediately if the injury is a work-related disease or death.[732] A copy of the completed form along with the DWC's Notice of Rights and Responsibilities must be provided to the injured employee at the time it is filed.[733]

Can an employee dispute or appeal a denial of benefits?

Yes, to dispute a claim for medical or income benefits, an injured employee must follow certain dispute resolution procedures outlined by the DWC, which oversees the dispute resolution process. The DWC requires that employees first try to resolve the issue by discussing the issue with an attorney or Office of Injured Employee Council (OIEC) Ombudsman then contacting the insurance carrier about the issue.[734] If the dispute has not been resolved, the employee may request a benefit review conference.[735] A benefit review conference is essentially an informal meeting in which the employee, his or her attorney or ombudsman, a representative of the insurance carrier, and a DWC benefit review officer discuss the dispute to try to reach an agreement.[736] If an agreement cannot be reached at this stage, the employee may request a formal contested case hearing in which a DWC administrative law judge will hear all the evidence in the dispute and render a decision in writing.[737]

Any party to the dispute may appeal the judge's decision or choose to go to arbitration.[738] If a party chooses to appeal the decision, which is the last step in the dispute resolution process, a DWC Appeals Panel will issue a written decision after reviewing the administrative law judge's

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[728] *Id.*
[729] *Id.* § 122.2.
[730] *Id.*
[731] *Id.*
[732] *Id.* § 120.2.
[733] *Id.*
[734] *Id.* § 141.1.
[735] TEX. LAB CODE § 410.023.
[736] *Id.* §§ 410.021-.023.
[737] *Id.* § 410.151.
[738] TEX. LAB. CODE § 410.104.

decision, the hearing record, and written statements provided by the parties.[739]

After all dispute resolution processes have been exhausted, a party may appeal the Appeals Panel's decision in district court.[740]

Could an employee's on-the-job injury or illness also qualify the employee for leave under the Family Medical Leave Act (FMLA)?

Yes, if the employee's on-the-job injury or illness qualifies as a serious health condition under FMLA and the employee needs to take time off of work, the city must give the individual these benefits.[741] A serious health condition is an illness, injury, impairment, or physical or mental condition which requires overnight hospitalization or continuing treatment.[742] More information on FMLA can be found in Chapter 5.

Can a city require employees to take FMLA concurrently with workers' compensation if the injury requires time off work?

Yes, a city could adopt an employee policy requiring that FMLA and workers' compensation be taken concurrently.[743]

Can an employee's on-the-job injury or illness also qualify the employee for an accommodation under the Americans with Disabilities Act (ADA)?

If an employee sustains a workplace injury that rises to the level of a disability, the employee would be protected from employment discrimination and entitled to a reasonable accommodation under the ADA. However, not all employees who are injured in the workplace will be covered, as workplace injuries do not always fit the definition of a "disability." Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual."[744] Because many workplace injuries are temporary in nature or do not have long-term impacts, they do not "substantially limit a major life activity" and would therefore not be protected by the ADA. This may be the case even in situations where employees have been assigned permanent impairment ratings indicating some limitation with movement or ability. If the permanent impairment under workers' compensation standards does not rise to the level of a disability under the ADA, the employee would not be covered by the ADA.

When determining whether an employee is entitled to an accommodation under the ADA, a city should consult with legal counsel. More information on the ADA can also be found in Chapter 9.

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[739] 28 TAC §§ 142.16 -143.5.
[740] TEX. LAB. CODE §§ 410.208, 410.251-.308.
[741] 29 U.S.C. § 2601-2654.
[742] 29 CFR § 825.102.
[743] *Id*. § 825.702(d)(2).
[744] 42 U.S.C. § 12102.

What is a return-to-work program, and should a city consider a program?

A return-to-work program is a program that is designed to allow employees who have been out on leave due to a workplace injury to return to work as soon as it is medically safe to do so. Under a return-to-work program, an employer can provide appropriate work, taking into account the employee's medical restrictions as determined by the employee's treating doctor. While an employee may be unable to perform all of his or her previously assigned job duties, the employee may still be able to perform some of his or her job duties and/or may be able to perform modified or alternate work for the city.

Developing and implementing an effective return-to-work program can be beneficial to the city as well as the employee. These programs can significantly reduce a city's employee costs, such as overtime that other employees may accrue while covering the injured employee's duties or costs associated with hiring a temporary employee to fill in for the injured employee. A city's workers' compensation costs may also decrease if the employee works during the recovery period, reducing or eliminating the need for temporary income benefits. In addition, according to the DWC, injured employees recover faster and maintain physical and emotional health if permitted to return to work under such a program.[745]

DWC provides resources for developing a return-to-work program on their website at: https://www.tdi.texas.gov/wc/rtw/index.html. The Texas Municipal League Intergovernmental Risk Pool also provides a resource on establishing a return-to-work program on its website at: https://tmlirp.org/publications-tips-sheets.

Can a city require an employee to use accumulated sick leave before receiving workers' compensation benefits?

If a city has adopted (by a majority vote of the council) a policy allowing employees receiving workers' compensation benefits to use their previously accrued sick leave benefits in an amount equal to the difference between the benefits provided for under workers' compensation and the weekly compensation the employee was receiving before the injury occurred, the employee may elect to do so.[746] If an employee chooses to use his or her sick leave to cover the difference in this manner, the employee's sick leave benefits must be deducted proportionately from the employee's sick leave balance.[747] Using accrued sick leave in this way also does not limit or affect an employee's entitlement to any medical benefits.[748] However, a city policy may not require an employee to take sick leave benefits before receiving workers' compensation benefits.[749]

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[745] *Return to work*, TEX. DEP'T OF INSUR., *available at*: https://www.tdi.texas.gov/wc/rtw/index.html.
[746] TEX. LAB. CODE § 504.052.
[747] *Id*.
[748] *Id*.
[749] *Id*.

Can employees on workers' compensation leave continue to accrue/earn vacation and sick leave?

Whether sick and vacation time continues to accrue while an employee is out on workers' compensation leave depends on the employer's policies. A city would need to follow its adopted employee policies with regard to how an employee earns vacation and sick time. If the city's policy contains a specific provision related to employees who are out on leave, those would be followed; however, if the city's policies are not specific to employees on leave, the city would follow the usual vacation and sick time accrual policy that applies to all employees who are similarly situated to the employee who is on leave. Basically, if employees who are absent from work do not continue to accrue sick and/or vacation leave, employees on workers' compensation leave likely would not accrue the leave; additionally, if the reverse is true, then employees on workers' compensation leave would also accrue the vacation and/or sick time.

How does the new line of duty illness or injury leave comport with the Workers' Compensation Act?

In 2023, the legislature passed H.B. 471 that requires cities to provide certain first responders with a leave of absence for an illness or injury related to the first responder's line of duty.[750] This new law provides that any benefits provided under the Workers' Compensation Act shall be offset, to the extent applicable, by any amount for incapacity received under the provisions of the bill.[751] This means that any benefits a first responder is entitled to under workers' compensation will be diminished by any benefits an employee receives under the provisions of H.B. 471. More information on this paid line of duty injury and illness leave for first responders can be found in Chapter 5.

Can a city terminate an employee if the employee is on workers compensation leave?

If an employee wants to return to work and is released by his or her doctor with some limitations, a city must determine if the individual can perform the essential functions of the job. If the employee can perform some of the essential functions of the job either on a part-time or full-time basis or other alternate duties are identified by the city as part of its return-to-work program, an employee should be permitted to do so while he or she is recovering.

If the employee's injury qualifies as a disability under the ADA, the city must engage in the interactive process to find a reasonable accommodation that would enable the employee to perform his or her job, unless it would impose an undue burden on the city.[752]

If a reasonable accommodation cannot be provided without causing an undue burden on the city and the individual must be let go, the city should ensure that it has appropriate documentation of this fact as the employee could have a claim under workers' compensation or under the ADA. Rights under the ADA and state workers compensation law could be a factor in litigation if an

[750] TEX. LOC. GOV'T ch. 177A; Tex. H.B. 471 (88th R.S. 2023), *available at* https://www.legis.state.tx.us/tlodocs/88R/billtext/html/HB00471F.HTM.
[751] TEX. LAB. CODE § 504.041(a)(1)(A).
[752] 42 U.S.C. §§ 12101-12117.

employee is terminated after exercising these rights.[753] This type of action should be discussed with legal counsel before taking place.

Can a city be held liable for discriminating against or retaliating against an employee who has filed a workers' compensation claim?

Yes. Employers are prohibited from discharging or otherwise discriminating against an employee for instituting proceedings in good faith under the Workers' Compensation Act. This includes filing or notifying the employer of his or her intention to file a claim for workers' compensation benefits, hiring a lawyer to represent him or her in a claim, or testifying in a claim proceeding under the Workers' Compensation Act.[754]

In 2017, the legislature also passed a law that waives a city's governmental immunity from suit and permits first responders who have been discriminated against or retaliated against under the Workers' Compensation Act to sue the city.[755]

Under the Workers' Compensation Act, money damages are capped at a maximum amount of $100,000 for each person aggrieved and $300,000 for each single violation. A single occurrence is considered to be a single employment policy or employment action that results in discrimination or unlawful discharge of one or more employees concurrently.[756] A person unlawfully discharged would also be entitled to reinstatement of his or her former employment position with the city.[757]

What is the role of the Office of Injured Employee Counsel?

The Office of Injured Employee Counsel (OIEC) is a state agency that provides free assistance to injured employees with workers' compensation claims and the workers' compensation system.[758] OIEC also provides an ombudsman program which assists injured employees with disputes that may arise with the city's workers' compensation insurance provider.[759]

Do Occupational Safety and Health Administration (OSHA) standards apply to cities?

No, OSHA standards do not apply to cities.[760] However, city employers are still required under state law to: (1) provide and maintain a place of employment that is reasonably safe and healthful for employees; (2) install, maintain, and use methods, processes, devices, and safeguards, including methods of sanitation and hygiene, that are reasonably necessary to protect the life, health, and safety of city employees; and (3) take all other actions reasonably necessary to make

[753] TEX. LAB. CODE §§ 401.022, 451.001.
[754] *Id.* §§ 401.022, 451.001.
[755] *Id.* § 451.0025.
[756] *Id.* § 504.002(a-1).
[757] *Id.* § 451.002.
[758] *Id.* § 404.101.
[759] *Id.*
[760] 29 U.S.C. § 652(5).

the employment and place of employment safe.[761] Adopting safety and health standards and policies in which employees are notified of and trained on can help cities comply with these requirements as well as prevent workplace injuries and illnesses. For more information and resources, cities can visit the Texas Department of Insurance's website at: https://www.tdi.texas.gov/wc/safety/index.html.

Is a city required to notify its employees about its workers' compensation coverage?

Yes. Cities are required to notify their employees of the method by which their employees will receive benefits and the effective date of coverage.[762] The Texas Department of Insurance provides the required forms that employers must post throughout the employer's workplace as well as provide to new employees.[763] These include the workers' compensation insurance coverage notice (Notice 6, 7, or 10 depending on how coverage is provided), information about the Office of Injured Employee Counsel (OIEC) Ombudsman Program,[764] and information on certain work-related communicable diseases and eligibility for workers' compensation benefits (Notice 9).[765]

These posters can be found on the Texas Department of Insurance's website (https://www.tdi.texas.gov/forms/form20employer.html) and the Office of Injured Employee Counsel's website (https://www.oiec.texas.gov/news/employernotice.html).

Resources

Texas Labor Code Chapter 501:
https://statutes.capitol.texas.gov/Docs/LA/htm/LA.501.htm

Texas Labor Code Chapter 504:
https://statutes.capitol.texas.gov/Docs/LA/htm/LA.504.htm

Texas Workforce Commission Workers' Compensation Resource:
https://efte.twc.texas.gov/workers_compensation.html

Texas Department of Insurance Workers' Compensation Resources:
Employer FAQ
https://www.tdi.texas.gov/wc/employer/employerfaq.html

Workers' Compensation Income and Medical Benefits:
https://www.tdi.texas.gov/wc/employee/benefits.html

[761] TEX. LAB. CODE § 411.103.
[762] *Id.* § 504.018(b).
[763] 28 TAC § 110.101.
[764] *Id.* § 276.5(c).
[765] *Id.* § 110.108.

TML Intergovernmental Risk Pool - Workers' Compensation At-a-Glance:
https://info.tmlirp.org/hubfs/Podcast/Episode%2010a/TMLIRP%20WC%20Quick%20Reference%20guide%20TIPS%20sheet.FINAL.6.27.2022.pdf

CHAPTER 17—Employment Laws that May Apply to Your City

Federal Employment Laws

Statute	Applicability to Employees	What It Does
Age Discrimination in Employment Act - ADEA (29 U.S.C. § 621)	All	• Protects individuals (employee or applicant) who are 40 years or older from employment discrimination based on age. • 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.
Americans With Disabilities Act – ADA (Title I) (42 U.S.C. § 12112)	15 or more employees	• 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. • 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.

Statute	Applicability to Employees	What It Does
Civil Rights Act of 1866 – Section 1981 (42 U.S.C. § 1981)	All	• Prohibits racial and ethnic bias in employment.
Civil Rights Act of 1964 – Title VII (42 U.S.C. §§ 2000e-2; 2000e-3)	15 or more employees	• Prohibits employment discrimination based on race, color, national origin, religion, or sex (includes Pregnancy, sex stereotyping, and sexual harassment). • 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.

Statute	Applicability to Employees	What It Does
Consolidated Omnibus Budget Reconciliation Act – COBRA (42 U.S.C. § 300bb-5)	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).	• 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). • • 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.
Equal Pay Act – EPA (29 U.S.C. § 206 (d))	All	• Prohibits pay differentials based on gender for employees working in substantially equal jobs requiring equal skill, effort, and responsibility under similar working conditions.
Fair Labor Standards Act – FLSA (29 U.S.C. § 201 *et seq*.)	All	• Establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full- time or part-time workers. • 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

Statute	Applicability to Employees	What It Does
Family Medical Leave Act – FMLA (29 U.S.C. § 2601 *et seq.*)	All cities provide notice; Only eligible employees are given benefits	• 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).
Immigration Reform and Control Act of 1986 – IRCA (8 U.S.C. § 1324b)	Four	• 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. • Requires all employers (regardless of size) to verify and keep records of work-authorization documents.
Service on Grand Jury (29 U.S.C. § 1875)	All	• 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.

Statute	Applicability to Employees	What It Does
Patient Protection and Affordable Care Act (commonly referred to as "health reform" or "Obamacare") (42 U.S.C. §§ 18001-18121; 26 U.S.C. §§ 6055-6056)	Affects all health insurance and provides mandates to employers with 50 or more employees.	• 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.
Pregnancy Workers Fairness Act (PWFA) – (42 U.S.C. § 2000gg)	15 or more employees	• Requires employers to provide a reasonable accommodation to a qualified employee or job applicant for a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an undue hardship
Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) – (29 U.S.C.A § 218d)	All nursing mothers	• Requires employers to provide breaks and a private space for nursing mothers to express breast milk.

Statute	Applicability to Employees	What It Does
Service on Grand Jury (29 U.S.C. § 1875)	All	• 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.
Uniformed Services Employment and Reemployment Rights Act – USERRA (38 U.S.C. § 4311 *et seq.*)	All	• 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. • 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).
Workplace Safety (29 U.S.C. § 3660(c))	All	• 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.

Texas Employment Laws

Employment Law	Applicability to Employees	What It Does
Compliance with Subpoena (TEX. LAB. CODE § 52.051)	All	• 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.
Emergency Evacuations (TEX. LAB. CODE §§ 22.002; 22.004)	All (except emergency service personnel)	• 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.
Fire and Police Employee Relations: Collective Bargaining (TEX. LOC. GOV'T CODE § 174.051)	Police, fire	• Procedure and rules for establishing and maintaining collective bargaining for police and fire.
Genetic Information (TEX. LAB. CODE § 21.401 *et seq*.)	All	• 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.
Illness and Injury Leave (TEX. LOC. GOV'T CODE § 177A)	Certain first responders	• Paid leave for certain first responders who suffer an illness or injury while on duty.

Employment Law	Applicability to Employees	What It Does
Jury Service (TEX. CIV. PRAC. & REM. CODE § 122.001)	All	• Prohibits an employer from discharging an employee because the employee is called to jury duty.
Local Control of Police Officer Employment Matters in Certain Municipalities (TEX. LOC. GOV'T CODE § 142.051)	Police, fire in certain types of cities	• Procedure and rules for establishing and maintaining meet and confer agreements.
Mental Health Leave (TEX. LOC. GOV'T CODE § 614.015)	Police	• Mental health leave for police officers who experience a traumatic event in the scope of employment.
Military Service (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	• 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.
Municipal Civil Service for Firefighters and Police Officers (TEX. LOC. GOV'T CODE ch. 143)	Cities with 10,000 in population or more	• Procedure and rules for establishing and maintaining civil service rules for police and fire.
Right to Work (TEX. LAB. CODE § 101.052)	All	• Prohibits an employer from denying employment to an applicant based on membership or non-membership in a labor union.

Employment Law	Applicability to Employees	What It Does
Running for Office (TEX. LOC. GOV'T CODE § 150.041)	All	• Prohibits a city from prohibiting an employee from running for office and prohibits a city from disciplining an employee for running for office.
Texas Commission on Human Rights Act – TCHRA (TEX. LAB. CODE § 21.051-.055)	All	• Prohibits employment discrimination on the basis of race, color, disability, religion, sex, national origin, or age. • 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.
Texas Whistleblower Act (TEX. LAB. CODE § 554.002)	All	• 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.
Texas Workers' Compensation Act (TEX. LAB. CODE § 451.001)	All	• 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.
Political Activity (TEX. ELEC. CODE § 161.007)	All	• 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.

Employment Law	Applicability to Employees	What It Does
Political Activity (TEX. LOC. GOV'T CODE § 150.002)	Police, fire; 10,000 or more in population; not 143 civil service	• Prohibits a police or fire employee from engaging in political activity • while in uniform.
Voting (TEX. ELEC. CODE §§ 276.001; 276.004)	All	• 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. • 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.
Withholding of Wages (TEX. FAM. CODE § 158.209)	All	• Prohibits an employer from using a 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.