

Legal Q&A

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Who is required to take the oath of office?

The Texas Constitution requires that all appointed and elected officers in the state must take an oath of office. TEX. CONST. Art. XVI, §1. This includes elected officials, such as city councilmembers and mayors, as well as other municipal offices. An “office” is defined generally as a position that “exercises a sovereign function of government largely independent of the control of others.” *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955) (citing *Dunbar v. Brazoria County*, Tex.Civ.App., 1949, 224 S.W.2d 738, 740, writ ref.). If a position in a city is independent of the direction of the council or other city employee and performs a legislative function that is not reviewed and voted on by the governing body, it is usually an office. A city manager, for example, would usually not be an officer required to take the oath because a city manager is an employee and takes direction from the city council.

In a type A general law city, the following officers are required to take the oath by law before beginning their work with the city: city secretary, city treasurer, city tax assessor and collector, city attorney, city marshal, and city engineer. TEX. LOC. GOV'T CODE §§22.005, 22.071. Any other positions created by the governing body as “municipal offices” under Texas Local Government Code Section 22.071 may also be required to take the oath of office. *Id.*

In a home rule city, the charter may also require that persons holding certain positions at the city take the oath of office. Nothing prohibits a city from swearing in members of committees or boards. That is true even if they are advisory only and do not fall under the definition of “officer.” A city may require an oath of all appointed officers if the governing body wishes to do so. Please see below for a discussion of when police officers should take the oath of office.

If a city requires its police officers to take the oath of office, do they need to repeat the oath every two years?

Attorney General Opinion DM-381 (1996) concluded that it is advisable for city police officers to take the oath of office. While no court has said that the oath is mandatory for police officers, the penalty for not erring on the side of caution could be court-ordered suppression of physical evidence or testimony. However, DM-381 concludes that police officers in civil service cities who take the oath of office do not need to repeat the oath every two years.

The opinion, unfortunately, is unclear about whether police officers in non-civil service cities must repeat the oath. The argument for doing so is that public officers typically serve only two-year terms. TEX. CONST. Art. 16, § 30(b). Most cities view their rank-and-file police officers as regular employees, rather than appointed public officers. Thus, it may seem strange to suggest that police officers have “terms” that expire, which may require re-appointment and a new oath. Nevertheless, until the legislature, a court, or the attorney general offers more guidance on the issue, the safest practice is for police officers in non-civil service cities to perform the oath and filing process every two years. See also, *Bell v. Gayle*, 384 F.Supp. 1022, N.D.Tex. 1974.

Who may give the oath of office?

Texas Government Code Section 602.002 lists multiple positions that carry the power to administer the oath of office. They include, among others: a judge, retired judge, or clerk of a municipal court or court of record, as well as a senior judge or commissioner of a court of record; a justice of the peace or clerk of a justice court; a notary public; a legislator or retired legislator; a peace officer, if the oath is administered when the officer is engaged in the performance of his duties and the administration of the oath relates to his duties; and a city secretary or city clerk in a matter pertaining to the official business of the city. TEX. GOV'T CODE §602.002. Please review the statute for a complete list of those authorized to give the oath of office. In addition, the mayor of a general law type A city may administer oaths of office. TEX. LOC. GOV'T CODE §22.042(d).

What is the oath of office?

Article XVI, Section 1, of the Texas Constitution outlines the official oath of office as follows:

“I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.”

In addition, before taking the oath of office and beginning the duties of office, each elected or appointed officer required to take the oath must also subscribe to the following statement:

“I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.”

TEX. CONST., art. XVI, § 1.

For city officials and appointed officers, the sworn statements are then filed with the city secretary.

How long does an officer or official have to take the oath after taking office?

All elected and appointed officers must take the oath of office before entering upon the duties of their offices. TEX. CONST. art. XVI, § 1(a)-(b). A state statute provides the same for officials and officers in type A general law cities. TEX. LOC. GOV'T CODE §22.005.

What happens if an elected official fails to take the oath of office?

While the law is not completely clear on the issue, a failure to take the oath of office by an elected official could mean that the official never took office. In a type A general law city, a

municipal office is considered vacant if the officer-elect fails to qualify for his or her office within thirty days after the election. *Id.* §22.007. In order to qualify, an officer-elect must (among other things) take the oath of office. *State v. Jordan*, 28 S.W.2d 921, 922, 924 (Tex. Civ. App.--Amarillo 1930, writ dism'd); Tex. Att'y Gen. Op. No. LO-96-056, p. 2 (1996). Thus, if an elected official in a type A general law city fails to take the oath of office within thirty days after being elected, his or her position may be considered vacant.

For type B and some type C general law cities, the statutes known as the “borrowing provisions” (found in Chapter 51 of the Texas Local Government Code) may mean that the same reasoning applies in those cities. The statutes provide that a type B general law city has “the same authority, duties, and privileges” as a type A city, unless it is in direct conflict with another state law that specifically applies to type B cities. TEX. LOC GOV'T CODE §51.035. Similar language gives the governing body of a type C city with between 501 and 4,999 inhabitants the same authority and duties as a type A city, unless a conflicting law applies specifically to type C cities. *Id.* §51.051. Because there is no similar provision for type B or C cities, the consequences of an elected official failing to take the oath may apply in a type B or C city as they do in a type A city.

Home rule cities should confer with the city's attorney, because the charter will control whether a failure to take the oath within a specific period of time creates a vacancy.

Note that—if the elected official is an incumbent—he or she may continue to serve, even if the office is declared vacant for failure to qualify. The Texas Constitution provides that, in most cases, an elected official continues to serve past the end of his or her term until replaced, usually by election or appointment. TEX.CONST. art. XVI, §1. Thus, if a councilmember were already serving in a council position and for some reason was found not to have qualified within the required time period, he would still be a member of the governing body under this “holdover” provision, because he was not replaced.