TOP TEN EMPLOYMENT LAW QUESTIONS

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Can I terminate this employee?

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

1. **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. Also, the Local Government Code puts some limitations on how Type A cities can terminate certain employees who are also officers. TEX. LOC. GOV'T CODE § 22.077. If one of these issues arises, the procedure outlined by these items should be followed.
2. **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 the performance measures the employee has not met or the personnel policies that have been violated. Written documentation that shows the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discriminatory claim based on some quality of the employee, this kind of documentation is good evidence if the city is sued. Also, an employee who is aware of problems may be less likely to take action against the city when adverse action is taken against the employee. Finally, keep in mind that there are special documentation requirements for police officers. *See id.* §§ 614.021-023.
3. **Consistency:** Ensure that similarly situated employees are treated the same. If one person in the city library is late every day and is never disciplined, but another person is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated, and ensure that your personnel policies and discipline procedures lend themselves to objectivity and consistency. However, there could be a rational basis for treating some employees differently if they are in different departments or have different duties.
4. **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? Is the employee a member of another protected class? Look at the acts listed above—plus USERRA, the Texas Whistleblowers Act, the Age Discrimination in Employment Act, and other state and federal laws—before taking action.

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

Can we drug test our employees?

Sometimes, but not often. The TML Legal Department receives many calls from cities on this issue. Most cities either: (1) desire to implement random drug testing for all their employees; or (2) already have such a policy in place. Many city officials are surprised to learn that cities may not randomly drug test all employees. Unless an exception applies (such as special safety or security concerns, reasonable suspicion, or Department of Transportation regulations), a city may not drug test its employees.

A city may only drug test its employees without individualized suspicion, also referred to as "random drug testing," if there is a "special need" that outweighs the individual's privacy interest. *Skinner v. Ry. Labor Execs. Ass'n*., 489 U.S. 602 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989). This standard means that most city employees may not be tested for drugs without individualized suspicion. While a private employer may often have the ability to randomly drug test its employees, governmental entities—such as cities—are more restricted by the United States Constitution, including the search and seizure provisions of the Fourth Amendment. The primary reason a city might be able to "randomly" drug test an employee is when the employee performs safety-sensitive or security-sensitive duties. Not all police officers or fire fighters fit into this category, but backhoe drivers might.

A councilmember is related to our code enforcement officer (or another employee). Is this a problem?

Maybe. This question comes up often, and the answer involves state nepotism law. First, state nepotism law states that a city cannot hire an individual who is related within a prohibited degree to the final hiring authority, which is often the city council. TEX. GOV'T CODE § 573.041. The prohibited degree is within three degrees by blood or two degrees by marriage. *Id.* § 573.002. Employing someone who is related within the prohibited degree is not allowed, even if the related councilmember abstains. However, sometimes having a related employee is acceptable under the nepotism statute. For example, if your city has less than 200 in population, nepotism law does not apply to your city. *Id.* § 573.061. It is also permissible to have a related employee when the individual had been working for the city a certain amount of time before the related councilmember is appointed or elected to office. *Id.* § 573.062. A home rule charter, city ordinance, or other city policy can be more restrictive than state law. For more information, please see the Office of the Attorney General's handbook, *2010 Texas Nepotism Laws Made Easy*, at www.oag.state.tx.us/AG_Publications/pdfs/nepotism_easy.pdf.

Do I have to post notice of a city job opening?

Generally, there is no law that requires a city to post or advertise a job opening. Nevertheless, the best way to prevent having an Equal Employment Opportunity Commission (EEOC)

discrimination complaint or lawsuit filed against an employer is to advertise a job opening and then ensure that the city hires the applicant who is best qualified for the position. Federal, state, and sometimes local laws prohibit hiring practices that discriminate on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship, military service, and national origin. A city's hiring practice of merely advertising an opening to a certain geographic area or merely by word of mouth, for example, may be used as evidence of discriminatory intent if a claim is filed against the city. To avoid a discrimination claim, an employer should advertise a job opening so that it reaches a large cross-section of the population. Advertising in a general circulation newspaper and on the Internet are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper, as long as it is pursuant to a consistent policy of doing so. If a city does not have a hiring policy, including a policy regarding the advertisement of a job opening, the city should seriously consider adopting one. Before advertising a job vacancy, an employer should ensure the advertisement contains a written job description that provides objective qualifications and responsibilities necessary to perform the job. The description should be devoid of any reference to sex, race, national origin, or any other protected class. In addition, a job description should include the essential functions of the position and other requirements, such as education, skills, and work experience. Once a job description is in place, it should be used as a template for the job advertisement.

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.

Can we give our employees a bonus?

The answer depends on when the employee is offered the bonus. Under the Texas Constitution and Texas case law, cities are prohibited from giving retroactive employee pay increases or bonuses that are not agreed upon before work begins. *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ); TEX. CONST. art. III, § 53. This means that the city can give "bonuses" to its employees, but only if the bonus is part of the personnel policy or an agreement before the employee starts work. A city cannot decide to give an employee a bonus after the work is done. For example, a city cannot give holiday bonuses to employees unless holiday bonuses are included in the personnel policy at the beginning of the year. However, a city may make additional compensation, such as longevity pay, part of the employees' compensation at the beginning of the year through the budget and personnel policies, to be expected for work that will be performed.

Do we have to pay our employees overtime?

A city must pay overtime to all "nonexempt" employees if the employees work more than 40 hours in a seven-day work period. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201, *et seq*. However, some employees are "exempt" and do not have to be paid overtime if they work more than 40 hours a week. 29 U.S.C. § 213(a). 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 overtime, but is paid a salary regardless of the number of hours the

employee works. However, nonexempt city employees can be paid in compensatory time, paid time off, instead of overtime. A nonexempt employee earns one-and-one-half hours of compensatory paid time off for every hour of work more than 40 hours in a seven-day work period. 29 U.S.C. § 207(o); 29 C.F.R. § 553.23. The city must allow the employee to take compensatory time off when requested and must pay compensatory time off hours when the employee leaves the city, regardless of whether the person is terminated or quits.

What is considered part-time?

State and federal law generally do not determine what is a full-time or part-time employee; the city's own policy does. Federal law only gets involved if nonexempt employees work more than 40 hours in one week, at which time they must be paid overtime. 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 or retirement benefits) to its employees, the city should review its personnel policies and contact its benefits providers to see what the requirements are. The Texas Municipal Retirement System can be reached at www.tmrs.org. The Texas Intergovernmental Employee Benefits Pool can be reached at www.tmliebp.org.

An employee has been injured on the job and is on workers' compensation. Is there anything else we need to worry about? May we terminate this employee if it isn't possible to perform the job now?

When an employee is injured on the job, the city would have three main legal concerns: workers' compensation, the Americans with Disabilities Act (ADA), and the Family Medical Leave Act (FMLA). First, if the employee qualifies for FMLA and has a serious medical condition that warrants time off, the city needs to give the individual these benefits. 29 U.S.C. § 2601-2654. However, the city policy could require that FMLA and workers' compensation be taken concurrently. 29 C.F.R. § 825.702(d)(2). The next issue involves when the employee wants to return to work or is released by the doctor with some limitations. If the doctor's note indicates some limitations, the city must determine if the individual can perform the essential functions of the job. If the individual cannot perform the essential functions of the job, the city must then determine if there is a reasonable accommodation under the ADA that would enable the employee to perform the job without being an undue burden on the city. 42 U.S.C. §§ 12101-12117. If the city decides that no reasonable accommodation can be provided and the individual must be let go, the city needs to ensure that it has appropriate documentation of this fact, since the individual could have a claim under workers' compensation or under the ADA.

Can a city regulate whether its employees campaign or run for political office?

Texas courts generally allow cities to impose reasonable restrictions on political speech engaged in by its employees. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Commc'ns Workers of Am. V. Ector County Hosp. Dist.*, 467 F.3d 427, 441-42 (5th Cir. 2006). *See also* TEX. LOC. GOV'T CODE §§ 150.002, 150.003 (regulating political activities of fire and police department employees of cities with a population of 10,000 or more). For instance, the City of Dallas Charter contained numerous political activity restrictions, including but not limited to the following:

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

The Fifth Circuit held that these provisions were not unconstitutional. *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983). Also, prohibiting political activity while on duty is proper, being reasonably necessary to the conduct of city business. Tex. Att'y Gen. Op. JM-521 (1986). 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. 485 F.Supp. 2d 777 (W.D. Tex. 2007).

Notwithstanding the *Wachsman* opinion, a city may not prohibit employees from seeking public office. *Stone v. City of Wichita Falls*, 477 F.Supp 581, aff'd 646 F.2d 1085 (5th Cir. 1981) cert denied, 102 S. Ct. 637 (1981) (holding that charter provisions stating that any city employee who becomes a candidate for election forfeits his employment is unconstitutional). But requiring resignation prior to taking office as mayor or commissioner may be proper for employees and officers who the public employer has authority to hire and fire. *Newcomb v. Brennan*, 558 F.2d 825, cert. denied, 434 U.S. 968 (1977). However, termination upon announcement of candidacy, particularly for any office other than mayor or commissioner, may subject the city to liability for wrongful termination.

May we talk about employment matters in executive session?

The Open Meetings Act requires that meetings of governing bodies be held at properly posted locations where the public can attend. TEX. GOV'T CODE §§ 551.001-.146. The Act does provide some exceptions to this rule, allowing the governing body to go into executive session to discuss certain sensitive or confidential matters. The city can meet to discuss individual employees in executive session if some requirements are met. *Id.* § 551.074. The discussion must be about an individual employee's appointment, employment, evaluation, reassignment, duties, discipline, or dismissal, or to hear a complaint or charge against the employee. However, the city cannot meet in closed session to discuss an individual employee if that employee requests that the governing body have the discussion in open session. The city cannot discuss an entire department or giving salary increases to multiple or all employees in closed session, since the discussion would not be about an individual employee.