

Legal Q&A

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Editor's Note: *Evelyn left the TML Legal Services Department in July. She has taken a position as assistant city attorney with the City of Houston. Her expertise and dedication to the League's membership will be sorely missed, and we wish her well with her new position.*

Q: How is volunteer status determined under the Fair Labor Standards Act (FLSA)?

A: To qualify as a “volunteer” under the FLSA, an individual must satisfy three conditions: (1) he must perform hours of service for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for rendered services; (2) his services must be offered freely and without pressure or coercion, direct or implied, from an employer; and (3) he cannot be employed by the city to perform the same type of services for which he proposes to volunteer. *See* 29 C.F.R. §553.101. An individual who meets these criteria is considered a volunteer and not an employee who is subject to the FLSA minimum wage and overtime pay provisions.

Q: May a city compensate a volunteer?

A: Cities that use volunteers often wrestle with what they can pay the individuals without jeopardizing their volunteer status. Although the FLSA provides that a volunteer may not be compensated, it allows a city to pay “expenses, reasonable benefits, [and] a nominal fee” to bona-fide volunteers without jeopardizing their volunteer status. *Id.* §553.106.

For example, a city may reimburse a volunteer for approximate out-of-pocket expenses incurred incidentally to providing volunteer services. *Id.* Such expenses may include uniform allowances, reasonable cleaning expenses, transportation or meal costs, books or supplies, or tuition to attend classes intended to teach the individual to perform the volunteer services efficiently. *Id.* §553.106 (a)-(c). A city may also furnish a volunteer with reasonable benefits—including group insurance plans (for example, liability, health, life, disability, workers' compensation), pension plans, or length-of-service awards—without jeopardizing an individual's volunteer status. *Id.* §553.106(d).

The term “nominal fee” is not defined by the FLSA, but the FLSA regulations provide guidance for when a fee is nominal and permissible. For a payment to be considered a permissible “nominal fee,” it must not be “a substitute for compensation” or “tied to productivity.” *Id.* §553.106(e). The United States Department of Labor (DOL) acknowledges that the prohibition against tying a volunteer's payment to productivity does not preclude a city from paying a volunteer a “per call” or a “per shift” fee, as long as the fee can be fairly characterized as tied to the volunteer's sacrifice rather than productivity. *Id.*; Dep't Labor Op. FLSA 2006-28 (Aug. 7, 2006). The DOL also created a bright-line rule, which provides that a fee not exceeding twenty percent of what a city would pay a full-time employee performing the same services is a “nominal fee.” Dep't

Labor Op. FLSA 2005-51 (Nov. 10, 2005). A city should look to its payroll as a benchmark for this calculation, and absent such information, look to information from neighboring jurisdictions, the state, or ultimately the nation, including information provided by DOL's Bureau of Labor Statistics. *Id.*

Q: May a city employee also serve as a volunteer for the city?

A: City employees may desire to volunteer at certain city events, and cities often welcome such benevolent services. However, a city should be aware of certain restrictions imposed by the FLSA. Employees of a city may volunteer their services provided that "such services are not the same type of services which the individual is employed to perform for the city." 29 C.F.R. §553.103(a). The term "same type of services" means "similar or identical services" and includes duties that are "closely related to the actual duties performed by or responsibilities assigned to the employee." *Id.* For example, a firefighter cannot volunteer as a firefighter for the same city. *Id.* Also, a volunteer would be precluded from working some shifts for pay for the city and continue to work some shifts on a volunteer basis. In this case, all hours worked on all shifts would have to be combined and compensated for FLSA purposes. Even without evidence of coercion, allowing paid employees to perform the "same type of services" for their employer on an uncompensated "volunteer" basis if they choose to do so would be in violation of the FLSA. Dep't Labor Op. FLSA 2004-15 (Oct. 18, 2004).

In contrast, a city employee may volunteer to perform in a different capacity for the employing city. For example, a city police officer may volunteer as a part-time referee in a basketball league sponsored by the city. 29 C.F.R. §553.103(c). A volunteer may also volunteer to perform the "same type of services" he is employed to perform by one city for a different public entity.

Q: Would a city be liable for the actions of its volunteer?

A: Although a volunteer is generally not considered a city employee, a volunteer's action may create liability for a city. As such, a city should be cognizant of its responsibilities involving volunteers.

The Texas Tort Claims Act (TTCA) waives sovereign immunity for certain actions of governmental employees. TEX. CIV. PRAC. & REM. CODE § 101.021(1). The Act defines an employee as "a person, including an officer or agent, who is in the paid service of a governmental unit." *Id.* § 101.001(2). The Supreme Court of Texas has concluded that an unpaid "volunteer" is generally not considered an "employee" for whose acts the governmental unit can be held liable. *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994). However, a city may be liable for the acts of a volunteer in some cases, such as 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. *El Paso Laundry Co. v. Gonzales*, 36 S.W.2d 793 (Tex. Civ. App. — El Paso 1931). There

may also be a basis for liability stemming from the negligent screening and hiring of volunteers. *See Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472 (Tex. 1995).

Given that liability questions are notoriously fact-specific, city officials should consult with local counsel and their liability insurance carriers regarding liability for the actions of its volunteers.

Q: Would a city be liable to a volunteer who is injured while volunteering?

A: To the extent authorized by the TTCA, a city 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. TEX. CIV. PRAC. & REM. CODE § 101.021. A city owes the same duty of care to volunteers as to others on city property. *City of Austin v. Selter*, 415 S.W.2d 489 (Tex.Civ.App.--Austin 1967).

A city may want to limit its liability by obtaining liability coverage for its volunteers. State law allows a city to provide workers' compensation insurance for its volunteers. TEX. LAB. CODE §504.012. Additionally, each volunteer police force member of a city must be insured or covered against any injury suffered in the course and scope of performing the person's assigned duties at the request of or under a contract with a state agency or city. TEX. GOV'T CODE §614.122.