

**May 2006 TTC**  
**Legal Q & A**  
By Kathryn Hoang

**Q. May a city create a “sick leave pool” made up of sick leave contributed by employees to be used by employees who have exhausted their sick leave time?**

**A.** Yes. A city has the exclusive authority to establish the compensation and conditions of employment for its employees. *See Byrd v. City of Dallas*, 6 S.W.2d 738 (Tex. 1928). A home rule city could implement a voluntary sick leave pool for its employees if the program does not conflict with the city charter or other statutory provisions, such as civil service or collective bargaining. A general law city could also adopt a voluntary sick leave pool. Caution should be taken when adopting a sick leave pool to ensure the program does not violate Article III, Section 53, of the Texas Constitution.

Article III, Section 53, prohibits a city from implementing a sick leave pool that grants additional benefits to employees for work that has already been performed. *See Op. Tex. Att’y Gen. No. JM-1160* (1990). For example, if a city employee has exhausted all sick leave and taken unpaid leave before the city creates a sick leave pool, the employee could not use the pool as a means for reimbursement for the unpaid leave days previously taken. A sick leave pool can be used, however, to increase an employee’s potential sick leave benefits prospectively. *See Op. Tex. Att’y Gen. No. DM-129* (1992).

**Q. What is the Texas Whistleblower Act?**

**A.** The Texas Whistleblower 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.” TEX. GOV’T CODE § 554.002(a).

**Q. In addition to suspension or termination, what is considered an “adverse personnel action” under the Whistleblower Act?**

**A.** “Personnel action” is defined as “an action that affects an employee’s compensation, promotion, demotion, transfer, work assignment, or performance evaluation.” TEX. GOV’T CODE §554.001(3). Some courts have opined that reprimands or severe harassment may be enough to trigger the Act.

**Q. Who is considered an “appropriate law enforcement authority” under the Whistleblower Act?**

**A.** 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. TEX. GOV’T CODE §554.002(b). 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.

**Q. Is an internal city policy considered a “law” under the Whistleblower Act?**

**A.** Internal policies are not usually considered “laws” under the Act. However, some courts look at whether the city council adopted the policy. For example, an appeals court in Waco found that the City of Waco’s Equal Employment Opportunity policy is a law for the purposes of the Act. *See City of Waco v. Lopez*, 183 S.W.3d 825 (Tex.App.—Waco 2005).

**Q. What are the penalties associated with a claim under the Whistleblower Act?**

**A.** 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. TEX. GOV’T CODE §§ 554.003(a), 554.0035. 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. TEX. GOV’T CODE §§ 554.003(b). Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter.

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. TEX. GOV’T CODE § 554.008(a). The penalty shall be paid by the supervisor, not the city, and shall be deposited in the state treasury. *Id.* at (c) and (d).

**Q. Is there a statute of limitations for whistleblower claims?**

**A.** A grievance must be filed no later than the 90<sup>th</sup> day after the date on which the alleged violation occurred or was discovered by the employee through reasonable diligence. TEX. GOV’T CODE § 554.005.

**Q. Is there a notice requirement under the Whistleblower Act?**

**A.** 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. TEX. GOV’T CODE § 554.009. The sign is available at [www.oag.state.tx.us/AG\\_Publications/pdf/whistleblower\\_poster.pdf](http://www.oag.state.tx.us/AG_Publications/pdf/whistleblower_poster.pdf).

**Q. Where can I find more information on the Act?**

**A.** For more information on the Texas Whistleblower Act, you may refer to the Texas Attorney General’s *Public Officers: Traps for the Unwary 2006* handbook at: [www.oag.state.tx.us/AG\\_Publications/pdfs/2006trapshb.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/2006trapshb.pdf), or contact the TML Legal Department at 512-231-7400 or [legal@tml.org](mailto:legal@tml.org).