

Employment Law Basics

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No. 1: Employment At-Will

- Why can't I fire anyone I want whenever I feel like it? Isn't Texas an At-Will State?

“absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”

No. 1: Employment At-Will

- Employment-at-will limitations:
 - Written contract/agreement
 - Employment contracts
 - Collective bargaining agreements
 - Personnel policies?
 - Federal and state laws
 - Statutory due process requirements
 - Discrimination
 - Retaliation
 - Refusal to do an illegal act

No. 2: Statutory Due Process

- Chapter 614, Subchapter B, Government Code
 - Complaints against peace officers and firefighters
- Chapter 142, Local Government Code
 - Meet and confer agreements
- Chapter 143, Local Government Code
 - Civil service statutes
- Section 22.077, Local Government Code
 - Removal of municipal officers in a Type A general law city

No. 3: Anti-Discrimination Laws

- **Federal Laws**

- Title VII of the Civil Rights Act of 1964

- Prohibits discrimination on basis of race, color, religion, national origin or sex.

- Pregnancy Discrimination Act

- Prohibits discrimination on basis of pregnancy, childbirth or medical condition related to pregnancy or childbirth.

- Equal Pay Act

- Prohibits unequal pay for equal work.

- Age Discrimination in Employment Act (ADEA)

- Protects individuals over 40 years on the basis of age.

No. 3: Anti-Discrimination Laws

- Americans With Disabilities Act (ADA)
 - Protects qualified individuals with a disability.
- Civil Rights Act of 1991
 - Amends Title VII and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.
- Genetic Information Nondiscrimination Act (GINA)
 - Prohibits discrimination on basis of genetic information (information about disease, disorder or condition).
- Immigration Reform Control Act (IRCA)
 - Prohibits discrimination against protected individuals on basis of national origin or citizenship status.

No. 3: Anti-Discrimination Laws

- **State Law**

- Texas Commission on Human Rights Act (TCHRA)

- Chapter 21, Labor Code
- Prohibits discrimination on the basis of race, color, disability, religion, sex, national origin or age.

- Texas Workers' Compensation Act

- Chapter 451, Labor Code
- Prohibits discrimination/retaliation for filing a workers' compensation claim in good faith; hiring a lawyer to represent employee in a claim; instituting a workers' compensation claim; or testifying at a workers' compensation proceeding.

No. 3: Anti-Discrimination Laws

What conduct is prohibited?

- **Discrimination**

- Intentional (disparate treatment)

- Defense: where religion, sex, national origin or age is a bona fide occupational qualification (BFOQ) reasonably necessary to normal operation of the city's business.
- Race is never a BFOQ.

- Unintentional (disparate impact)

- Neutral policies/practices that have a disproportionate, adverse impact on a protected class
- Defense: legitimate non-discriminatory business necessity.

No. 3: Anti-Discrimination Laws

What conduct is prohibited?

- **Harassment**

- Quid pro quo – some benefit of employment in exchange for a sexual favor.
- Hostile work environment
 - Unwelcome conduct that is based on a protected class; and
 - Enduring the conduct becomes a condition of continued employment; or
 - The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

No. 3: Anti-Discrimination Laws

- **Harassment**

- Employer is strictly liable for the actions of its supervisors if harassment resulted in a tangible employment action (e.g. firing the employee).
- Defense: (1) Employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

No. 4: Retaliation

- Title VII, ADEA, ADA, EPA, GINA, FLSA, Chapter 21, Workers' Compensation Act prohibit retaliation.
- Prohibits an employer from taking a materially adverse employment action against an individual because the individual engaged in a protected activity.
- A retaliation claim can be found to be valid even if the original discrimination allegation is unproven or unsubstantiated.

No. 5: Americans With Disability Act

- **Who is protected?**

- A qualified individual with a disability (i.e. an individual with a disability who can perform the essential functions of a job with or without a reasonable accommodation).

- **Does an individual have a disability?**

- A physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing or learning);
- A record of such an impairment; or
- Regarded as having a disability.

No. 5: Americans with Disabilities Act

- **What is a reasonable accommodation?**
 - Change in the work environment to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment. For example:
 - Making existing facilities readily accessible and usable;
 - Part-time or modified work schedules;
 - Reassignment to a vacant position;
 - Acquisition or modification of equipment or devices.
 - Defense: Undue hardship

No. 5: Americans With Disabilities Act

- It is the employee's responsibility to request a reasonable accommodation.
- The employer should not ask or assume an employee has a disability or needs an accommodation unless the need is obvious.
- Focus on the job performance not what may be causing poor job performance.
- Once an employee asks for an accommodation, the city must engage in the interactive process with the employee.

No. 6: Family and Medical Leave Act

- **What benefits does the FMLA provide?**
 - Entitles eligible employees to 12 weeks or 26 weeks of unpaid leave for certain qualifying events.
- **Are all cities covered by the FMLA?**
 - All cities are covered by the FMLA regardless of size, but cities with less than 50 employees are not required to comply with FMLA leave requirements; they must post FMLA posters.

No. 6: Family and Medical Leave Act

- **Which employees are eligible for FMLA?**
 - Has been employed for at least 12 months;
 - Has worked for at least 1,250 hours in the 12-month period immediately preceding the date the FMLA leave begins; and
 - Is 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.

No. 6: Family and Medical Leave Act

- **What events qualify for 12-weeks of FMLA leave?**
 - For the birth and care of employee's new born child;
 - Placement of an adopted or foster child with the employee;
 - To care for a spouse, child or parent with a serious health condition;
 - For the employee's own serious health condition; or
 - Qualified military exigencies if the employee's spouse, child or parent is a covered military member on covered active duty.

No. 6: Family and Medical Leave Act

- **What events qualify for 26-weeks of FMLA leave?**
 - To care for a covered military service member (including certain veterans) with a serious injury or illness that was sustained or aggravated in the line of duty while on active duty.
- **What special rules apply to FMLA leave?**
 - FMLA leave can be on intermittent on a reduced schedule basis.
 - An employee must be restored to original or equivalent job with equivalent pay, benefits and terms of employment.

No. 6: Family and Medical Leave Act

- An employee may choose, or the employer may require the employee to substitute accrued paid leave to cover some or all of the FMLA leave period.
- An employer is required to maintain the employee's health benefits as if the employee were continuously employed during the leave period.
- FMLA-covered absences cannot be used as the basis for any kind of disciplinary action.

No. 7: Texas Whistleblower Act

- Prohibits a city from suspending or terminating the employment of, or taking other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing city or another public employee to an appropriate law enforcement authority. Tex. Gov't Code 554.002.

No. 7: Texas Whistleblower Act

- Remedies:
 - Injunctive relief
 - Actual damages
 - Court costs
 - Reasonable attorney fees
 - Reinstatement to former or an equivalent position
 - Lost wages
 - Reinstatement of fringe benefits and seniority rights
 - Civil penalty paid by supervisor up to \$15,000.

No. 8: Fair Labor Standards Act

- Federal minimum wage
 - \$7.25/hour
- Overtime pay
 - Nonexempt employees must be paid overtime pay at the rate of 1 ½ times the employee’s regular rate of pay for all hours worked over 40 in a workweek.
 - In lieu of overtime pay, a public agency can pay “compensatory time off ” (“comp time”) at the rate of 1½ times the employee’s regular rate.
 - Public safety employees may accrue up to 480 hours of comp time.
 - Other city employees may accrue up to 240 hours of comp time.

No. 8: Fair Labor Standards Act

- Exemptions

- Executive, administrative, and professional employees are exempt from both overtime pay and minimum wage if they meet both the salary test (\$684/week) and the job duties test.

A city can choose to pay exempt employees overtime pay or comp time.

No. 8: Fair Labor Standards Act

- Special rules for peace officers and fire fighters
 - Partial exemption (207(k) exemption)
 - Overtime pay based on a “work period” that may be from seven consecutive day to 28 consecutive days in length.
 - Note: A city with a population of more than 10,000 may, in some instances, not utilize the 7(k) exemption for its non-exempt police officers. See 142.0015(f), LGC
 - Complete exemption
 - If a police/fire department employs less than five employees in law enforcement or fire protection activities, the police and firefighters are exempt from overtime pay.

No. 9: The Government as an Employer

- First Amendment
 - Freedom of expression
 - Free exercise of religion
- Fourth Amendment
 - Drug testing based on individualized suspicion.
 - Random drug testing only for safety-sensitive employees.
- Fifth Amendment
 - Right of a public employee not to be compelled to incriminate themselves by their employer. *Garrity v. New Jersey*, 365 U.S. 493 (1967)

No. 10: Local Policies

- Policies can establish due process.
- Conduct may not rise to an illegal act but may be a violation of policy.
- Policies can address issues not covered by law, for example, holiday pay, breaks, vacation, sick time.
- Are your policies inadvertently discriminatory?
- Are your policies up to date?

Helpful Resources

- [Employment Law Manual for Texas Cities](#)
- [Texas Workforce Commission](#)
- [U.S. Department of Labor, Wage Division](#)
- [EEOC](#)
- TML-IRP Call Before You Fire: 1-800-537-6655
- [Texas Municipal Human Resources Association](#)

