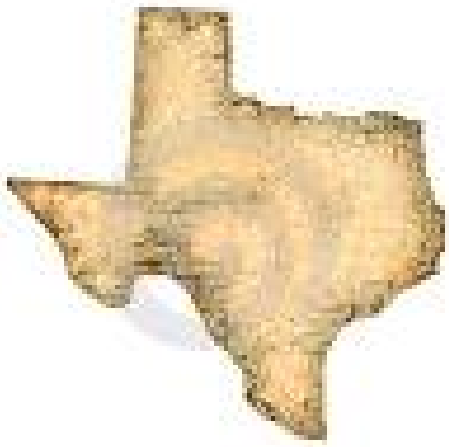
MUNICIPAL EMPLOYMENT LAW MADE EASY



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The following questions and answers provide a layperson's explanation of state and federal employment laws as they apply to Texas municipal officials and are intended to provide general guidance on the issues. The Texas Municipal League Legal Department is always available to answer questions from city officials. You can contact us at (512) 231-7400 or email us at legalinfo@tml.org. While many people worked on this document, two attorneys who no longer work at TML contributed greatly to the substance of this handbook while they were here. Kathryn Hoang, who now works in private practice, and Evelyn Njuguna, who now works at the City of Houston, both originally prepared much of the material in this book. Cori Eggeling, a law clerk at the Texas Municipal League, contributed the Affordable Health Care Act chapter as well as helping update and format this document.

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CHAPTER 1--Top Employment Law Questions

1. Can I terminate this employee?

Possibly but caution is needed. Cities often struggle with the question of when and how to fire a poor performing employee. Even though Texas is an "at-will" employment state, where anyone can be fired for any nondiscriminatory reason, many federal and state laws protect employees. These laws often 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 what their failings are. Many times supervisors hold back on firing an employee in fear of a lawsuit. They ask themselves, "How can I safely fire a poor performer who's pregnant, or on medical leave, or who just filed a worker's compensation claim?" The reality is that any time someone is terminated she 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. Also, the Local Government Code puts some limitations on Type A cities on how they can terminate certain employees who are also officers.[1] If one of these issues arises then the procedure outlined by these items should be followed.
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> **(b) Documentation:** Make a paper trail. This is one of the most important items involved in terminating an individual. Usually employees are not terminated for a one-time offense, but for poor performance based on violations of personnel policies. Ideally, there will be objective documentation detailing what performance measures the employee has not met or personnel policies she has violated. Written documentation that shows that the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discrimination claim based on some characteristic of the employee, this kind of documentation is good evidence if sued. Also, if an employee is aware of problems he may be less likely to take action against the city when adverse action is taken against the employee. Finally, keep in mind that there are special documentation requirements for police officers.[2]
>
> **(c) Consistency:** Ensure that similarly-situated employees are treated the same. If one person in the city library is late everyday and is never disciplined and another person is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure that your personnel policies and discipline procedures lend themselves to objectivity and consistency. However, there could be a rational basis for treating some employees differently if they are in different departments or have different duties.

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[1] TEX. LOC. GOV'T CODE § 22.077.
[2] *See id.* §§ 614.021-023.

(d) Discrimination and Retaliation: Are there any legitimate claims that the employee or applicant could make? Could an injured employee make a claim under the Family Medical Leave Act, the Americans with Disabilities Act, or Workers' Compensation? Are they part of another protected class? Look at the above acts plus USERRA, the Texas Whistleblowers Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action.

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

2. Can we drug test our employees?

Sometimes, but not often. Cities often 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.[3] 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. See the Drug Testing section of this manual for more information.

3. 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.[4] The prohibited degree is within three degrees by blood or two degrees by marriage.[5] 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

[3] *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).
[4] TEX. GOV'T CODE § 573.041.
[5] *Id.* § 573.002.

population then nepotism law does not apply to your city.[6] Another reason why it is permissible is when the individual had been working for the city a certain amount of time before the related councilmember is appointed or elected to office.[7] For more information please see the Attorney General's Handbook on nepotism at http://www.oag.state.tx.us/AG_Publications/pdfs/nepotism_easy.pdf. A home rule charter, city ordinance, or other city policy can be more restrictive than state law.

4. 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 that 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 it 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.

5. 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.[8] This means that the city can give "bonuses" to its employees, but only if the bonus is part of the personnel

[6] *Id.* § 573.061.
[7] *Id.* § 573.062.
[8] *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.--El Paso 1971, no writ); TEX. CONST. art. III, § 53.

policy or an agreement before the employee starts work.[9] A city cannot decide to give an employee a bonus after the work is done.[10] 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.

6. 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.[11] However, some employees are "exempt" and do not have to be paid overtime if they work over 40 hours a week. [12] 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 her 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 hour of compensatory paid time off for every hour of work over 40 hours in a seven-day work period.[13] The city must allow the employee to take compensatory time off when requested and must pay the employee his compensatory time off hours when he leaves employment with the city, regardless of whether he is terminated or quits. For more information, see the Fair Labor Standards Act section of this manual.

7. 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 a nonexempt employee works over 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 http://www.tmrs.org/. The Texas Intergovernmental Employee Benefits Pool can be reached at http://www.tmliebp.org/.

8. An employee has been injured on the job and is on workers' compensation. Is there anything else we need to worry about? Can we terminate this employee if he cannot perform his 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

[9] Tex. Att'y Gen. Op. Nos. GA-492 (2006) & JM-1253 (1990).
[10] Tex. Att'y Gen. Op. No. JC-383 (2001).
[11] Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201, *et seq*.
[12] 29 U.S.C. § 213(a).
[13] 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.

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.[14] However, the city policy could require that FMLA and workers' compensation be taken concurrently.[15] The next issue involves when the employee wants to return to work or is released by his doctor with some limitations. If the doctor's note indicates some limitations, the city must determine if the individual can perform the essential functions of the job. If the individual cannot perform the essential functions of the job, the city must then determine if there is a reasonable accommodation under the ADA that would enable the employee to perform her job without being an undue burden on the city.[16] If the city decides that no reasonable accommodation can be provided and the individual must be let go, then the city needs to ensure that it has appropriate documentation of this fact since the individual could have a claim under workers' compensation or under the ADA. For more information see the FMLA and ADA sections of this manual.

9. Can 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.[17] 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.[18] 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 discuss them 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.

[14] 29 U.S.C. § 2601-2654.
[15] 29 C.F.R. § 825.702(d)(2).
[16] 42 U.S.C. §§ 12101-12117.
[17] TEX. GOV'T CODE §§ 551.001-.146.
[18] *Id.* § 551.074.

CHAPTER 2--Hiring

Who hires city employees?

In general law cities, the city council usually has final hiring and firing authority. Some general law cities have city managers or other employees who may be delegated the hiring or firing authority, but the city council usually has the final say. In a type A city, the authority to appoint and hire officers and employees is given to the governing body of the city, the city council.[19] If the city has adopted the Chapter 25 city manager form of government through an election then who has final hiring and firing authority may not always be the city council.[20] In home rule cities, hiring and firing authority is determined by the charter.

Some positions are appointed under other statutes, but the governing body still makes the hiring and appointing decisions. Economic development directors are appointed by the governing body, the city council.[21] The city council also determines whether to have the municipal judge appointed or elected.[22]

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 that 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 it 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

[19] TEX. LOC. GOV'T CODE § 22.071.
[20] *Id.* § 25.029.
[21] *Id.* §§504.051, 505.051.
[22] *Id.* § 29.004.

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.

What is discrimination in hiring?

Federal, state, and sometimes local laws prohibit hiring practices that discriminate on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship, union activity, military service and national origin.[23] State and federal enforcement agencies, such as the Texas Workforce Commission's Civil Rights Division and the Equal Employment Opportunity Commission, respectively, look at whether or not an employer's recruitment is wide enough to attract a diverse candidate group.

Should the city adopt a hiring policy?

It is up to the city, but a hiring policy that states that hiring is nondiscriminatory and that requires posting of jobs, either externally or internally, may keep a city from being sued or liable for hiring discrimination.

Can a city drug test an individual before hiring him or her?

Besides employees who perform safety or security sensitive functions as described below in the drug testing section, individuals who may be tested for drugs include an applicant for employment, after the job offer is made but before the applicant takes the position, and/or if some safety or security concern is present.[24]

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

What 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 not arrests.[25] If a city believes a felony conviction could impact job performance, the city should not ask only about convictions, but should ask about convictions and guilty or no contest pleas to get a more complete picture. Here is a sample question about criminal history from the Texas Workforce Commission's Web site: "During the past (fill in the number) years, have you ever been

[23] For examples, see other sections of this article, including the Americans with Disabilities Act, Employment Discrimination, the Age Discrimination in Employment Act, and USERRA.
[24] 42 U.S.C.A. § 12114; *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (pre-employment; post-offer testing); *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (commercial drivers license); *Nat'l Treasury Emps. Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990).
[25] *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982).

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.)" The city should ensure that any information used to make a hiring decision is related to the job and the job description.

Resources

Texas Workforce Commission Handbook:
http://www.twc.state.tx.us/news/efte/tocmain2.html

CHAPTER 3--Fair Labor Standards Act

What is the Fair Labor Standards Act?

The Fair Labor Standards Act (FLSA) generally provides for a minimum wage for employees and that a covered, nonexempt employee must 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.[26] It also provides for exemptions to this general rule.

However, not all employees of a city are affected by the FLSA. Certain employees are not covered by the Act, and some are covered but exempted by a specific provision of the Act. Employees that are not covered by the Act include elected officials and their personal staffs, legal advisors, and bona fide volunteers.[27] 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.[28]

What is the minimum wage?

The current minimum wage is $7.25 an hour.[29]

Which employees are required to be paid overtime?

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

How can the city differentiate between exempt and nonexempt employees?

Most employees are "nonexempt" and must be paid overtime if they work more than 40 hours in a seven-day work week. The "standard" salary test provides that any employee who earns less than $455 a week ($23,660 a year) is automatically entitled to overtime pay, regardless of the employee's position. On the other hand, an employee who earns

[26] 29 U.S.C. § 201, *et seq.*
[27] *Id.* § 203(e).
[28] *Id.* § 203.
[29] *Id.* § 206.

more than $100,000 a year is exempt from overtime compensation, regardless of job classification, under the "highly compensated employee" test.

The three primary exemptions for overtime pay are executive, professional, and administrative.[30] For an employee to be considered exempt under the executive employee test, the employee must: (a) have as a primary duty the management of the enterprise or of a recognized department or subdivision; (b) customarily and regularly direct the work of two or more employees; (c) have authority to hire or fire other employees (or the employee's recommendations as to hiring, firing, promotion, or other change of status of other employees are given particular weight); and (d) be compensated on a salary basis at a rate not less than $455 a week.[31]

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.[32] The employee must also be compensated on a salary basis at a rate not less than $455 a week.

Finally, an employee is exempt under the administrative employee test if the employee: (a) is responsible for the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; (b) exercises discretion and independent judgment with respect to matters of significance within the organization; and (c) is compensated on a salary or fee basis at a rate no less than $455 a week.[33]

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

How is overtime calculated?

If overtime is paid, it must be not less than one-and-one-half times the regular rate of pay.[34] The regular rate of pay is the hourly pay of the employee, which must be greater than $7.25 an hour, plus any other bonuses or pay the employee receives.[35]

[30] *Id.* § 213(a)(1).
[31] *Id.* § 213; 29 C.F.R. § 541.100
[32] 29 U.S.C. § 213; 29 C.F.R. § 541.300.
[33] 29 U.S.C. § 213; 29 C.F.R. § 541.200.
[34] 29 U.S.C. § 207(a).
[35] *Id.* § 207(e).

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

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

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

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

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, and laws dealing with the military may require some unpaid time off. At least two state laws also have some time off requirements. Section 431.005 of the Government Code states that an employee who is a member of the state military forces or the armed forces is entitled to a paid leave of absence of up to 15 working days for authorized training or duty.[36] Finally, police and fire employees must be given the same number of days off as other city employees.[37] Also, fire employees must also have September 11th listed as one of their holidays.[38]

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

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 is implicated only if a nonexempt employee works over 40 hours in one week, at which time they must be paid overtime. Many times benefits can be affected by an employee's full-time or part-time status. If the city wonders 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 their requirements are. The Texas Municipal Retirement System can be reached at http://www.tmrs.org/. The Texas Intergovernmental Employee Benefits Pool can be reached at http://www.tmliebp.org/.

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

Yes. City employees can be paid in compensatory time (paid time off) instead of overtime. Compensatory time is paid time off, and a nonexempt employee earns one-and-one-half hour of compensatory time for every hour of work over 40 hours in a seven-

[36] TEX. GOV'T CODE § 431.005.
[37] TEX. LOC. GOV'T CODE § 142.0013.
[38] *Id.*

day work period. However, compensatory time may only be given to employees if the employees agree before beginning work to accept compensatory time off in lieu of overtime through individual agreements or through a collective bargaining agreement. [39]

When does the city have to pay compensatory time?

The city must allow an employee to use compensatory time off if the employee requests it and the use of the time does not "unduly disrupt" the city's work.[40] The city also must pay the employee his compensatory time off hours when he leaves employment with the city, regardless of whether he is terminated or quits.[41]

How many hours of compensatory time can an individual earn?

An employee who is not engaged in public safety activities can only accrue 240 hours of compensatory time off (160 hours of overtime). If an employee works more than these hours they must be paid overtime wages.[42]

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

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

Is a city required to provide an employee with a meal break or rest period, and does the city have to compensate an employee who takes such a break?

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 employee is free to leave the worksite; and (3) the meal

[39] 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.
[40] 29 U.S.C. § 207(o)(5).
[41] *Id.* § 207(o)(4).
[42] *Id.* § 207(o)(3).

break is at least thirty minutes long.[43] Rest breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable.[44]

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

It depends on whether an employee is exempt or non-exempt under the Fair Labor Standards Act (FLSA). Section 13(a)(1) of the FLSA provides a complete exemption from minimum wage and overtime for an employee who meets the duties test (administrative, executive, or professional), is paid at a rate of at least $455 per week, and is compensated on a "salary basis."[45] 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."[46] 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.[47] 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.[48]

Recently, 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."[49] 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.[50] 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.[51]

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.[52] The FLSA includes in the definition

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[43] *See Bernard v. IBP., Inc.,* 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. § 785.19.
[44] 29 C.F.R § 785.15.
[45] 29 U.S.C § 213(a) (1); 29 C.F.R. § 541.600(a).
[46] 29 C.F.R. § 541.602(a).
[47] *Id.*
[48] 29 C.F.R. §§ 541.602; 541.710.
[49] Dep't Labor Op. FLSA2006-7 (2006).
[50] *Id.*
[51] *Id.*
[52] *Lee v. Coahoma County, Miss.*, 937 F.2d 220, 226 (5th Cir. 1991).

of employer "any person acting directly or indirectly in the interest of an employer in relation to an employee."[53] Thus, if a supervisor or employee "acts, directly or indirectly" for the employer, then that person could be held individually liable for the violation.[54] 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.[55] 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."[56]

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

Cities are prohibited from granting extra compensation to an employee after her services have been rendered.[57] However, a city is authorized to correct improper payments. For example, if an employee who is classified as nonexempt under the Fair Labor Standards Act (overtime) was not properly compensated for his or her overtime work, back pay may be proper to remedy that situation. However, if a city gives longevity pay or some other pay that is included in the budget and is offered to the employee before the work is performed, such extra pay may be permissible. Please consult with local legal counsel regarding specific cases.

Resources

Department of Labor:
http://www.dol.gov/compliance/laws/comp-flsa.htm

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

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[53] 29 U.S.C. § 203(d).
[54] *Lee*, 937 F.2d at 226.
[55] *Perry v. Greanias*, 95 S.W.3d 683, 699 (Tex. App.—Houston [1st Dist.] 2002).
[56] *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).
[57] TEX. CONST. art. III, § 53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ).

FLSA Statute:
http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

FLSA Regulations:
http://www.dol.gov/dol/allcfr/ESA/Title_29/Chapter_V.htm

FLSA Poster:
http://www.dol.gov/whd/regs/compliance/posters/flsa.htm

CHAPTER 4--FLSA 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.[58] 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).[59]

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.[60]

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.[61] The law enforcement agency and fire suppression employees are treated separately. A city could have less than five employees in law enforcement and claim the exemption even if the city had five or more employees in fire suppression and could not claim the exemption for the fire suppression employees.

Also, an employee who is assigned to the fire department or police department and who performs support services, such as a dispatcher, alarm operator, clerk, or mechanic, does not count towards the five-employee threshold. Likewise, because volunteers are not considered employees, they do not count towards the minimum employee threshold.[62] 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.[63]

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[58] 29 U.S.C. § 207(k).
[59] *Id.*; 29 C.F.R. § 553.201.
[60] 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.
[61] 29 C.F.R. § 553.200.
[62] *Cleveland v. City of Elmendorf,* 388 F.3d 522 (5th Cir. 2004).
[63] 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.[64] 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).[65] To avail itself of the 7(k) exemption, a city must establish a work period.[66] 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 U.S. Department of Labor (DOL) regulations define an employee engaged in law enforcement activities as an employee:

> (1) who is a uniformed or plainclothed member of a body of officers and surbodinates 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; (2) who has the power to arrest; and (3) 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.[67]

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.[68] Additionally, employees who may be members of a fire or police department and who perform support activities, such

[64] 29 U.S.C. § 207(k).
[65] 29 C.F.R. § 553.201.
[66] *Id.*
[67] *Id.* § 553.211(a).
[68] *Id.* § 553.211(e).

as dispatchers, radio operators, repair workers, clerks, or janitors do not qualify for the 7(k) exemption.[69]

Does 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.[70]

Cities that utilize employees who perform dual-functions as firefighters and paramedics should be aware of a fairly recent 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.[71]

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

While the 7(k) exemption is limited to public agencies and does not apply to private entities, the Fifth Circuit has held that a volunteer fire department that provided traditional fire fighting and fire protection services, was funded almost exclusively by taxes, was accountable to the county, and for which the county had ultimate authority over its actions, was a public agency for purposes of the 7(k) exemption.[72]

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

The FLSA does not preempt a state law or municipal ordinance that provides more benefits than the FLSA requires.[73] 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.[74] As such, if a majority of nonpublic safety employees in a city work 40 hours, a police officer would be entitled to overtime pay when the officer works more than 40 hours. However, a city may require a police officer to work more hours than permitted in the event of an

[69] *Id.* § 553.211(g).
[70] 29 U.S.C. §203(y).
[71] *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5th Cir. 2006).
[72] *Wilcox v.Terrytown Fifth Dist. Volunteer Fire Dep't. Inc.*, 897 F.2d 765 (5th Cir. 1990).
[73] 29 U.S.C. § 218.
[74] TEX. LOC. GOV'T CODE § 142.0015(f).

emergency.[75] 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.[76] 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.[77] A police officer or fire fighter can also work extra hours when exchanging hours with another fire fighter or police officer.[78]

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.[79] A city can still use the 7(k) exemption for non-exempt firefighters or members of a fire department who provide emergency medical services.[80]

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

If the duties and salary of a police chief, ranking police officer, or detective would meet the "standard" or "highly compensated employee" tests for executive or administrative employees, then he or she could be considered exempt. The police chief is almost certain to qualify for one or the other exemption. Other ranking police officers and detectives may be exempt, depending on their job duties and responsibilities, and how closely they are supervised.[81]

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.[82]

Resources

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

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[75] *Id.*§ 142.0015(g).
[76] *Id.* § 142.0015(j).
[77] *Id.*
[78] *Id.* § 142.001(d).
[79] *Id.* § 142.0015(c).
[80] *Id.* § 142.0015(b).
[81] 29 U.S.C. § 213.
[82] TEX. LOC. GOV'T CODE § 141.032.

CHAPTER 5--Family and Medical Leave Act

What is the Family and Medical Leave Act?

The Family and Medical Leave Act (FMLA) is a federal law that went into effect in 1993.[83] Under the FMLA, eligible employees are entitled to 12 weeks or 26 weeks of unpaid leave for certain qualifying events. On January 16, 2009, new FMLA regulations went into effect that clarify leave provisions and add new leave options for military personnel and their families.

Is my city covered by the FMLA?

All cities as public entities are covered by the FMLA, regardless of the city's size.[84]

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.[85]

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

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

What types of events qualify for leave under the FMLA?

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

[83] 29 U.S.C. §§ 2601-2654.
[84] 29 C.F.R. § 825.104.
[85] *Id.* §§ 825.108(d); 825.110.

or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member.[86]

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).[87] 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.[88] A city is also required to maintain the employee's health benefits as if the employee were continuously employed during the leave period.[89]

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.[90]

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.[91] 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.[92]

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.[93] If the city determines that restoration of a key employee

[86] 29 C.F.R. § 825.112(a).
[87] *Id.* § 825.100.
[88] *Id.*
[89] *Id.* § 825.209.
[90] *Id.* § 825.203.
[91] *Id.*
[92] *Id.*
[93] *Id.* § 825.214.

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.[94] 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.[95]

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.[96] If an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the Fair Labor Standards Act, the time taken may be counted against the employee's FMLA leave entitlement.[97] 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 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.[98] 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.[99]

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.[100] 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.

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.[101] The FMLA includes in its definition of employer "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."[102] Thus, if a supervisor or

[94] 29 C.F.R. §§ 825.217-219.
[95] *Id.* § 825.217.
[96] *Id.* § 825.207.
[97] *Id.* § 825.207(f).
[98] *Id*. § 825.300.
[99] *Id.*
[100] *Id.*
[101] *Modica v. Taylor,* 465 F.3d 174, 184-86 (5th Cir. 2006).
[102] 29 U.S.C. § 2611(4)(A)(ii)(I).

employee "acts, directly or indirectly" for the employer, then that person could be held individually liable for the violation.[103] 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.[104] 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.[105] 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."[106]

Resources

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.dol.gov/federalregister/HtmlDisplay.aspx?DocId=21763&Month=11&Year=2008

FMLA Posters:
http://www.dol.gov/whd/fmla/finalrule/FMLAPoster.pdf
http://www.dol.gov/whd/regs/compliance/posters/fmlaspan.htm

FMLA Notice of Eligibility for Employees:
http://www.dol.gov/whd/fmla/finalrule/WH381.pdf

[103] *Modica*, 465 F.3d at 184-85.
[104] *Id.* at 187-88.
[105] *Id.*
[106] *Id.* at 188.

CHAPTER 6--COBRA

What is the Consolidated Omnibus Budget Reconciliation Act?

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a health benefit program enacted by the federal government in 1986.[107] COBRA allows an employee to continue to receive employer-provided health benefits at the expense of the employee after the employee becomes ineligible for coverage under the employer's personnel policies.

Do cities have to participate?

COBRA covers all group health plans maintained by government entities, including cities, if the city employs twenty or more employees.[108] If a city provides health coverage to its employees, then the city must follow COBRA and allow an employee to continue coverage under its plan if the employee elects to do so. Eligible health coverage includes group health plans that are medical care and may include: hospital care, physician care, surgery, prescription drugs, and dental and vision care. A city that does not already offer health care coverage to its employees or their dependents does not have to participate.

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

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

What is a qualifying event?

A "qualifying event" is an event that causes an individual to lose group health coverage. A qualifying event could include the death of a covered employee, termination of an employee for any reason other than "gross misconduct," reduction in the hours of a covered employee's employment with the city, divorce or legal separation of a covered employee and spouse, or a child's loss of dependent status.[109]

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

If a city provides group health coverage, and an individual has certain qualifying events that may entitle the individual to continuation of health coverage under COBRA, the city must inform its health benefit plan administrator of the qualifying event. Some cities administer their own COBRA continuation coverage, while others have their health

[107] 29 U.S.C. § 1161 *et seq*; 42 U.S.C. § 300bb-1 *et seq*.
[108] 42 U.S.C. § 300bb-1 *et seq*.
[109] 42 U.S.C. § 300bb-3.

benefit provider administer their COBRA coverage. If a city administers its own COBRA coverage, the city would generally inform its benefits plan of the qualifying event, and then administer the coverage under federal law. If a city has its health benefits plan administer its COBRA coverage, the health plan is informed of the qualifying event by the city.

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

If the city receives notice of an employee's qualifying event, it should work with the employee to give notice to the appropriate administrator, even if notice of the qualifying event triggering the coverage would ordinarily be the employee's responsibility. After the COBRA benefits plan administrator has notice of the event, the administrator is responsible for providing an election notice and other documentation to the employee in question. The administrator can also deny coverage for certain reasons, but must give notice to the employee in question. If the city has questions regarding who administers its COBRA coverage, it should contact its health benefits plan and its city attorney.[110]

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

An employee and his dependents will generally be eligible for continuation of health coverage under COBRA even if the employee is fired for cause. However, an employee who is fired for "gross misconduct" would not be eligible for COBRA coverage or the COBRA subsidy described below. Unfortunately, the term "gross misconduct" is not specifically defined in COBRA or in regulations that implement COBRA. Therefore, whether a fired employee has engaged in gross misconduct will depend on the specific facts and circumstances. Generally, it can be assumed that being fired for most ordinary reasons, such as excessive absences or generally poor performance, does not amount to "gross misconduct." But "gross misconduct" may include illegal activities such as stealing, embezzling, or other mishandling of employer funds or property; violence and threats of violence that are related to the workplace; or drunk driving on the job.[111] If the employee is fired for "gross misconduct," the city would not be required to provide the employee and the employee's dependents continuation coverage under COBRA. The "gross misconduct" exception to COBRA continuation coverage would not apply to the situation where the employee is allowed to resign rather than be fired.[112]

[110] 42 U.S.C. § 300bb-6.
[111] *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).
[112] 42 U.S.C. § 300bb-3.

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

Quitting, retiring, being fired, or being laid off all count as qualifying events for COBRA continuation coverage.[113]

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

An employee whose hours are reduced and would lose his health coverage under the city's plan, whether because the employee chooses to go part time or the city requires it, would be eligible for COBRA continuation coverage. This includes the situation where the employee is absent from work due to disability, a temporary layoff, extended leave, or for any other reason besides Family Medical Leave Act (FMLA) leave.

How is health insurance coverage handled if the employee is on FMLA leave and becomes ineligible for health coverage under a city's plan?

Usually, a qualifying event occurs if an employee's absence from work would cause her and her family to lose coverage under the city's group health plan. That rule does not apply, however, when employees take leave that is protected under the FMLA. If an employee is eligible for FMLA leave and takes the leave, the city is required to maintain the employee's health insurance under the same conditions as before the leave (including any arrangement regarding payment of premiums).[114] This means that the city must continue to pay whatever amount of premium it paid before the individual went on leave and the individual must pay whatever amount he was required to pay before he went on FMLA leave. However, if an employee stays on leave past the twelve weeks of leave mandated by the FMLA for certain cities (generally those with more than 50 full-time employees), the extended absence would likely be a qualifying event that would require continuation coverage under COBRA.

Who pays for the coverage?

Who pays for the coverage depends on when the individual became eligible for continuation coverage and why the individual became eligible. In most cases, the city can choose to pay for part or all of the COBRA continuation coverage, or can require the individual to pay for the coverage. The maximum amount charged to these individuals cannot exceed 102 percent of the cost to the plan for coverage of similarly-situated individuals who are still eligible for coverage. The additional two percent can be charged as administrative costs. The individual can pay the premium on a monthly basis if they desire, and will either reimburse the city or pay the health benefits plan (depending on how the city decides to administer COBRA continuation coverage).[115] Also, whomever

[113] 42 U.S.C. § 300bb-3.
[114] 29 C.F.R. § 825.209.
[115] 42 U.S.C. § 300bb-2.

is administering the COBRA continuation coverage must give the individual at least 45 days after the individual elects to have the coverage to pay the first premium payment. But the plan can terminate coverage if the individual does not pay within the 45 day time frame.

The American Recovery and Reinvestment Act of 2009 added a COBRA subsidy for some COBRA eligible individuals. If the individual becomes eligible for COBRA continuation coverage between September 2008 and May 31, 2010 due to an involuntary termination of employment, the individual will be required to pay only thirty-five percent of the cost of his COBRA coverage if he wishes to participate in the city's health insurance plan (for the first 15 of 18 months for which he is eligible for continuation coverage). Cities are then required to pay the remaining sixty-five percent of the premium, but are entitled to a credit for that payment on their quarterly payroll tax return (Form 941).[116] Also, the act that extended the COBRA premium reduction eligibility period also expanded eligibility to any employee whose reduction of hours causes a loss of health coverage and who then terminated on or after March 2, 2010 through May 31, 2010. This expansion also includes a second election opportunity for these individuals who had a reduction-of- hours qualifying event followed by an involuntary termination, if they did not elect COBRA continuation coverage when it was first offered or elected but subsequently discontinued COBRA.

For more information on how a city will be reimbursed for the cost of the coverage, see the Internal Revenue Service's Web site at www.irs.gov. For more information on the American Recovery and Reinvestment Act please see www.recovery.gov. An individual can be ineligible or become ineligible for the continuation coverage subsidy if the individual is eligible for other group health coverage (such as through a new employer's plan or a spouse's plan) or if the employee's termination of employment was for gross misconduct. If the qualifying event occurred after May 31, 2010, then this provision does not apply and the city decides how much, if any, to pay.

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.[117]

[116] http://www.irs.gov/pub/irs-pdf/f941.pdf.
[117] 42 U.S.C. § 300bb-2.

How long does coverage have to continue?

Coverage lasts for a limited period of either eighteen or thirty-six months. The period for which continuation coverage must be available depends on why the individual lost her coverage in the beginning. However, the city and its health plan may provide longer periods of coverage beyond the maximum period required by law.

If the reason an individual is eligible for COBRA coverage is the end of employment or reduction of employee's hours, the individual and his dependents are eligible for up to eighteen months of coverage. For any other "qualifying event," the individual and the individual's dependents must be offered a maximum of thirty-six months of continuation coverage.

In addition, coverage may be extended if another qualifying event occurs while the individual is already on COBRA continuation coverage.[118]

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. S.B. 872 in the 2009 legislature requires the city to pay the same amount for a surviving spouse's health insurance as it pays for current employees.[119] 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.

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 her intent to continue coverage on the day of her retirement or before.[120] Cities over 25,000 must provide written notice to retirees of his right to purchase continued coverage from the city.[121]

Resources

Department of Labor:

Basic Information:	http://www.dol.gov/dol/topic/health-plans/cobra.htm
Faqs:	http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.HTML
Sample Notices:	http://www.dol.gov/ebsa/cobramodelnotice.html

[118] 42 U.S.C. § 300bb-2.
[119] Tex. S.B. 872, 81st R.S. (2009); TEX. GOV'T CODE §§ 615.001-.123.
[120] TEX. LOC. GOV'T CODE § 175.002.
[121] *Id.* § 175.005.

Subsidy Information:
http://www.dol.gov/ebsa/newsroom/fsCOBRApremiumreduction.html

Internal Revenue Service:
COBRA Premium Subsidy: http://www.irs.gov/newsroom/article/0,,id=204708,00.html

CHAPTER 7--Volunteers

Can city councilmembers volunteer for the city?

It depends on the situation. A city councilmember may volunteer for a volunteer fire department or other organization that protects the health, safety, or welfare of the city if the city council adopts a resolution allowing city councilmembers to do so.[122] But the attorney general has stated that a city official cannot volunteer for the governmental entity that it governs if the volunteer position would be: (1) supervised and controlled by the governing body; (2) the volunteer activity would normally be done by a compensated employee; and (3) the activity was not temporary or intermittent.[123] 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.[124] The Department of Labor (DOL) defines "same type of services" to mean similar or identical services. In general, DOL would consider the duties and other factors contained in the definitions of occupations in the Dictionary of Occupational Titles in determining whether the volunteer activities constitute the "same type of services" as the employment activities. For example, police officers can volunteer different work (non-law enforcement related) in city parks and schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed.

Can a city pay for its volunteer police officers' insurance or certification?

Some cities have concerns that providing TCLEOSE certification for their reserve officers will endanger the officers' status as volunteers. *Cleveland v. City of Elmendorf* specifically held that TCLEOSE 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.[125]

Cities also often ask about insurance for reserve officers. Title 29 C.F.R. section 553.106 specifically states that workers' compensation is considered to be a "reasonable benefit" that does not jeopardize an individual's ***volunteer status***. Also, state law requires a city to insure or otherwise cover each volunteer police force member against any injury

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[122] TEX. LOC. GOV'T CODE § 21.003.
[123] Op. Tex. Atty. Gen. No. JC-0371 (2001); *see also* Op. Tex. Atty. Gen. No. JM-0386 (1985) (holding that an alderman cannot be on the city's police reserve force).
[124] 29 C.F.R. § 553.103.
[125] 388 F.3d 522 (5th Cir. 2004).

suffered in the course and scope of the volunteer's duties performed at the request of the city.[126]

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.[127] 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.[128] Cities may be liable for acts of employees and volunteers where the city: (1) has the right to direct the volunteer in his/her duties; (2) has an interest in the work being carried out by the volunteer; (3) accepts direct or indirect benefit from the volunteer's work; and (4) has the right to fire or replace the volunteer.[129] There may also be a basis for liability stemming from the negligent screening and hiring of volunteers.[130]

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.[131] Cities owe the same duty of care to volunteers as to others on city property.[132] 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.[133] With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals.[134]

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[126] TEX. GOV'T CODE § 614.192.
[127] TEX. CIV. PRAC. & REM. CODE § 101.021(1); 101.001; *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994) (regarding a volunteer deputy sheriff).
[128] *Smith v. University of Texas*, 664 S.W.2d 180 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
[129] *El Paso Laundry Company v. Gonzales*, 36 S.W.2d 793 (Tex. Civ. App.—El Paso 1931, writ dism'd).
[130] *Doe v. Boys' Club of Greater Dallas*, 907 S.W.2d 472 (Tex. 1994).
[131] TEX. CIV. PRAC. & REM. CODE § 101.021.
[132] *City of Austin v. Selter*, 415 S.W.2d 489 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).
[133] TEX. LAB. CODE § 504.012.
[134] *Id.* § 408.001.

CHAPTER 8--Drug Testing

May a city perform random drug tests on its employees?

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 policy in place. Many are surprised to learn that they generally may not have random drug testing for 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.[135] 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.

Which employees may a city randomly drug test?

A city may randomly drug test its employees that are in safety or security sensitive positions. Examples of job duties that the courts have found to be safety or security sensitive sufficient to warrant suspicionless drug testing include: driving passengers as United States Department of Transportation licensed drivers; operation of trucks that weigh more than 26,000 pounds; tending to or driving school children as school bus attendants and drivers; teaching children; armed law enforcement officials whose duties include interdiction of drugs; nuclear power plant duties; and working on gas pipelines, among others.[136] Examples of employees whose job duties have not been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases and library workers.[137] Also, the Supreme Court has held that the requirement to

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[135] *Skinner v. Ry. Labor Execs. Ass'n*., 489 U.S. 602 (1989); *Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989).

[136] *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (licensed drivers); *Int'l Bhd. of Teamsters, v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (large trucks); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (employees involved in interdiction of drugs); *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986) (school bus); *Crager v. Bd. of Educ. of Knott County*, 313 F.Supp.2d 690 (E.D. Ky. 2004) (teachers); *IBEW, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir.1992) (nuclear power plant, gas pipelines).

[137] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (prosecute drug cases); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library workers).

carry a firearm by an employee is a strong reason weighing in favor of suspicionless drug testing.[138]

While who may be tested for drugs is always going to be a fact-based inquiry based on the duties of each employee, some duties lean towards allowing drug testing without individualized suspicion based on prior case law, including: carrying of passengers; driving with commercial drivers licenses or United States Department of Transportation licenses; positions that are heavily regulated by state and federal law; and operating heavy machinery.[139] Some duties and situations that, by themselves, may not warrant suspicionless drug testing include: office duties; handling money; driving a city vehicle or police car, prior drug use; or working with the public.[140] Before performing a suspicionless drug test on an employee, a city should ensure that there is a safety or security issue involved in the person's job duties that would be affected by drug use. Since job duties and their safety or security sensitive nature is a fact issue, a city should always consult its city attorney or local counsel before implementing a random drug testing policy or testing any employee for drug use.

What other times may a city drug test its employees?

While a city may not usually randomly drug test its employees, some employees may be tested for drugs. Besides employees who perform safety or security sensitive functions as described above, individuals who may be tested for drugs include: (1) an applicant for employment, after the job offer is made but before they take the position, if some safety or security concern is present; (2) an employee that drives commercial vehicles and who is covered by the U.S. Department of Transportation Regulations; or (3) an employee that the city has reasonable suspicion to believe is using drugs.[141]

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

What is reasonable suspicion?

Reasonable suspicion is a decision that the supervisor needs to make based on objective factors such as the appearance or actions of the employee. For example, employees may arguably test for drugs after an accident.[142] The employee's actions and appearance that

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[138] *Von Raab*, 489 U.S. at 672; *but see* Tex. Atty. Gen. Op. JM-1274 (1990) (stating that suspicionless drug testing of deputy sheriffs and jailers would violate privacy interests under the Texas Constitution).
[139] *Int'l Bhd. of Teamsters*, 932 F.2d at 1295 (carrying of passengers); *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (driver's license); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (heavily regulated industries); *Plane v. United States*, 796 F. Supp. 1070, 1075-77 (W.D. Mich. 1992); *Middlebrooks v. Wayne County*, 521 N.W.2d 774 (1994) (heavy machinery).
[140] *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (office); *Nat'l Treasury Empls. Union v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988) (driving a car).
[141] 42 U.S.C.A. § 12114; *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (pre-employment; post-offer testing); *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (commercial drivers license); *Nat'l Treasury Emps. Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990).
[142] *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 677.

cause the supervisor to have individualized suspicion that the employee is on drugs should be documented.

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

Drug testing information is confidential and should be treated very carefully. Employers must comply with the Americans with Disabilities Act when dealing with the results of such tests.[143] Employers are required to keep drug test results in a separate file from an employee's personnel file and that file must remain confidential.[144]

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

Does Texas regulate the drug testing of employees?

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

Should a city adopt a drug testing policy?

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

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

Drug testing policies raise constitutional issues such as the right to privacy and the right against unreasonable searches and seizures, as well as, under some circumstances, issues involving the Americans with Disabilities Act (ADA).[145] A drug testing policy should include when an employee may be drug tested, which employees or applicants may be tested, what job duties are considered safety or security sensitive, drug testing procedures that are minimally intrusive and respect the employee's right to privacy as much as possible, notice procedures for those who may be tested, how the results will be treated, and a policy for what occurs should a drug test come back positive. Also, many drug testing policies are included in drug free workplace policies adopted by cities.

A city should also ensure that its policy follows any ADA regulations, as well as other state and federal law that deal with medical information. The written drug policy should be strictly and consistently followed. Also, if a city is a federal contractor or a grantee of

[143] 42 U.S.C. § 12112.
[144] *Id.* § 12112(d)(3)(B).
[145] *Id.* §§ 12101-12213.

federal funds, the city must comply with the federal Drug-free Workplace Act of 1988. This act requires that a city adopt a "drug-free awareness" program and drug policy. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and mass transit industries. Any city employee with a Commercial Drivers License would fall under this Act and would be required to be tested for drugs pre-employment, post-accident, reasonable suspicion, and other testing. Any written city policy should reflect these requirements if a city has CDL employees.

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

Resources

Department of Labor:
Basic Information:
http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp
Drug Free Workplace Act:
http://www.dol.gov/elaws/asp/drugfree/screen4.htm.

Department of Transportation:
Transportation Employee Testing Act:
http://www.dot.gov/ost/dapc/employee.html.

Texas Workforce Commission:
Basic Information:
http://www.twc.state.tx.us/news/efte/drug_testing_in_the_workplace.html

CHAPTER 9--Employment Discrimination and Title VII of the Civil Rights Act of 1964 (Title VII)

What is Title VII of the Civil Rights Act?

Title VII is the federal statute that prohibits an employer from discriminating against an employee on the basis of race, color, sex, national origin, or religion.[146] Discrimination under Title VII does not apply only to hiring or firing an individual, but includes all aspects of the employment relationship, including: compensation, assignment, classification, transfer, promotion, layoff, recall, job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits, pay, retirement plans, disability leave, or other terms and conditions of employment.[147]

Which employers does Title VII apply to?

The provisions of Title VII apply only to an employer that employs more than 15 employees. Independent contractors, elected officials, or any person chosen by such officer to be the officer's personal staff are not considered "employees."[148]

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

Title VII creates a "bona fide occupational qualification" (BFOQ) exception, which allows an employer to hire (or refuse to hire) an individual on the basis of the employee's religion, sex, or national origin where religion, sex, and national origin are BFOQs reasonably necessary to the normal operation of the employer's business.[149] This is a very narrow and limited exception, and requires an analysis of facts that are specific to each case. Race or color is never a BFOQ.

Title VII also allows an employer to fail or refuse to hire an individual for national security reasons pursuant to a security program in effect pursuant to a federal statute or an Executive Order.[150]

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

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[146] 42 U.S.C. § 2000e-2.
[147] *Id.* § 2000e-3(a).
[148] *Id.* § 2000e(f) .
[149] *Id.* § 2000e-2(e).
[150] *Id.* § 2000e-2(g)(1).

- More than 500 employees- $300,000[151]

A plaintiff cannot recover punitive damages from a city.[152]

How does Title VII define and protect race?

Neither Title VII nor the Equal Employment Opportunity Commission (EEOC) define "race." However, the U.S. Supreme Court has interpreted race to include people of all races.[153] Recently, the EEOC issued a compliance manual that interprets racial discrimination to include employment action based on:

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

The EEOC defines "color" as "pigmentation, complexion, or skin shade or tone."[154] Color discrimination can occur between persons of different races, ethnicities, or between persons of the same race or ethnicity.[155]

National Origin?

National origin discrimination is "the denial of employment opportunity based on an individual's, (or his or her ancestor's) place of origin or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[156] 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.[157]

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[151] 42 U.S.C. § 1981a(b)(2)-(3)
[152] *Id.* § 1981a(b)(1).
[153] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).
[154] *Race and Color Discrimination*, EEOC COMPLIANCE MANUAL (April 19, 2006), *available at* www.eeoc.gov/policy/compliance.html.
[155] *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).
[156] 29 C.F.R. § 1606.1
[157] *Id.*

The most common claims of national origin discrimination arise from language requirements. The EEOC has stated that an employment decision that is based on an accent does not violate Title VII if an individual's accent interferes with an employee's performance of the job. More recently, litigation regarding "speak English only" rules has come into play. The EEOC's position is that a blanket "speak English only" rule that prohibits an employee from speaking any language other than English is a burdensome term and condition of employment.[158] 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.[159]

The EEOC provides that a rule that requires employees to speak English only at certain times is permissible if justified by business necessity.[160] However, a city must be careful with any such policy and should consult its city attorney or local counsel before crafting or adopting such a policy and should ensure that it has documented its reason to substantiate the business necessity for such a policy.

Sex?

Title VII protects both men and women from sex discrimination. Title VII also protects against "sexual stereotyping."[161] The Supreme Court has also recognized that same-sex sexual harassment can form a basis for a valid claim under Title VII.[162] While neither Title VII[163] nor Texas law creates a cause of action for sexual orientation, some cities have passed ordinances that limit an employer's right to terminate an employee based on sexual orientation.[164]

Is sexual harassment considered discrimination under Title VII?

In 1986, the U.S. Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.[165] Two years later, the Supreme Court decided two cases (*Faragher* and *Ellerth*)[166] that have made it more important than ever for employers to know how to minimize their liability when it comes to sexual harassment claims. In some cases, liability cannot be avoided, but in others, liability may be completed avoided.

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[158] 29 C.F.R. § 1606.7.
[159] *EEOC v. Premier Operator Servs., Inc*., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).
[160] 29 CFR § 1606.7.
[161] *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").
[162] *Oncale v. Sundowner Offshore Servs*., *Inc.*, 523 U.S. 75 (1998).
[163] *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).
[164] Austin, Fort Worth, Houston, Dallas, and El Paso have adopted ordinances that prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations.
[165] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).
[166] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

If an employee suffers an adverse employment action (for example, termination, transfer, changes in shifts, pay reductions) at the hands of a supervisor, the employer is liable for the actions of the supervisor, even if the employer did not know of the harassment or did not even have a way of knowing that the harassment was taking place.[167] To avoid this form of liability, a city should make sure that the authority to take an adverse employment action does not solely rest on one supervisor and that adverse employment actions are carefully reviewed before they become effective.

If the employee is harassed by a supervisor, but does not suffer an adverse employment action, the employer can escape liability by showing two things: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[168] As such, it is imperative that a city establish an effective anti-harassment policy, ensure that each employee receives a copy of the policy, reads and agrees to it, and ensure that the city follows the policy consistently. A city should also establish a complaints process that includes a point of contact for all complaints, provides a process for conducting an objective and thorough investigation of all complaints, and promises prompt remedial action to address any complaints.

While the *Faragher* and *Ellerth* decisions applied to sexual harassment, the Court drew analysis from other types of harassment on the basis of other protected classes, including race, color, national origin, religion, disability, and age. Thus, an employer should develop a policy that covers all forms of harassment.

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

Religion not only includes mainstream religions such as Catholicism, Judaism, Islam, or Buddhism, but also includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of a traditional religious view."[169] 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.[170] For example, Wicca[171] and atheism[172] 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.[173] Neither was a personal religious creed that certain cat food contributed to an employee's state of well-being.[174]

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[167] *Faragher*, 524 U.S. at 777.
[168] *Id.* at 778.
[169] 29 C.F.R § 1605.1;*Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).
[170] 29 C.F.R. § 1605.1.
[171] *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994).
[172] *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003).
[173] *Bellamy v. Mason's Stores Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).
[174] *Brown v. Pena*, 441 F.Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F. 2d 1113 (5th Cir. 1979).

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.[175] Common requests to accommodate religious practices include leave to observe religious days, requests for a time and place to pray, 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.[176]

An employer is not required to provide an accommodation if the accommodation imposes an undue hardship on the employer's legitimate business interests. An accommodation is an undue hardship if it requires "more than a *de minimis* economic costs on the employer."[177] In determining whether an accommodation will result in an undue hardship, the EEOC will look at the cost in relation to the size and operation costs of the employer and the number of employees who require an accommodation.[178]

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

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

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

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

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

> (1)the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.).[179]

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[175] 42 U.S.C. § 2000e(j).
[176] 29 C.F.R. § 1605.2(d)
[177] *Id.* § 1605.2(e)
[178] *Id.*
[179] *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993).

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.[180] Thus, a city official could be individually liable for a suit where the official has purposely discriminated against an employee based on his or her race and has taken a negative employment action against that employee.

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

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

Both of these sections can be used to bring suit against city officials in their individual capacities. One example of a Section 1983 claim, would be a claim for sexual harassment as a violation of an employee's constitutional rights.[181]

A city official could have the defense of qualified immunity against a Section 1981 or Section 1983 claim, but only if the official meets the required criteria. "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[182] 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.[183]

Resources

EEOC Information:
http://www.eeoc.gov/facts/qanda.html

Title VII Statute:
http://www.eeoc.gov/laws/statutes/titlevii.cfm

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[180] *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337-38 (5th Cir. 2003).
[181] *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997).
[182] *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)).
[183] *Lauderdale v. Texas Dept. of Criminal Justice*, 512 F.3d 157, 166-67 (5th Cir. 2007).

Title VII Regulations:

Sex Discrimination:
http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1604_09.html

Religious Discrimination:
http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1605_09.html

National Origin Discrimination:
http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1606_09.html

Employee Selection:
http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1607_09.html

CHAPTER 10--Americans with Disabilities Amendments Act of 2008

What is the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) is a federal law intended to prevent discrimination against individuals who have a disability.[184] This includes prohibitions on discrimination against individuals with disabilities in the employment relationship.[185] The ADA prohibits discrimination in all employment practices against "qualified individuals with disabilities."[186] A city as employer may not discriminate against these individuals in matters of hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment. In 2008, the ADA Amendments Act was passed which broadened the definition of disability to include more individuals.[187] The ADA applies to all city employers, regardless of the number of employees, under Texas law.[188]

What is a disability?

A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." It also includes individuals who are "regarded as" having such an impairment.[189] 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.[190] Under the Pregnancy Discrimination Act, pregnancy by itself is not a "disability" but may include impairments that may be disabilities depending on the situation.

What is a "major life activity"?

Major life activities include activities that most people can do to take care of themselves and live regular lives including: "performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." It also includes "major bodily functions" which includes correct functioning of the digestive, immune, neurological, respiratory, circulatory, and reproductive systems.[191] Any medical or mental problem that interferes with a person's normal activities or work would likely fall into one of these categories, making the determination of a disability almost always fall on the side of the individual having a disability.

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[184] 42 U.S.C. § 12101.
[185] *Id.* § 12111.
[186] *Id.* § 12112.
[187] ADA Amendments Act of 2008 (P.L. 110-325).
[188] TEX. LAB. CODE § 21.001.
[189] 42 U.S.C. § 12102.
[190] 29 C.F.R. § 1630.2.
[191] 42 U.S.C. § 12102.

Who is a "qualified individual"?

The next question is whether an employee is still "qualified" to do his job even if he has a disability under the act. A "qualified individual," who must be given a "reasonable accommodation" for her disability, is an individual who can perform the "essential functions" of the job regardless of a reasonable accommodation.[192] The city as employer determines the "essential functions" of a job, but a city should be careful not to let it appear that its job description, job posting, or other listing of essential functions is discriminatory against individuals with disabilities.[193]

What is a reasonable accommodation?

A reasonable accommodation is an accommodation to an employee that allows a qualified individual with a disability able to perform the job despite the disability.[194] For example, this would include changing the job site in some way to make it more accessible for an individual or allowing different break periods for an individual with a disability. A reasonable accommodation could also include time off for the individual with a disability.[195] This accommodation could mean a city would need to keep a position open for an individual with a disability for an extended period. It is has not been definitively decided whether an absence control policy could be used to terminate an individual with a disability who is on ADA leave.

When does a city have to give a reasonable accommodation?

A city must make a reasonable accommodation for an employee when the employee: (1) has a disability under the Act; (2) can perform the essential functions of the job with the reasonable accommodation; and (3) the reasonable accommodation does not present an "undue hardship" to the city as employer.[196] "Undue hardship" means that "significant difficulty or expense" would have to be incurred for an employee with a disability to be accommodated.[197] The factors included in determining whether an accommodation is "reasonable" or should be given includes: (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.[198] The larger the employer or the more employees an employer has, the more difficult or expensive an accommodation must be before it will be considered an "undue hardship." Whether a city must give a reasonable accommodation is a fact question that should be reviewed by local counsel or city attorney before a final determination is made.

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[192] 42 U.S.C. § 12111.
[193] 29 C.F.R. § 1630.2.
[194] 42 U.S.C. § 12111.
[195] *See* http://www.eeoc.gov/policy/docs/accommodation.html#N_1_ for examples of reasonable accommodations.
[196] 42 U.S.C. § 12112.
[197] *Id.* § 12111; 29 C.F.R. § 1630.15.
[198] 42 U.S.C. § 12111(10)(B).

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

A city only must accommodate a "known" disability. 42 U.S.C. § 12112(b)(5)(A). First, a city employer would start looking into giving an employee a reasonable accommodation if the employee requests it. An employer must be careful not to treat the individual as having a disability, but this would not keep them from asking how the employer can help an individual do their job if there are job performance issues. Also, the city may also be able to ask an employee for medical information when the employer and employee are trying to formulate a reasonable accommodation under limited conditions. 29 C.F.R. pt. 1630 app. §1630.9 (1998) For job applicants, an employer cannot ask an applicant if they are disabled or need a reasonable accommodation, even if it appears clear to the employer that this will be the situation. Instead an employer should ask the applicant whether they can perform the essential functions of the job and then base any action on the answer to this question.

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

Under the ADA, a medical examination for job applicants can only be required if: (1) all job applicants are required to undergo the same medical examination for the job category; (2) the job applicant has already been offered the job, but conditioned the job offer on the outcome of the medical examination; and (3) that information obtained is kept confidential. After an individual becomes an employee of the city, any medical examination must be job related and necessary for city business.[199] Also, a city should be very careful when approaching job applicants about disabilities. In an interview or job application, a city should focus on whether an individual can perform the essential job functions, not whether the individual may or may not have a physical or mental disability.

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

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

What if a "disabled" employee cannot do the job even with a reasonable accommodation?

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

[199] 42 U.S.C. § 12112.

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.

Can attendance be considered an essential job function*?*

Yes. According to the Ninth Circuit's decision, attendance *is* an essential function of the job for *all* employees who work at a place of business.[200]

How does the ADA work with drug use?

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

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

Not currently in Texas. Federal courts in Texas have held there is not individual liability for supervisors for violations of the Americans with Disabilities Act.[201] However, the specific issue has not been decided by the Fifth Circuit, the federal court of appeals covering Texas, so each supervisor in Texas should be careful to avoid violations of the Americans with Disabilities Act not only due to the implications to the city, but also because a court could hold in the future that there is individual liability for supervisors.

Does the ADA require employers to take any other action?

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

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

Cities must comply with ADA regulations regarding accessibility of city buildings and facilities. The federal government has provided two handbooks to assist cities with this task. These include:
ADA Compliance Guide for Small Towns: http://www.ada.gov/smtown.htm.
Technical Manual for Local Governments: http://www.ada.gov/taman2.html.

Resources

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

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[200] *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012).
[201] *Pena v. Bexar County, Texas*, 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).

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

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

CHAPTER 11--Pregnancy Discrimination Act

How should pregnant employees be treated?

The answer depends on whether the pregnant employee is "disabled" or not under the Americans with Disabilities Act (ADA). If the pregnant employee is claiming that she is disabled or provides a physician's letter indicating that she can no longer perform functions of her job then the city needs to go through the same reasonable accommodation analysis that it would go through for any other employee with a disability. The employing city needs to be careful and treat a pregnant employee like it would treat any other sick or disabled employee. If the employee is not disabled, but has asked for some accommodation, then the city can give her unpaid or paid time off, or the city can do as it wishes after consulting its personnel policies and local counsel.

Also, the Pregnancy Discrimination Act prohibits an employer from removing a pregnant employee from her assigned duties if she is able and willing to perform her job.[202] A pregnant employee must be permitted to work as long as she is able to perform her job. While a city may have concerns for the personal safety of the employee (including risks of harm to the fetus carried by the employee) case law has indicated that concerns for the safety of a pregnant employee is not a defense to unlawful discrimination.[203] For example, if the pregnant employee is willing and able to perform the duties of a first responder, she should be allowed to continue doing so. However, under the PDA, an employer is not required to grant preferential treatment to a pregnant woman but is obliged to ignore a woman's pregnancy and "treat the employee as well as it would have if she were not pregnant."[204]

Is there any Texas law on this issue?

State law also covers this issue. Section 180.004 of the Local Government Code requires a city to "make a reasonable effort to accommodate an employee" who is pregnant and whose physician has stated that she is physically restricted because of the pregnancy. Also, a city must provide a temporary work assignment if one is available and the pregnant employee's doctor has determined that the employee cannot perform her permanent work assignment.

Resources

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

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[202] 42 U.S.C. § 2000e; 29 C.F.R. § 1604.10.
[203] *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
[204] *Urbano v. Continental Airlines, Inc.* 138 F.3d 204, 206 (5th Cir. 1998) (quoting *Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996)).

CHAPTER 12--Age Discrimination

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.[205] The ADEA's protections apply to both employees and job applicants.[206] 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.[207]

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.[208] The ADEA applies to employers with 20 or more employees, including state and local governments.[209]

• *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.[210]

• *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

[205] 29 U.S.C. § 631.
[206] *Id.* §§ 623(a); 623(b).
[207] *Id.* § 623(i).
[208] *Id.* § 623(d).
[209] *Id.* § 630.
[210] *Id.* § 623(f)(1).

providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.[211]

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

Yes. State law states that a city "does not commit an unlawful employment practice by imposing a minimum or maximum age requirement for peace officers or fire fighters."[212] 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.[213]

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.[214]

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

[211] *Id.* §§ 623(f)(2)(A); 623(f)(2)(B).
[212] TEX. LAB. CODE § 21.104.
[213] 29 U.S.C. § 623(i).
[214] *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, 21.051(8); 29 U.S.C. § 623(a).

CHAPTER 13--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."[215]

In addition to suspension or termination, what is considered an "adverse personnel action" under the Act?

"Personnel action" is defined as "an action that affects an employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation."[216] Some courts have opined that reprimands or severe harassment may be enough to trigger the Act.[217] The Supreme Court of Texas has held that removing unpaid duties from an employee was not an adverse personnel action.[218]

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.[219] 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.[220]

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.[221] 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.[222] Sovereign immunity is waived and abolished to the extent

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[215] TEX. GOV'T CODE § 554.002(a).
[216] *Id.* § 554.001(3).
[217] *See Univ. of Houston v. Barth*, 178 S.W.3d 157, 163-64 (Tex. App.—Houston [1st Dist.] 2005).
[218] *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007).
[219] TEX. GOV'T CODE § 554.002(b).
[220] *See City of Elsa v. Joel Homer Gonzalez*, No. 09-0834 (Tex. Oct. 1, 2010) (per curiam); *Tharling v. City of Port Lavaca*, 329 F.3d 422 (5th Cir. 2003).
[221] TEX. GOV'T CODE § 554.003(a).
[222] *Id.* § 554.003(b).

of liability for the relief allowed under this chapter.[223] 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.[224] The penalty shall be paid by the supervisor, not the city, and shall be deposited in the state treasury.[225]

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.[226] However, there are different statute of limitations and procedures for cities and city employees where the city has a grievance procedure in place.[227] For more information on this topic, please see the Attorney General of Texas's Public Officers: Traps for the Unwary handbook. The link to this handbook is provided below.

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.[228]

Resources

Texas Whistleblower Act Poster:
www.oag.state.tx.us/AG_Publications/pdf/whistleblower_poster.pdf.

Attorney General Handbook with additional Whistleblower Act information:
http://www.oag.state.tx.us/AG_Publications/pdfs/2006trapshb.pdf.

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

[223] *Id.* § 554.0035.
[224] TEX. GOV'T CODE § 554.008(a).
[225] *Id.* §§ 554.008(c) & (d).
[226] *Id.* § 554.005.
[227] *Id.* § 554.006(a).
[228] *Id.* § 554.009.

CHAPTER 14--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.[229]

Does USERRA apply to my city?

The provisions of USERRA apply to all employers, including cities, regardless of size.[230] 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.[231] 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.[232]

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.[233] 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.[234]

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.[235] Service also includes active duty for training, inactive duty training, or full-time National Guard duty. It also covers a

[229] 38 U.S.C. §§ 4301; 4311(b).
[230] 20 C.F.R. §§ 1002.34(a); 1002.39.
[231] 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18.
[232] 20 C.F.R. §§ 1002.41; 1002.43.
[233] *Id.* §§ 1002.5(o); 1002.5(l); 1002.59.
[234] *Id.* § 1002.57 (b); TEX. GOV'T CODE § 431.017.
[235] 20 C.F.R. § 1002.5(l).

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.[236]

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.[237] This notice can be either verbal or written.[238] 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.[239] An employee does not need to provide notice to the employer of intent to return to work after completing uniformed service.[240] 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.[241]

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.[242] 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.[243] 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.[244]

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[236] *Id.* §§ 1002.54; 1002.55.
[237] *Id.* § 1002.85(a).
[238] *Id.* §1002.85(c).
[239] *Id.* § 1002.86.
[240] *Id.* § 1002.88.
[241] *Id.*
[242] *Id.* § 1002.32.
[243] *Id.* § 1002.115(c).
[244] *Id.* § 1002.115(b).

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.[245]

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.[246] Those individuals have an additional two years from the date of completion of service to apply for reemployment.[247] This time can be extended to accommodate circumstances beyond the employee's control that make reporting impossible or unreasonable.[248]

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.[249] 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.[250]

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").[251] 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.[252]

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."[253] 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.[254] 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."

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[245] *Id.*§ 1002.115(a).
[246] *Id.* § 1002.116.
[247] *Id.*
[248] *Id.*
[249] *Id.* § 1002.180.
[250] *Id.* § 1002.181.
[251] *Id.* §§ 1002.191; 1002.193.
[252] *Id.* § 1002.198.
[253] *Id.* § 1002.225.
[254] *Id.*

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

USERRA protects employees who are reemployed after uniformed service from discharge by an employer. An employee whose period of service in the uniformed service was for more than 30 days (but less than 181 days) may not be discharged, except for cause, for 180 days after the employee's date of reemployment.[255] 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.[256] 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.[257]

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.[258]

How does USERRA protect health care benefits?

USERRA does not require a city to establish a health plan or provide any particular health coverage.[259] 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.[260] Also, when an employee is reemployed, coverage generally must be reinstated without a waiting period or pre-existing condition exclusions.[261] 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.[262] For longer tours, the city is permitted to charge the employee up to 102 percent of the entire premium.[263]

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

On January 28, 2008, the United States Congress enacted House Resolution 4986, the National Defense Authorization Act of FY 2008 (NDAA), which grants family and temporary medical leave for certain employees who have relatives in the military.[264] This

[255] *Id.* § 1002.247(a).
[256] *Id.* § 1002.247.
[257] *Id.* § 1002.248.
[258] *Id.* § 1002.151.
[259] *Id.* § 1002.164(b).
[260] *Id.* § 1002.164(a).
[261] *Id.* § 1002.168.
[262] *Id.* § 1002.166(a).
[263] *Id.* § 1002.166(b).
[264] H.R. 4986, 110th Cong. (2008).

legislation amends the Family and Medical Leave Act (FMLA) to grant employees who are eligible for leave under the FMLA to 12 workweeks of leave during a twelve-month period because of any "qualifying exigency" arising out of the fact that the spouse, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces.[265] The statute also grants an FMLA-eligible employee who is the spouse, child, parent, or next of kin of a service member who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness to a total of 26 weeks of leave during a twelve-month period to care for the service member.[266] The U.S. Department of Labor has published proposed rules implementing this regulation.

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

Under Section 431.005 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.[267] State military forces include "the state military forces, a reserve component of the armed forces, or a member of a state or federally authorized Urban Search and Rescue Team." These individuals must be paid and cannot be subject to lost time, loss of an efficiency rating, or a loss of vacation, personal, or sick leave.

Resources

Department of Labor:
http://www.dol.gov/compliance/laws/comp-userra.htm

USERRA Statute:
http://www.dol.gov/vets/usc/vpl/usc38.htm

USERRA Rules and FMLA Rules:
http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm#20cfr1002.a
http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf.

USERRA Poster:
http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf

Texas Workforce Commission:
http://www.twc.state.tx.us/news/efte/legal_issues_for_military_leave.html

[265] 29 U.S.C. § 2612(a).
[266] *Id.*
[267] TEX. GOV'T CODE § 431.005.

CHAPTER 15--Employment and Open Government Laws

Can the city council talk about employment matters in executive session?

The Open Meetings Act requires that meetings of governing bodies be at properly posted meetings where the public can attend.[268] 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 officers or employees in executive session if some requirements are met.[269]

What issues can be discussed?

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.[270]

What if the employee does not want the discussion to take place in closed session?

The city cannot meet in closed session to discuss an individual employee if that employee requests that the governing body discuss them in open session.[271]

Can the city discuss giving raises to all city employees or all employees in one department?

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.

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

Just like any other notice, the city needs to put enough information in the notice so that interested citizens will know what will be discussed. The more senior or executive the employee, the more information should be on the agenda.[272] 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. If a city terminates an employee in violation of the Open Meetings Act, the city could be liable for wages between the time the employee was incorrectly terminated and the employee is correctly terminated under the Open Meetings Act.[273]

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[268] TEX. GOV'T CODE § 551.041.
[269] *Id.* § 551.074.
[270] *Id.*
[271] *Id.*
[272] *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).
[273] *Ferris v. Tex. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App.—Austin 1991, writ denied).

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 an exception applies.[274] 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.

A city is prohibited from disclosing the social security number of a living person.[275] A document that is otherwise public information, and which contains an employee's social security number, may be disclosed by 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.[276] A current or former employee's home address, home telephone 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.[277] Cities are required to ask each employee, within fourteen days of the employee's date of hire, appointment, or ending of service with the city, whether he or she wants this information to be treated confidentially.[278]

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."[279] 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."[280] This information typically includes personal financial information, certain medical information, or information relating to a sexual harassment investigation. Certain tax documents and documents relating to consultation with a physician also would be considered confidential and must be withheld from disclosure.[281]

Can a city councilmember or mayor look at 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.[282] It is recommended that a city adopt a written policy regarding how a councilmember or city official can access an employee's personnel file and the protection of the information.

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[274] TEX. GOV'T CODE § 552.002(a).
[275] *Id.* § 552.147(a).
[276] *Id.* § 552.147(b).
[277] *Id.* § 552.024.
[278] *Id.*
[279] *Id.* § 552.102(a).
[280] *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).
[281] TEX. OCC. CODE § 159.002(b); 42 U.S.C. § 12112; 26 U.S.C. § 6103(a).
[282] Op. Tex. Att'y Gen. No. JM-119 (1983).

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 ask the city to keep this information confidential. [283] There are also special rules for personnel files in civil service cities which should be followed.[284]

Can an employee have access to his personnel file?

Section 552.023 of the Government Code provides that a person, or the person's authorized representative, has a special right of access to information that relates to the person that would otherwise be withheld from disclosure to protect the person's privacy interests. However, if the city seeks to withhold information in order to protect the interests of the city or of law enforcement, then the employee may not have access under Section 552.023.

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
http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb.pdf
http://www.oag.state.tx.us/AG_Publications/pdfs/2006pia_easy.pdf

Open Meetings Act
http://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb.pdf
http://www.oag.state.tx.us/AG_Publications/pdfs/openmeetings_easy.pdf

Open Government Training
http://www.oag.state.tx.us/open/og_training.shtml

Open Records Decisions
http://www.oag.state.tx.us/open/ogindex.shtml

[283] TEX. GOV'T CODE § 552.117(a).
[284] TEX. LOC. GOV'T CODE § 143.089(g).

CHAPTER 16—Issues to Pregnancy and Children

Does federal law give employees the right to take leave for family or medical reasons?

Yes. Under the Family and Medical Leave Act (FMLA), a federal law, eligible employees are entitled to 12 weeks or 26 weeks of unpaid leave for certain qualifying events, including those related to having children and taking care of their family members.[285]

Which city employees are eligible to take leave under the FMLA?

To be eligible for leave under the FMLA, 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.[286]

May an eligible employee take leave for pregnancy-related reasons, or to take care of a newborn?

Yes. An employee may take FMLA leave: (1) to care for a newborn child; (2) to have a child placed with the employee for adoption or foster care; (3) because of a serious health condition that prevents the employee from performing his or her job; and (4) for other reasons.

Who may an employee receive FMLA leave to care for?

An employee may qualify for FMLA leave to care for: (1) the employee, if he or she has a serious health condition; (2) a spouse with a serious health condition; or (3) a son or daughter—either biological, adopted, foster child, or stepchild—with a serious health condition.[287]

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.[288]

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[285] 29 U.S.C. §§ 2601-2654.
[286] *Id.* § 825.110.
[287] *Id.* § 825.122.
[288] *Id.* § 825.115.

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

Yes. Both eligible parents are entitled to take up to 12 weeks of parental leave during the first year of a child's life. However, if both parents work for the same city employer, the city may require that they take a combined total of 12 weeks to care for the newborn. The leave does not have to be taken immediately following the birth of the child, but must be taken within one year of the birth of the child, unless the child has a serious health condition.[289]

Does a city have to pay the employee while on FMLA leave?

No, not under federal law. However, a city employer may require that a parent take paid vacation and sick leave concurrently with FMLA leave, if it is in a written city policy that they do so.[290]

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.[291]

What is the Americans with Disabilities Act of 2008?

The Americans with Disabilities Act (ADA) is a federal law intended to prevent discrimination against individuals who have a disability.[292] This includes prohibitions on discrimination against individuals with disabilities in the employment relationship. The ADA prohibits discrimination in all employment practices against "qualified individuals with disabilities."[293] A city as employer may not discriminate against these individuals in matters of hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment. In 2008, the ADA Amendments Act was passed, which broadened the definition of disability to include more individuals. ADA Amendments Act of 2008 (P.L. 110-325). Under Texas law, the ADA applies to all city employers, regardless of the number of employees.[294]

What is a "disability" or "major life activity," and who is a "qualified individual"?

A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." It also includes individuals who are "regarded as" having such an impairment.[295] A major life activity is considered to be substantially limited if an individual cannot perform the activity at all or is limited in the

[289] *Id.* § 825.120.
[290] *Id.* § 825.206.
[291] *Id.* § 825.214.
[292] 42 U.S.C. § 12101.
[293] *Id.* § 12112.
[294] TEX. LABOR CODE § 21.001.
[295] 42 U.S.C. § 12102.

"condition, manner or duration under which an individual can perform" the activity when compared to what an average person can do.[296]

A "qualified individual," who must be given a "reasonable accommodation" for her disability, is an individual who can perform the "essential functions" of the job, regardless of a reasonable accommodation.[297] The city as employer determines the "essential functions" of a job, but a city should be careful not to let it appear that its job description, job posting, or other listing of essential functions discriminates against individuals with disabilities.[298]

Is attendance considered an "essential job function"?

Yes. According to the United States Court of Appeals for the Ninth Circuit, attendance *is* an essential function of the job for *all* employees who work at a place of business.[299]

What is the Pregnancy Discrimination Act?

The Pregnancy Discrimination Act was established to protect women from workplace discrimination on the basis of pregnancy, childbirth, or related medical conditions. It provides regulations for employers with 15 or more employees regarding hiring, pregnancy, maternity leave, health insurance, and fringe benefits. It is important to remember that the PDA does not require more favorable treatment to pregnant employees, but also does not prohibit employment practices that favor pregnant employees.[300]

The PDA requires employers to treat pregnant women the same as it treats other temporarily disabled employees.[301] It also prohibits an employer from removing a pregnant employee from her assigned duties if she is able and willing to perform her job.[302] 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 concern for the safety of a pregnant employee is not a defense to unlawful discrimination.[303]

Under the Pregnancy Discrimination Act (PDA), pregnancy by itself is not a "disability" but may include impairments that are disabilities.[304]

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[296] 29 C.F.R. § 1630.2.
[297] 42 U.S.C. § 12111.
[298] 29 C.F.R. § 1630.2.
[299] *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012).
[300] *Calif. Fed. Sav'g & Loan Ass'n v. Guerra*, 479 U.S. 272, 286-87, 292 (1987).
[301] *Troupe v. May Dep't Stores Co*., 20 F.3d 734, 738 (7th Cir. 1994).
[302] 42 U.S.C. § 2000e; 29 C.F.R. § 1604.10.
[303] *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
[304] 42 U.S.C. § 2000e; 29 C.F.R. § 1604.10.

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

Yes, but only if she indicates a need for such assistance. An employer may not single out pregnancy-related conditions for special procedures when determining an employee's ability to work. If a pregnant employee is temporarily unable to perform job functions because of her pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows other temporarily disabled employees to take a lighter or alternative duty, the employer also must give an employee who is pregnant the same options. Pregnant employees must be permitted to work so long as they are able to perform the essential functions of their jobs. An employer may not take "anticipatory" action against a pregnant employee, or make general assumptions about the impact that a pregnancy might have on a woman's ability to do her job.[305] According to the Equal Employment Opportunity Commission, if an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer cannot require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.[306]

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.[307] In other words, when assigning a pregnant officer to light duty, an agency must use the same criteria applied for other temporarily disabled officers. A pregnant employee should not be forced into a light duty assignment so long as she is physically able to perform the essential functions of her regular assignment. Likewise, a city employer should be careful when allowing a pregnant employee to elect a light duty assignment before it is medically necessary, unless other, non-pregnant employees are allowed to make this election.

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

No. According to the Supreme Court's ruling in *UAW v. Johnson Controls*, employers may not have fetal protection policies that exclude women from certain hazardous jobs, even if the intent of the policy is benevolent.[308] 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."[309] An employer "may only take into

[305] *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999).
[306] www.eeoc.gov/facts/fs-preg.html.
[307] *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. App. 1 Dist. 1991).
[308] 499 U.S. 187 (1991).
[309] *Id.* at 204.

account the woman's ability to get her job done," not whether the job poses a risk to the fetus.[310]

Is there any Texas law regarding the treatment of pregnant employees?

State law does address the treatment of pregnant employees. Similar to the ADA, Section 180.004 of the Texas 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. In addition, if a pregnant employee's doctor has determined that the employee cannot perform her permanent work assignment, the city must provide a temporary work assignment if one is available.

What law regulates how employees are paid?

The Fair Labor Standards Act (FLSA) is a federal law that governs how private and public employees, including city employees, must be paid. Generally, it provides for a minimum wage for employees and requires that 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.[311] It also provides for exemptions to this general rule.

Is a city required to provide an employee with a meal break or rest period, and does the city have to compensate an employee who takes such a break?

No, a city is not generally 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 is compensable depends on the duration of the break and whether the employee works during the break. A city is not required to compensate an employee for a meal break if the following requirements are met: (1) the employee is completely relieved from performing any job duty; (2) the employee is free to leave the worksite; and (3) the meal break is at least thirty minutes long.[312] Rest breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable.[313]

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

Yes. The Patient Protection and Affordable Care Act amended the FLSA, requiring that employers provide special areas and break times to nursing mothers to express breast milk for one year after the birth of their nursing child.[314]

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[310] *Id.* at 205.
[311] 29 U.S.C. § 201, *et seq*.
[312] *Bernard v. IBP, Inc.*, 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. § 785.19.
[313] 29 C.F.R § 785.15.
[314] 29 U.S.C. § 207(r); www.dol.gov/whd/regs/compliance/whdfs73.htm.

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."[315] These breaks must be allowed as frequently as needed. Employers should be aware that each woman is different, and the frequency and duration of each break will vary among employees.

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

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

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

Nursing employees must be provided with a private location, shielded from view and free from any intrusion from others, to express breast milk.[316] Under the FLSA, a bathroom, even if private, does not count as a location. A private space does not have to be established strictly for the use of the breastfeeding employee; it does, however, have to be available any time the employee needs to express milk.

Are there any exceptions to this requirement?

Yes. A city employer with less than 50 employees does not have to provide nursing employees with these breaks or private areas if it would cause an undue burden to the employer.[317]

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.[318] 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.

[315] 29 U.S.C. §207(r)(1)(A).
[316] *Id.*
[317] 29 U.S.C. § 207(r)(3).
[318] TEX. HEALTH & SAFETY CODE § 165.002.

Chapter 17-Affordable Health Care Act

What is the federal Patient Protection and Affordable Care Act?

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

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

The Act is supposed to both decrease health costs and improve accessibility to health care by incentivizing every person in the United States to have health coverage and providing programs to make that happen. The logic behind the Act's reforms is that, if every person has health insurance:

1. The cost of health care will go down because health care providers (and therefore insurance companies) will no longer be required to bear the cost of providing care to the uninsured.
2. Health care will be more accessible because individuals will no longer be denied care based on their inability to pay.

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

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

- **Health Benefit Exchanges**
  The Act requires individual states to develop their own system of "health benefit exchanges." (If a state opts out of establishing its own exchange(s), the federal government will implement an exchange program in that state.) Exchanges are organizations (either governmental or non-profit) that will be established to develop a more organized, efficient, and competitive market for buying health insurance.

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

They will also help individuals determine which additional services they are eligible for, such as tax credits, expanded Medicaid coverage, and government programs like the Children's Health Insurance Program.

Beginning in 2014, exchanges will essentially be a "database" to help individuals and small businesses (with up to 100 employees) obtain coverage. Insurance and other providers choose to participate in exchanges, and consumers will have access to all of the providers' plan information and costs in a standardized format. Consumers can then ask questions, choose the plan that is best for them, and enroll in that plan, all through the exchange.[319]

- **Pre-Existing Conditions**
  The Act's pre-existing condition prohibition will make health care available to uninsured individuals who have been denied health insurance due to a pre-existing condition.

  The Act currently prohibits individual providers from discriminating against children with pre-existing conditions. For adults, pre-existing condition insurance plans are available from the government, and such plans will remain available until 2014. At that time, all providers will be prohibited from discriminating against all consumers with pre-existing conditions.[320]

- **Young Adult Coverage**
  The Act mandates that children be allowed to stay on a parent's health care plan until the age of 26. Factors such as being married, not living with their parents, attending school, not being financially dependent on their parents, or being eligible to enroll in their employer's plan will not affect a child's eligibility.[321]

- **Co-ops**
  Consumer operated and oriented plans (co-ops) are private, non-profit organizations that will be established to sell insurance according to the same rules as other health coverage providers. What may make co-ops different from other providers is that they will be run by their customers. In theory, this means that the needs and concerns of customers are a co-ops top priority. Within co-ops, members elect a board of directors, which must be composed primarily of individuals who are customers enrolled in the co-op plan.

  Because co-ops will be non-profit, any profits are required to be used to lower premiums, improve the quality of health care, increase health benefits, contribute to the stability of coverage for members, and/or expand enrollment. Few specifics of how co-ops will operate are currently available.[322]

[319] 42 U.S.C. § 18021.
[320] 42 U.S.C. § 18001.
[321] 42 U.S.C. § 300gg-14.
[322] 42 U.S.C. § 18042.

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

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

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

- **Expansion of Medicaid**
  Medicaid is a joint federal-state program in which each state operates its own Medicaid system that must conform to federal guidelines in order for the state to receive matching funds and grants. In Texas, Medicaid costs account for over 20 percent of the state's budget. Medicaid eligibility has been based on categories, such as pregnant women, children, parents, seniors, and people with disabilities.

  The Act expands the eligibility criteria and also offers more federal dollars to states to help fund Medicaid programs. Prior to the Act, the federal government generally set minimum income eligibility thresholds for each category, and states had flexibility to expand beyond these minimums.

  In January 2009, median eligibility levels for children were at about 235 percent of the poverty level, but eligibility for parents was much more restrictive. The Act creates a national floor of coverage at 133 percent of poverty (around $14,000 for an individual and $29,000 for a family of 4) for all individuals. This will mean a large expansion in Medicaid coverage for parents and adults without dependent children in many states. Medicaid services will be made available through the state exchanges.

  The federal government will fully fund the costs for those who become eligible for coverage in 2014. Full federal funding will continue until 2016, after which the federal portion will decrease to around 90 percent by 2020.

Which of the Act's reforms were immediate and which will be phased in over time?

The following provisions are examples of reforms that were immediate upon the Act's passage:

- Elimination of the lifetime dollar limit on benefits that some plans had in place, with some exceptions.[323]
- Requiring insurers offering group or individual coverage to provide a report on the ratio of incurred losses or incurred claims to premiums. Beginning in 2011, the Act requires rebates to covered persons if spending on health care after accounting for taxes, fees (and after January 1, 2014 for risk adjustment, risk corridor payments, and reinsurance payments) is less than 85 percent in the large group market and 80 percent in the case of insured plans in the individual and small group markets.[324]
- Requiring insurers and group health plans to cover certain preventive screening services and immunizations recommended for infants, children and adolescents.[325]
- Requiring insurers and group health plans to maintain current standards for breast cancer screening.
- Requiring health insurance issuers that offer group or individual coverage, as well as group health plans that provide coverage to dependents to provide coverage for dependent children who are under age 26.[326]
- Prohibiting group health plans and health insurance issuers offering group or individual coverage from imposing pre-existing condition exclusions on children under the age of 19.[327]
- Prohibiting rescission or cancellation of coverage, with certain exceptions.[328]
- Beginning in the 2010 plan year, requiring the federal government – in conjunction with the states – to have a process for annual review of premium rate increases for insurers offering group or individual coverage in order to identify "unreasonable increases in premiums for health insurance coverage." The Act also requires the disclosure of information related to rate increases along with justifications on providers' Internet Web sites.[329]

The following provisions are examples of reforms that will be phased in on January 1, 2014:

- **Health Insurance Exchanges**: Starting in 2014, consumers will be able to buy health coverage directly through state exchanges, which will offer a choice of health plans that meet certain benefits and cost standards.
- **Individual Requirement to Have Insurance**: Most individuals who can afford it will be required to obtain basic health insurance coverage or pay a penalty to help offset the costs of caring for the uninsured.
- **Tax credits**: Tax credits will become available for those with income between 100 percent and 400 percent of the poverty line who are not eligible for other

[323] Pub. L. 111-148 §10101 amending PHS Act §2711.
[324] Pub. L. 111-148 §10101(e); Pub. L. 111-148 §1251.
[325] Pub. L. 111-148 §10101 amending PHS Act §2713; Pub. L. 111-148 §1251.
[326] Pub. L. 111-148 §2714; Pub. L. 111-152 §2301.
[327] Pub. L. 111-148 §10103; Pub. L. 111-152 §2301.
[328] Pub. L. 111-148 §2712; Pub. L. 111-152 §2301; Pub. L. 111-152 §2301
[329] Pub. L. 111-148 § 1103(c)

affordable coverage. (In 2010, 400 percent of the poverty line is around $43,000 for an individual or $88,000 for a family of four.)

- **Annual Limits on Insurance Coverage**: New and existing plans will be prohibited from imposing annual dollar limits on the amount of coverage an individual may receive.
- **Small Business Health Insurance Tax Credit**: Small business tax credits will begin, in which the credit may be up to 50 percent of the employer's contribution to provide coverage for employees.
- **Discrimination Due to Pre-Existing Conditions or Gender**: Insurance providers will be prohibited from refusing to sell coverage or renew policies because of any individual's pre-existing conditions. Also, in the individual and small group market, the Act will eliminate the ability of insurance companies to charge higher rates due to gender or health status.

Does the Act impose a penalty on a person who does not have health insurance coverage?

According to a recent U.S. Supreme Court decision (discussed below), the Act does not impose a "penalty" for failure to maintain coverage. Rather, the Court concludes that the Act imposes a "tax to encourage certain behaviors." Beginning January 1, 2014, a fee will be assessed on most individuals who do not obtain health coverage.[330] This tax is called the "shared responsibility payment" and is frequently referred to as the "individual mandate" to buy coverage.

The Internal Revenue Service (IRS) will send a notification by June 30 of each year to such individuals. The notification will provide information on how to obtain coverage and how to enroll through a person's state insurance exchange. Upon receiving the notification, individuals who refuse to obtain health coverage will be taxed unless they meet certain exemption criteria.

The Act may exempt an individual from the requirement to obtain coverage or pay the tax if, among other things, the person:

- Would have to pay more than eight percent of his or her income for health insurance.
- Has income below the threshold required for filing income taxes.
- Qualifies for certain religious exemptions.
- Is an undocumented immigrant.
- Is incarcerated.
- Is a member of an Indian tribe.
- Has a single gap in coverage lasting less than three months in a year.

[330] 26 U.S.C. § 5000A

What will be the amount of the tax on individuals who refuse to obtain coverage?

The total penalty for the taxable year will not exceed the national average of the annual premiums of a bronze level health plan offered by state exchanges. (Note: Coverage in state exchanges will be offered at four levels with complex actuarial values that are based on the amount the provider pays, e.g., bronze plan coverage will generally be paid at 60 percent; silver at 70 percent; gold at 80 percent; and platinum at 90 percent.)

The amount of the penalty is determined using the greater of two amounts: a specified percentage of income or a specified dollar amount.

The percentage of income will be phased in over time starting at one percent in 2014. In 2015, it will increase to two percent. In 2016 and beyond, it will increase to two-and-a-half percent and higher.

The dollar amount will be phased in over time as well starting in 2014 as $95 per adult, and $47.50 per child (up to $285 for a family). In 2015, it will increase to $325 per adult and $162.50 per child (up to $975 for a family). In 2016, it will increase to $695 per adult and $347.50 per child (up to $2,085 for a family). In years following 2016, it will increase annually according to the cost of living.[331]

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

The Act does not mandate that employers provide health coverage. However, it may impose taxes in certain cases on those with 50 or more employees that refuse to do so.[332] Employers with fewer than 50 employees are not subject to a tax if the tax would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

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

Larger employers that offer coverage could be subject to the tax as well. Employers who provide coverage that does not on average cover at least 60 percent of the cost of covered services for a "typical population" (or the premium for the coverage exceeds 9.5 percent of an employee's income) and has employees that receive a tax credit will be required to pay a penalty of $3,000 up to a maximum of $2,000 times the number of workers in

[331] 26 U.S.C. § 5000A
[332] 26 U.S.C. § 4980H

excess of 30 workers. ("Typical population" means the medical services generally required by average citizens without any pre-existing conditions or additional specialty medical services.")

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

Coverage will be tracked through reports that are required to be submitted annually along with IRS tax filings.[333]

Who is responsible for reporting coverage?

Every entity that provides coverage for another individual is responsible for reporting that information with its tax return.[334]

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

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

Who challenged the Act in court, and on what basis?

Twenty-six states, as well as private individuals and business organizations, brought action against the federal Health and Human Services, the Treasury, and the Labor Departments and their Secretaries, challenging the constitutionality of the Act. A federal district court in Florida held that the Act's expansion of Medicaid is constitutional. However, it also held that the Act's individual mandate provision exceeded congressional authority and declared the entire Act invalid.

The government appealed the individual mandate holding, and the plaintiffs appealed the Medicaid expansion issue. The United States Court of Appeals for the Eleventh Circuit affirmed that the individual mandate is unconstitutional and affirmed the constitutionality of the Medicaid expansion. The appeals court holding was then appealed to the U.S. Supreme Court.

On what basis did the Supreme Court uphold the law?

In *National Federation of Independent Business v. Sebelius*,a majority of the Court, in a 5-4 decision, upheld the Act as constitutional by citing the power of Congress to levy taxes.[335] Even though Congress did not label the "shared responsibility payment" (a.k.a. the "individual mandate") as a tax, the Court determined it to be one because of the following factors:

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[333] 26 U.S.C. § 6055
[334] 26 U.S.C. § 6055
[335]

- Collection is administered by the IRS.
- Coverage status is reported when filing federal tax returns.
- It is not applicable to individuals not required to file tax returns.
- It is calculated based on amount of taxable income, number of dependents, and tax filing status.
- The individual payment "produces at least some revenue for the government," which is an "essential feature of any tax."

According to the Court, Congress is not requiring Americans to purchase something. Rather, the Act penalizes them for not purchasing something. Thus, the individual payment was held to be a tax rather than a penalty and the authority of Congress is found in their power to tax (and not in the Commerce Clause). Because a majority found the individual mandate to be constitutional, the question of whether the individual mandate would be severable from the rest of the Act did not have to be decided.

What did the dissent argue?

The dissenting opinion argued that the Act's individual mandate and Medicaid expansion overstepped federal powers entirely, both in "mandating the purchase of health insurance and in denying non-consenting states all Medicaid funding." Holding that the individual mandate constitutes a penalty and cannot be upheld under Congress' taxing power because Congress framed the mandate as a penalty rather than a tax, the dissent stated "even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels." Addressing the Medicaid expansion, the dissent argued that it is unconstitutionally coercive of the states.

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

That remains to be seen.

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

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

If an employer decides to stop providing coverage, that means its employees will have to seek coverage elsewhere. The cost of such coverage under the Act's provisions can't currently be calculated.

Resources

U.S. Department of Health & Human Services:
http://www.healthcare.gov

Kaiser Family Foundation:
http://www.statehealthfacts.org
http://healthreform.kff.org

Health Reform GPS:
http://www.healthreformgps.org

CHAPTER 18--Employment Laws that May Apply to Your City

FEDERAL EMPLOYMENT LAWS

Statute	Minimum Number of Employees	What is it?
Title VII of the 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.
Title I of the Americans With Disabilities Act - ADA (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.
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	All	• Establishes minimum wage, overtime pay, record-keeping and youth

(29 U.S.C. § 201 et seq.)		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 proceeding.
Age Discrimination in Employment Act - ADEA (29 U.S.C. § 621)	20 or more employees	• 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.
Section 1981 of the Civil Rights Act of 1866 – Section 1981 (42 U.S.C. § 1981)	All	• Prohibits racial and ethnic bias in employment.
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).

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). • Requires an employer to provide special leave benefits for uniformed military and their families. • Prohibits an employer from interfering, restraining, or denying the exercise of an employee's right to take leave under the FMLA. • Prohibits an employer from retaliating against an employee who opposes practices made unlawful by the FMLA (applies to all employees even if not eligible for FMLA). • Requires an employee to be restored to the same position the employee held before taking leave or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

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.
Workplace Safety (29 USC § 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.
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.

TEXAS EMPLOYMENT LAWS

Employment Law	Minimum Number of Employees	What is it?
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. Gov't 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.
Jury Service (Tex. Civ. Prac. & Remedies Code § 122.001)	All	• Prohibits an employer from discharging an employee because the employee is called to jury duty.
Military Service (Tex. Gov't Code § 431.005)	Eligible employee (member of state military forces or reserve component of the armed forces)	• 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. • Provides that an employee is entitled to be restored to the same position that the employee held when ordered to duty.
Withholding of Wages (Tex. Family 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.
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.
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.
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.
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.
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. <u>Exception</u>: does not apply to emergency service personnel if the city provides adequate emergency shelter; and does

		not apply to persons necessary to provide for safety and well-being of general public including persons necessary for the restoration of vital services.

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