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10:15-11:15am

Building Blocks – Fundamentals of Municipal HR

This document is provided for general informational purposes only. It is not intended and is not to be construed to constitute legal advice. Please consult your employment attorney for specific situations.



Texas Open Records Act

AKA “The Public
Information Act”

Public Information Act

- Everything is public with few exceptions:
 - 552.101
 - Common Law Privacy
 - 552.102
 - Dates of Birth/Personnel File
 - 552.117/552.1175
 - Police Officer Confidentiality



Remember, civilian employees must opt-in to confidentiality of personal information, through submitting a form pursuant to 552.023

Keep copy of Open Records Decision No. 684 handy

Confidentiality Quiz

- Transcripts?
- Ongoing internal/administrative investigation
- City-mandated psychologist's reports?
- Certified agenda for executive sessions?
- Police officer or fire fighter departmental files?
- Birth years of employees?
- Zip codes of employees?



Basics of FMLA

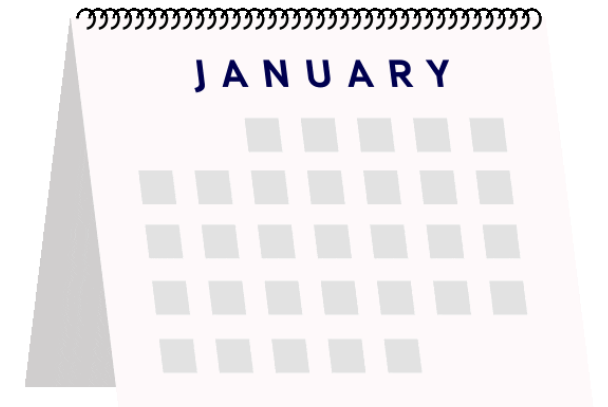


FMLA Basics: Benefits of FMLA

- 12 weeks of job protected leave – can't discipline or take other adverse action because EE requested/took leave (§825.220)
- Same or equivalent job upon return (§§825.214, 825.215)
- Continuation of group health insurance (§825.210)
- Unpaid – best practice is to require unpaid FMLA to run concurrently with sick, then vacation leave; and, also run concurrently with workers' comp leave (§825.207)

FMLA Basics: Employee Eligibility


- 50 or more EEs, within 75 miles; includes F/T, P/T, and employees on leave
- 12 months of employment (within past 7 years)
- 1,250 hours of service (include OT) during 12 months prior to leave
- Not already taken 12 or more weeks leave within previous 12-month period
- EE must provide 30 days' notice if foreseeable; otherwise, as soon as practicable



FMLA Basics: Qualifying Reasons for Leave

- EE's own serious health condition (SHC) that prevents EE from working
- To care for a spouse, child, or parent with a SHC
- Incapacity due to pregnancy, prenatal medical care, or childbirth
- To care for EE's child after birth, or placement for adoption or foster care (must conclude within 12 months of birth/placement)
- Military family leave





Why Care if an Absence is FMLA- Qualifying?

Ability to address attendance issues

FMLA-qualifying absences are protected
even if not designated as FMLA

To prohibit “protected” absences of
indefinite duration

To comply with law

Does EE have Choice to Not Designate Absence as FMLA?

US DOL Opinion FMLA 2019-1-A: 3/14/2019

- ER may not allow EE to “save” FMLA – neither EE nor ER has discretion not to trigger FMLA if applicable
- Burden on ER to know and apply FMLA: If EE provides enough information, then up to ER to raise the issue with EE and designate FMLA whether EE asks for FMLA or not
- When the law says that EE may not waive FMLA rights, it means ERs cannot allow EEs to waive FMLA rights.

Practice pointers:

- ER may place EE on FMLA leave if absence due to SHC
- Have & enforce consistent policy - if absence is FMLA-qualifying, then designate as FMLA (& provide required notices)
- It is not EE’s choice – make sure supervisors know this!



FMLA has Short Deadline

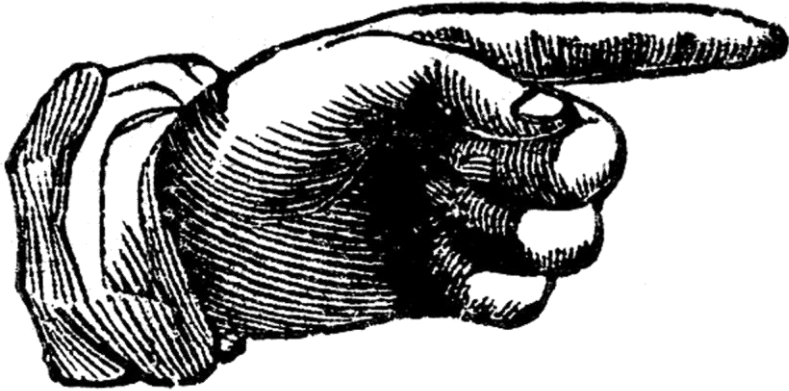
To meet deadlines, supervisors must immediately advise HR if:

- Future Absence - Reason to believe absence may be for FMLA-covered reason.
- Current Absence - An EE misses work for 3+ days (or less if intermittent leave) because of SHC (EE's own SHC or that of spouse, child or parent), or other potentially FMLA-covered reason.
- Five business days to send Eligibility Notice(WH 381) (§825.300(b))

EE's time records must indicate if absence or tardy is FMLA.

ER's Required FMLA Notices (§825.300)

Please Notice This



- Poster in plain view for all EEs/applicants to see
- General notice in EE Handbook
- Notice of Eligibility / Rights & Responsibilities Notice
- Designation Notice (WH 382)

Challenge: Intermittent FMLA Leave (§825.202)

- FMLA allows for “intermittent absences,” i.e., smaller, separate periods of time off
- FMLA can be taken in small chunks of time if:
 - Medically necessary
 - Because of qualifying exigency
 - For planned medical treatment, or
 - As otherwise approved by ER
- Certification must set out reasons for & schedule of intermittent leave; if unforeseeable, then an estimate of frequency & duration of absences.
- Can’t require EE to bring doctor note for each intermittent FMLA absence.

FMLA: Confidentiality of Medical Information – “Need to Know”

- FMLA regulations strictly limit who is in “need-to-know” zone.
- Only authorized EEs should have access and only on strict “need-to-know” basis.
 - HR staff who determine FMLA eligibility
 - Supervisors/managers needing info on work restrictions/ accommodations
- Supervisors don’t have “need-to-know” based solely on their status as a supervisor
- Ask: What is legitimate business reason for disclosure to particular individual or group of individuals?
- “Need-to-know” zone can vary on case-by-case basis






Proper Use of DOL Forms

* DOL Forms Published
June 2020

Notice of Eligibility/Rights & Responsibilities Notice (§825.300(b) and (c); DOL Form WH-381)



- ALWAYS make sure EE has worked 1250 hours!



- ER must notify EE of eligibility to take FMLA w/in 5 business days (absent extenuating circumstances) from date of:
 - EE's request for FMLA OR when ER learns absence may be FMLA-qualifying



- Must provide separate notice for each FMLA-qualifying event



- Sets out ER's expectations, EE's obligations, & consequences if not met



- Include blank Certification form & job description – EE has 15 days to return completed Certification



- Retroactive designation – if EE is continuously absent/not harmed by designation (825.301(d))



- If EE's eligibility status changes, ER must notify EE w/in 5 business days – keep EE informed!

Designation Notice (§825.300(d); DOL Form WH-382)

- When ER has enough information to determine if absence FMLA-qualifying (typically upon receipt of Certification), ER (usually HR) must notify EE if leave is or is not FMLA
- Must be given w/in 5 business days, absent extenuating circumstances
- If information in Notice changes, ER must notify EE w/in 5 business days
- Must include if FFD certification will be required



Challenge: How do Supervisors Know which Absences Covered by FMLA Certification?

- Length of absence set out in Certification, which supervisors don't usually see
- Frequency & length of intermittent leave – how is this tracked?
- How much information does HR share with supervisors?
- Who is responsible for recording FMLA absences in timekeeping system?
- Have EE say “FML”, or if multiple certifications, “FML 1”, “FML 2”, etc.



Return to Work



FMLA & ADA: Fitness-For-Duty/Return to Work Certifications



Problem: Supervisor allows EE to return to work without proper release



Solution: Involve HR in return-to-work process



Always provide copy of job description


FMLA: Fitness-for-Duty/Return to Work Certifications

- Require before return to work if leave due to EE's own SHC, but only if advance Notice given to EE & limited to SHC causing FMLA leave
- Designation Notice – include job description w/ essential job functions
- Must specifically address ability to perform essential job functions set out in Designation Notice (or in attached job description), but limited to SHC causing FMLA leave
- EE responsible for costs & not paid for time or travel costs
- HR (not supervisor) may contact HCP to clarify/authenticate, but can't delay return to work while contacting HCP
- Can't require for each intermittent absence; can require once every 30 days if reasonable belief of significant risk of harm to EE/others
- If EE fails to timely provide, not allowed to return to work
- If EE fails to provide at all & fails to request more FMLA leave, EE not entitled to reinstatement & may be terminated; ER might ask for recertification
- Don't forget option of requiring fitness-for-duty exam under ADA; ER has more leeway under ADA than FMLA

Job Descriptions Must Be Updated & Included Essential Job Functions



- Just because supervisor says function is essential doesn't make it so
- If it's essential, make sure "regular and timely attendance" is in job description
- Consider: Frequency & importance of task; Can others perform task? Do other employees with same job title/duties perform same task? Does this EE perform?

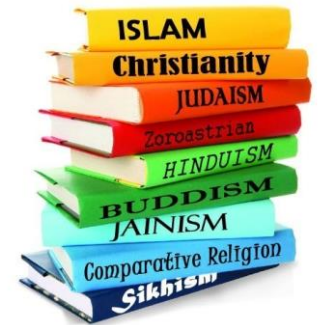


ADA/
ADAAA



Reasonable Accommodation

- Cover disability, religion, pregnancy (See also TLGC §180.004)
- Require ADA requests to be in writing – to HR
- Complaints – refer back to EEO/Harassment Policy
- Affirmative duty to engage in interactive process



5th Circuit Affirms ER Not Required to Provide Indefinite Leave as Reasonable Accommodation

EE planned to use leave until retirement, but since no reasonable accommodation would enable EE to return to work and perform essential job functions, not a “qualified individual” under ADA.

Moss v. Harris County Constable (5th Cir. March 15, 2017).



5th Circuit Holds Regular Attendance at Work is Essential Function of Most Jobs

In most cases, employers not required to allow telecommuting as reasonable accommodation. And, in determining what job functions are truly “essential,” employer’s judgment takes precedence over all other factors. *Credeur v. State of Louisiana* (5th Cir. June 23, 2017).



ADA/ADAAA: Fitness to Return to duty

- If reasonably and objectively fear employee is a 'direct threat' but do not know for sure, may require employee to submit to fitness for duty examination
- ADA/ADAAA permits medical examinations ***only when job-related and consistent with business necessity***
- Employer must prove “business necessity” is vital to business and the request for a medical examination is “no broader or more intrusive than necessary.”
- Acceptable reasons: frequent absences, safety and reducing several absenteeism, suspected abuse of attendance policy*
- Remember, “business convenience” does not mean “business necessity”

Overlap Between FMLA, ADA, Workers Comp

- Under expanded ADAAA, an employee with a serious health condition (SHC) under FMLA is likely to have ADA-protected disability
- Many on-the-job workers' comp illnesses/injuries are also SHC under FMLA and/or disability under ADA



EEO & Harassment



- Consider combining policies
- Include all protected characteristics, including race, color, religion, sex, sexual preference or orientation, gender identity or expression, national origin, age, disability, pregnancy, military or veteran status, citizenship, genetic information, or any other characteristic protected by law
- Set out EEOC's definition of sexual harassment
- Provide examples
- Consider Prohibiting “Inappropriate Conduct” rather than only unlawful harassment.

SB 45 Tex. Labor Code §§21.141-.142



Texas Legislature codified the prohibition against sexual harassment in the workplace:

- Expanded definition of “employer” to include anyone who “acts directly in the interests of an employer in relation to an employee.”
- Applies to all employers with ***one or more employees***
- Now, supervisors (and possibly other employees) can be held ***personally liable*** for engaging in or failing to stop sexual harassment.
- Now, violation occurs if employers and/or supervisors fail to take ***immediate & appropriate corrective action.***

“Protected
Categories”
under federal
and state law,
and Employer
policies,
include:

- Race – Title VII
- Color – Title VII
- Religion – Title VII
- Sex – Title VII
- National Origin – Title VII
- Sexual orientation/preference – Title VII
- Gender identity/expression – Title VII
- Age (over 40) – ADEA
- Disability – ADA
- Military service/veteran status – USERRA
- Pregnancy – PDA
- Citizenship – IRCA
- Genetic Information – GINA

What is Retaliation?



- An adverse action against a covered individual because they engaged in a protected activity.
 - Protected activity includes filing/threatening to file charge of discrimination; serving as witness in EEO investigation/litigation; complaining internally of harassment/discrimination; cooperating in internal investigation; requesting reasonable accommodation.
 - U.S. Supreme Court's Test: Would employer's action deter reasonable worker from making complaint or supporting charge of discrimination? *Burlington Northern & Santa Fe Railroad v. White* (2006).
 - Examples of retaliation: termination, transfer, demotion, discipline, isolation, withholding a pay increase, denying time off, enforcing policies more strictly, "papering" the file, exclusions from "power lunch."

Military Leave

- USERRA
 - Escalator principle
 - Unpaid leave
- Texas Government Code, Chapter 437
 - Full pay for up to fifteen work days
 - Not bank from year-to-year
 - Per fiscal year
- Employees may not be required to take paid leave



Records Retention

- Minimum requirements
- Check with City policies but see also Texas State Library and Archives Commission Rules
- Measured in calendar years
- Applies only to “official records”



This is the Law!

Texas Gov't Code, Subchapter J establishes that the Texas State Library & Archives Commission “shall issue” records retention schedules.

These regulations establish mandatory *minimum* retention periods.

Destruction of government records contrary to these provisions is criminal.

[http://www.tsl.texas.gov/slr/recordspubs/
localretention.html](http://www.tsl.texas.gov/slr/recordspubs/localretention.html)



Two Applicable Sets of State Regulations



General Records “GR”



Public Safety – “Local Schedule PS”



Must retain the longer period of time



But, always check with your City Secretary to see what your entity has adopted



FLSA



FLSA
FAIR LABOR STANDARDS ACT

While the Fair Labor Standards Act does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the Act does not regulate. For example, the Act does not require:

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- Pay raises or fringe benefits
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours of work for persons 16 years of age and over.

Exempt or Non-Exempt

“Salary” does not mean “Exempt”

- 
- Decision must be made before hire

- 
- Non-exempt means hourly and entitled to overtime

- 
- If salaried and exempt, must specify the duties and must be paid a minimum weekly salary


White Collar Exemption

- White Collar Exemption is the most commonly applied. 29 U.S.C. § 213(a)(1).
 - Duties Test (executive, administrative, professional) and
 - Salary Level Test, or
 - Highly Compensated Employees
 - “Customarily and regularly performs one of the exempt duties of an administrative, executive or professional employee, but who does not otherwise meet the duties test.”

Salary Threshold for Exempt

- Minimum weekly salary to \$684/week or \$35,568/year
 - Will permit employers to include nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10%
- Highly Compensated employee minimum increased to \$107,432/year





Overtime for Non- Exempt Employees

- Pre-Shift and Post-Shift Work
- Roll Call
- Report Writing
- Training
- Breaks/Call-back/On call
- Furloughs
- Travel

Calculating Overtime



Time and a half

40+ hours in 7 day workweek

Define workweek in writing

Not pay period

Can make up time in same 7 day work period, but not pay period



Christensen v. Harris County *U.S. Supreme Court (May 1, 2000)*

A public employer may compel use of compensatory time

* *But see* § 142.0016 TLGC

Remember, public safety can accrue up to 480 hours of comp time; regular government employees can accrue up to 240 hours of comp time

Weekly Timesheets

- Policy requiring all employees (exempt and non-exempt) to keep weekly timesheets – and *sign!*
- For exempt, timesheets not kept for purposes of determining employee's wages, but for determining how much leave employee has taken



Public Employer: Special Rule for “Docking” Exempt Employees’ Pay

Public Accountability

- Pay system established by statute, ordinance, regulation or policy/practice established per principles of public accountability
- 29 C.F.R. §541.701
 - Does not destroy exemption if employee has exhausted leave, or use has been requested and denied
 - AND – if furloughed – may dock pay and not destroy exemption



FLSA and Police and Fire Employees

7(k) exemption

Texas—firefighters only

Components of 7(k) exemption select work period up to 28 day

Pay overtime only if hours exceed chart

Hourly versus salaried employees

Fluctuating work week and half-time method of computing overtime

Police: §142.0015 TLGC

Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the [FLSA](#) to law enforcement and fire protection personnel of State and local governments.

Characteristics

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;
2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. So long as the employee meets the criteria above, he or she is an employee "employed in fire protection activities" as defined in section 3(y) of the FLSA.

Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Employees engaged in law enforcement activities may perform some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.

Coverage

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.

Requirements

[Hours of work](#) generally include all of the time an employee is on duty at the employer's establishment or at a prescribed work place, as well as all other time during which the employee is suffered or permitted to work for the employer. Under certain specified conditions time spent in sleeping and eating may be excluded from compensable time.

The FLSA requires that all covered nonexempt employees be paid the statutory [minimum wage](#) of not less than \$7.25 per hour effective July 24, 2009.

The FLSA requires that all covered nonexempt employees be paid [overtime pay](#) at no less than time and one-half their regular rates of pay for all hours worked in excess of 40 in a workweek.

Section 13(b)(20) of the FLSA provides an overtime exemption to law enforcement or fire protection employees of a public agency that employs less than five employees during the workweek in law enforcement or fire protection activities.

Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis. A "work period" may be from 7 consecutive days to 28 consecutive days in length. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

Under certain prescribed conditions, a State or local government agency may give compensatory time, at a rate of not less than one and one-half hours for each overtime hour worked, in lieu of cash overtime compensation. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time.

An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

At the time of termination an employee must be paid the higher of (1) his or her final regular rate of pay or (2) the average regular rate during his or her last three years of employment for any compensatory time remaining "on the books" when termination occurs. For more information on state and local governments under the FLSA, see [Fact Sheet #7](#).

No covered employer may employ any minor in violation of the [youth employment provisions](#) of the FLSA. The Act establishes specific provisions concerning prohibited occupations and/or hours of employment of minors under age 18.

Covered employers must make, keep and preserve payroll-related records as described by regulations [29 CFR Part 516](#).

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)

29 CFR §553.31 Substitutions

Section 7(p)(3).

- (a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
- (b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or “trade time” with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.
- (c) A public agency which employs individuals who substitute or “trade time” under this subsection is not required to keep a record of the hours of the substitute work.
- (d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

Regular Rate of Pay

- “Regular Rate of Pay” generally exceeds hourly rate
- Must include add-ons:
 - Longevity
 - Educational
 - Shift differential
 - Assignment
- Does Not Include:
 - Uniform allowance
 - Cell phone reimbursement
 - Comp time/Overtime payments
 - Car reimbursement



If Employee is NOT Exempt, Calculate Regular Rate

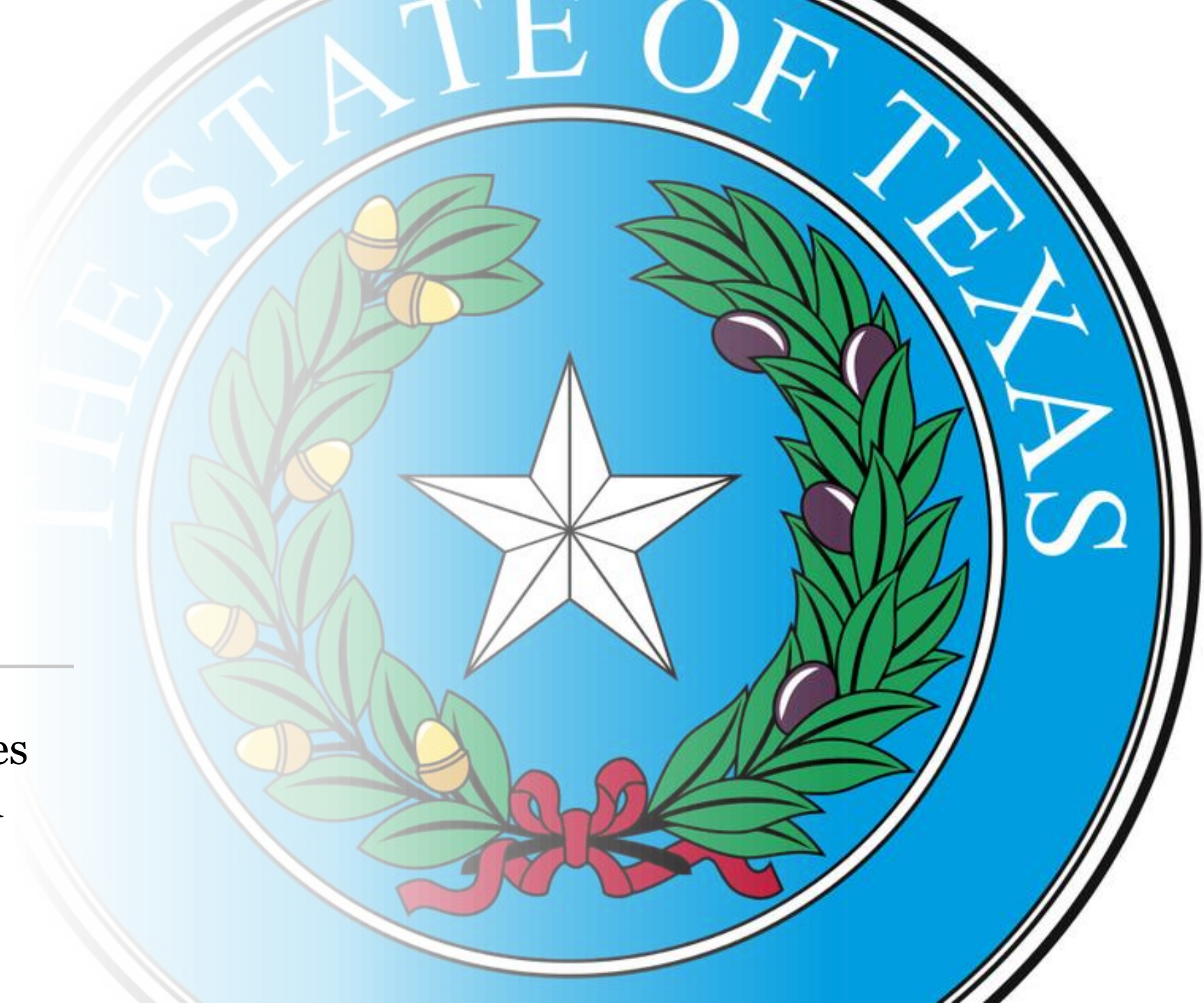
- Must be more than minimum wage
- Overtime – 1 1/2 times regular rate
- “Regular rate” must be an hourly rate
- Calculation: All remuneration earned in week ÷ total number of hours worked
- Remember, if the employer does not have any time records-the DOL/judge/jury will take the employee’s word for it!





Texas Local Government Code

Compensation & Expenses
of Municipal Officers and
Employees



§ 141.008 - PAYROLL DEDUCTIONS for ASSOCIATION DUES

(In cities with population greater than 10,000)

ALL EMPLOYEES

- City *may* deduct if employee requests in writing.

FIRE FIGHTERS (a-1)

- City *must* make deduction if it receives revenue from the state and it permits deductions for purposes other than charity, health insurance, taxes, or other purposes. Request must be in writing.

POLICE OFFICERS (a-2)

- City *must* make deduction if department not covered by collective bargaining or meet-and-confer agreement, and city permits deductions for purposes other than charity, health insurance, taxes or other purposes. Request must be in writing.

Employee participation is voluntary.

Written Request on form provided by city, to include amount of deduction and directive to transfer to designated association. Remains in effect until written notice of revocation.

Reasonable administrative fee - City may charge administrative fee from each employee for collecting, accounting for, and disbursing the funds.

§141.032 - LONGEVITY PAY FOR POLICE & FIRE

(In cities with population greater than 10,000)

A police officer or fire fighter is entitled to an additional payment of \$4 a month for each year of service in the department, not to exceed 25 years.





§141.033 Classification of Positions; Salary Schedule

A city under this subchapter shall classify all positions in fire and police and shall specify the duties and prescribe the salary for each classification.

A member of the fire or police department who is required to perform the duties of a particular classification is entitled to be paid the salary prescribed for that position during the time the member performs the duties.



Chapter 142

Local Government Code

ASSISTANCE, BENEFITS &
WORKING CONDITIONS
for POLICE OFFICERS
& FIRE FIGHTERS

§142.0015- (f-j) Police Officers - Overtime

(f) With 2 exceptions, police officers can't be required to work more hours during a calendar week than the number of hours in the normal work week of the majority of city employees other than fire fighters and police officers.

2 Exceptions:

- 1. Emergency**- if there is an unexpected happening or event or an unforeseen situation or crisis that calls for immediate action & Chief orders the officer to work overtime.
- 2. Written waiver** - if a majority of police officers sign a written waiver, city may require police officers to work more hours than permitted by sub. (f).

Overtime – Even with written waiver, officer who works more hours in normal calendar month than majority of city employees (other than police and fire), is entitled to overtime pay.

§142.0015 – Fire fighters and dispatchers

Fire fighters are non-exempt except for Chief and Assistant Chief (b)

Fire fighters who work in non-suppression duties – separate overtime threshold (c)

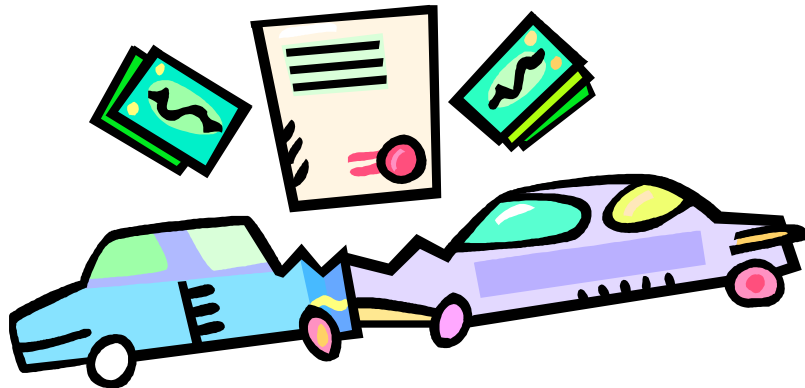
Dispatchers *cannot* be placed on alternate work period; must be paid OT weekly (k)

§ 142.0016 - USE OF COMP TIME (Population of more than 10,000)

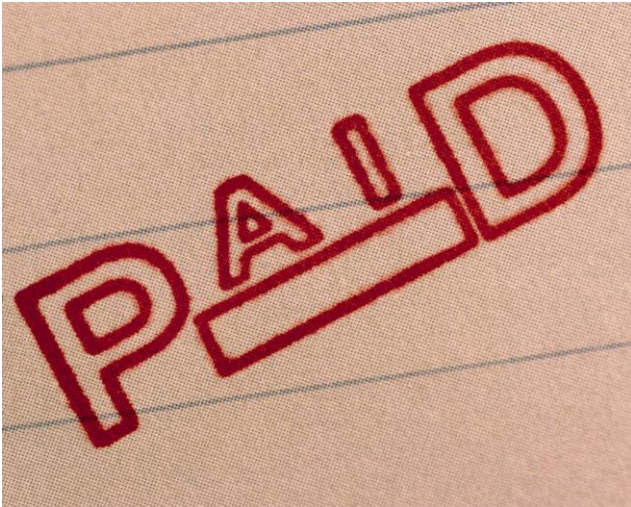
- A fire fighter or police officer may, with city's approval, accept comp time in lieu of overtime pay, at rate of 1-1/2 times the regular rate.
- **Use of Comp Time** – A fire fighter or police officer may use comp time only when both employee and city agree.
- **Pay-out** – City may, at any time, pay all or part of employee's accumulated comp time if employee and city so agree
- If full payment of accumulated comp time would exceed 10% of annual salary, city may at its option, defer payment of excess amount until first pay period of next fiscal year.
- Accumulated comp time must be paid at employee's rate of pay at time payment is made, or at time payment requested, whichever is greater.
- If employee dies or is terminated for any reason, city pays accumulated comp time to employee or his/her estate.

§ 142.006 MOTOR VEHICLE LIABILITY INSURANCE for PEACE OFFICERS and FIRE FIGHTERS

- A City shall provide insurance against liability to third persons arising out of the operation, maintenance, or use of a motor vehicle owned or leased by the City.
- The City may elect to self-insure or to reimburse the employee on an individually-owned automobile liability insurance policy.



§142.008 - SALARY CONTINUATION & SUBROGATION



- If a city pays an employee who has been injured, due to the tortious act of a third party, under a salary continuation program, the city may claim subrogation to the extent of such payments.
- A city is prohibited from denying salary continuation benefits because the employee has a cause of action against a third party for personal injuries.


§142.009 - PAYMENT FOR COURT APPEARANCES

A city is required to pay a firefighter or police officer for appearing as a witness in a criminal or civil suit if the city or another city or governmental agency is a party, if the employee's appearance is:

- required
- made on time off, and
- done in capacity as fire fighter or police officer

Payment is at the employee's regular rate of pay.





Chapter 150

MISCELLANEOUS PROVISIONS AFFECTING POLICE & FIRE

Subchapter A applies to cities with a population of at least 10,000 which do not participate in civil service.

§150.002 - POLITICAL ACTIVITIES

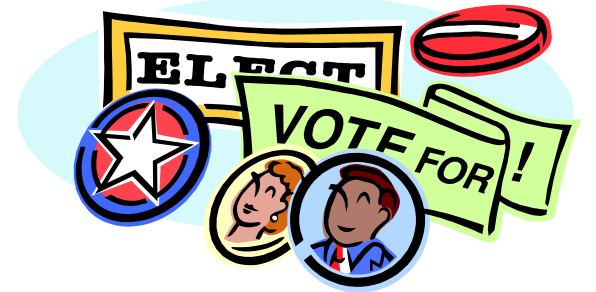


A fire fighter or police officer ***may not*** engage in political activity related to a campaign for elective office while in uniform or on active duty.

A fire fighter or police officer ***may*** engage in political activity if not in uniform & not on active duty, but cannot solicit campaign contributions for a candidate other than from members of an employee organization to which that person belongs.

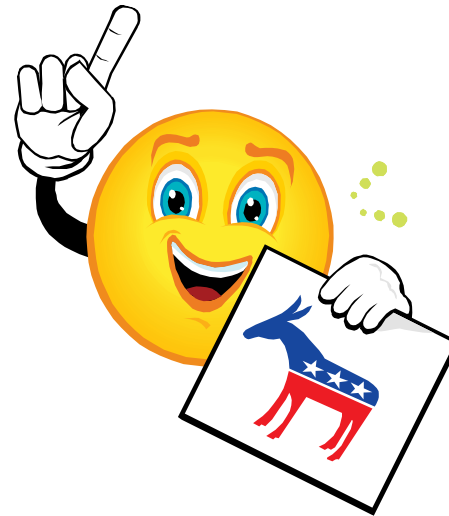
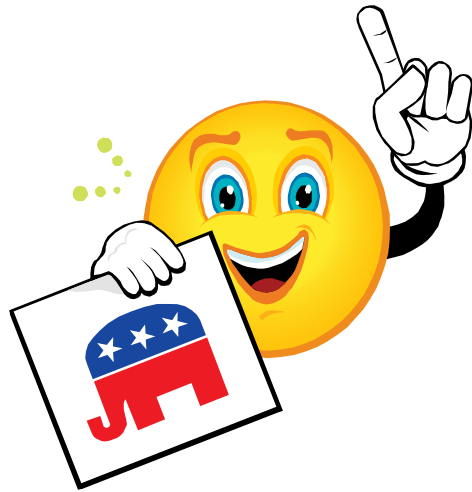
§150.002 - Political activity includes:

- Making a political speech or supporting or opposing a candidate
- Distributing a card or other political literature relating to a candidate's campaign
- Wearing a campaign button
- Circulating or signing a petition for a candidate
- Soliciting votes for a candidate
- Soliciting campaign contributions for a candidate



§150.003 - RESTRICTION PROHIBITED

A city may not restrict a police officer or fire fighter's rights to engage in political activity permitted in this subchapter.





Chapter 150

SUBCHAPTER B

Residency Requirements

Applies to all
cities regardless
of population.

§150.021 - RESIDENCY REQUIREMENTS

A city employee may not be required to reside within city limits as a condition of employment.

This prohibition does not apply to department head appointed by the mayor or city council.

The city may, however, adopt reasonable response times for employees who live outside city limits to respond to civil emergencies. Standards may not be applied retroactively.

Chapter 150
SUBCHAPTER C
Employees as
Candidates for Office


Applies to all
cities regardless
of population.

§150.041 – Prohibited Municipal Actions

“Candidate” as defined in §251.001(1) Election Code.

A city may not prohibit a municipal employee from becoming a candidate for public office.

The city may not take disciplinary action solely because the employee becomes a candidate; however, the employee is still expected to fulfill all the duties and responsibilities associated with their municipal employment.



Chapter 180

MISCELLANEOUS PROVISIONS AFFECTING CERTAIN POLICE & FIRE EMPLOYEES

§180.001- COERCION IN CONNECTION WITH POLITICAL CAMPAIGN

A person who coerces a police officer or fire fighter to participate or refrain from participating in a political campaign commits a misdemeanor punishable by a fine of not less than \$500 or more than \$2000, jail time for no more than 2 years, or both.

§180.002 - DEFENSE OF CIVIL SUITS

A city must provide legal counsel to a peace officer, fire fighter, or EMS employee, without cost to the employee, if a suit is filed for damages by a party other than a governmental entity involving an official act of the employee during the course and scope of employment. Employee must request legal counsel.



If the city fails to provide legal counsel, employee may recover reasonable attorney's fees incurred in defending the suit, if the employee is found to be without fault or acted with a reasonable good faith belief that his/her actions were proper.

§180.004 - WORKING CONDITIONS FOR PREGNANT EMPLOYEES

A city or a county is required to make a “reasonable effort” to accommodate employees who are determined by their physician to be partially physically restricted by a pregnancy.

If certification is provided that the employee is unable to perform her job duties as a result of her pregnancy, the “Office Supervisor” is required to assign the employee to a temporary work assignment, if available, in the same office.

Complaints Against Peace Officers & Fire Fighters

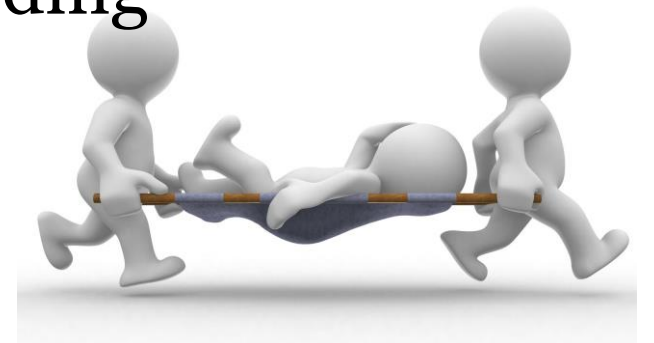
§614.022 - Complaint must be in writing and signed by the person making the complaint

§614.023 - Copy of the signed complaint must be given to employee within a ***reasonable time***

- Disciplinary action may not be taken unless a copy of signed complaint is given to employee.
- Employee may not be terminated or indefinitely suspended *unless*:
 - Complaint is investigated; and
 - Evidence to prove allegation of misconduct.

Workers' Compensation First Responders

- No more sovereign immunity . . . for “first responders”*
- Legislature amended Texas Labor Code, Section 451
- Section 451.0025 specifically waives sovereign immunity against governmental entity . . . for “first responders” claiming retaliation for filing a workers comp claim, hiring a lawyer or testifying in a workers comp proceeding





1st Amendment Rights

PICKERING-CONNICK Three-Part Test

1. Whether the employee's speech was a matter of public concern;
2. Whether the employee's First Amendment interests in speaking outweigh the interests of the government, as an employer, in providing effective and efficient services; and
3. Whether the employee has shown that the speech played a substantial part in the government's employment decision.

Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).



4th Amendment Rights

Drug Testing

Public Employers



- Avoid employing/hiring illegal drug users, decrease likelihood of impaired employees in workplace and deterrence
- Permissible under Texas Labor Code §21.120
- Cities must adopt a written policy before drug testing any employee
- Policy should be approved by your city attorney

Public Employers

- Drug tests are a “search” under 4th Amendment
 - Must balance individual’s right against the government employer’s legitimate interest in maintaining a drug-free workplace

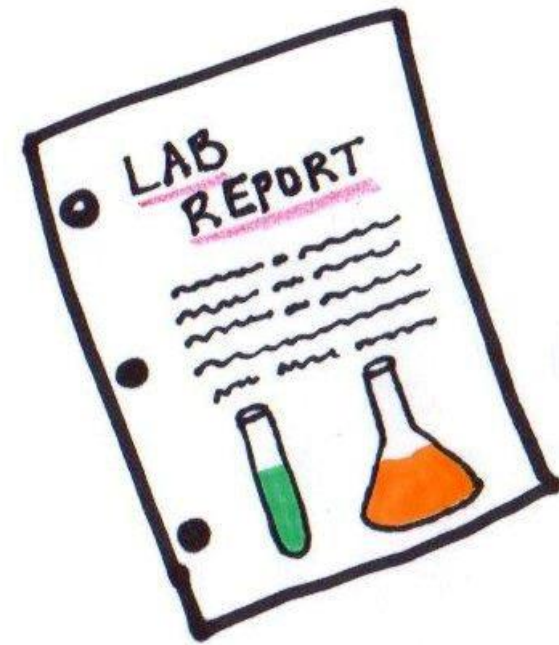
The 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



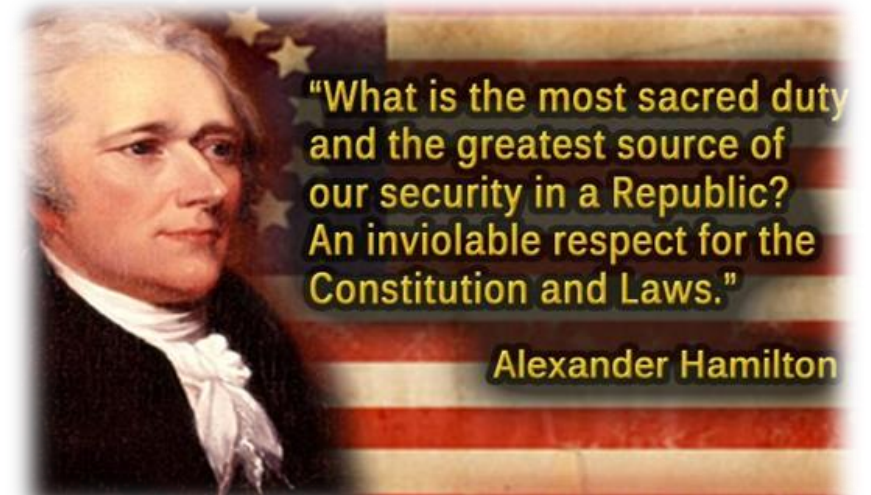
Public Employers

- Permissible drug testing
 - Random/suspicionless
 - Post-Accident
 - Reasonable suspicion



Random/suspicionless - strictest scrutiny

- “Strict scrutiny” means that the government employer must have a “compelling reason” to conduct the drug tests on a random/suspicionless basis
 - *Must be able articulate the compelling reason*



Random/suspicionless testing only permitted when:

- **“Special Need” and/or “Safety-Sensitive” / “Security-Sensitive”**
 - *Skinner v. Railway Labor Executives ' Ass 'n*, 489 U.S. 602, 618 (1989)
 - *Nat 'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989)
- Employers must carefully analyze each position that is being drug tested to determine if it is “safety-sensitive” before continuing to randomly drug test employees



Safety-Sensitive:

“a position in which a drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry firearms, perform life threatening procedures, work with confidential information or documents pertaining to criminal investigations, or confidential juvenile information, or work with controlled substances; a position in which a drug impairment constitutes an immediate and direct threat to the employee’s health or safety; a position in which the employee is responsible for the well-being of another; or a position in which a momentary lapse in attention could result in injury or death to another person.”

- Police Officers
- Firefighters
- CDL / US DOT

- ***WHO ELSE?***

- Lifeguard?
- Recreation Superintendent?
- Building Official?
- Parks/Groundskeepers?



Whose responsibility
is it to prove that a
position is “safety-
sensitive”?

**The
Employer’s**



Reasonable Suspicion Drug Testing

- Based on individualized, articulable observations such as:
 - observation of alcohol or drug use
 - apparent physical state of impairment
 - incoherent mental state
 - changes in personal behavior that are otherwise unexplainable
 - deteriorating work performance that is not attributable to other factors
 - evidence of possession of substances or objects which appear to be illegal or unauthorized drugs or drug paraphernalia

Post-Accident Drug Testing

- **Safety-Sensitive? Yes**
- **Everyone else...?**
 - *Bailey v. City of Baytown*, 78 1 F.Supp. 1210, 1216 (S.D. Tex. 1991)
employee at wastewater treatment plant had diminished privacy expectation – knew that a drug-testing policy in place
 - Some cause or “fault” should be linked to post-accident drug test
 - *United Teachers of New Orleans v. Orleans Parish School Ed.*, 142 F.3d 853 (5th Cir. 1998)
 - *Bryant v. City of Monroe*
 - *Amer. Fed. of Gov't Empl. Local 1533*, 754 F.Supp. 1409 (N.D. Cal. 1990).

Drug testing Applicants

- **Safety-sensitive positions? Yes**
 - *Chandler v. Miller*, 520 U.S. 305 (1997)
 - Elected officials-do not have to pass a drug screen to run for office
 - *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008).
 - Library workers: no.
- *Am. Fed 'n of State County & Mun. Employees Council 79 v. Scott*, 717 F.3d 851(11th Cir. 2013);
 - Governor wanted to randomly drug test all employees and all conduct pre-employment drug tests for candidates.

Result: a qualified “NO”

Other Issues

Results of drug tests:

- Confidential medical information-ADA

Alcohol tests?

- Job-related and consistent with business necessity (because it's a medical test)



Other Issues

How should
the drug test
be conducted?

- Urine?
- Blood?
- Breath?
- Hair?
- Oral?



Drug Testing

Risk analysis

Consult with your city
attorney



thank you!

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