

Volunteers

Volunteers are an asset to any organization, including city government. While volunteers are able to provide essential services that a city may not be able to afford, several employment-related issues may arise in connection with volunteers. This memo is meant to provide a brief overview of some of the legal issues to consider when accepting volunteer services from an individual.

Liability for volunteers

A city should be cognizant of its responsibilities involving volunteers. Although a volunteer is generally not considered a city employee, a volunteer's action may create liability for a city. A frequently asked question is whether a governmental unit is liable for the actions of persons who act on its behalf, but are not paid employees. The Texas Tort Claims Act waives sovereign immunity for certain actions of governmental employees.¹ The Act defines an employee as "a person, including an officer or agent, who is in the paid service of a governmental unit."² The Texas Supreme Court concluded that an unpaid "volunteer" is not generally considered an "employee" for whose acts the governmental unit can be held liable.³

However, a city may be liable for 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.⁴ There may also be a basis for liability stemming from the negligent screening and hiring of volunteers.⁵

Liability to volunteers

To the extent authorized by the Texas Tort Claims Act, 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.⁶ A city owes the same duty of care to volunteers as to others on city property.⁷ Consequently, a city may want to limit its liability for negligence by obtaining workers' compensation insurance coverage for volunteers. A city can usually opt to cover volunteer fire fighters, police officers, emergency medical personnel, and "other volunteers" that are specifically named under the city's workers' compensation insurance.⁸ With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals.⁹

Also, many liability insurance policies have a standard exclusion provision denying coverage for claims arising from injuries to volunteers if the city has purchased workers' compensation

¹ TEX. CIV. PRAC. & REM. CODE § 101.021(1).

² *Id.* at § 101.001(2).

³ *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994) (regarding a volunteer deputy sheriff).

⁴ *El Paso Laundry Company v. Gonzales*, 36 S.W.2d 793 (Tex.Civ.App. 1931, writ' dism'd).

⁵ *Doe v. Boys' Club of Greater Dallas*, 907 S.W.2d 472 (Tex. 1994).

⁶ TEX. CIV. PRAC. & REM. CODE § 101.021.

⁷ *City of Austin v. Selter*, 415 S.W.2d 489 (Tex.Civ.App.--Austin 1967, writ ref'd n.r.e.).

⁸ TEX. LAB. CODE § 504.012.

⁹ *Id.* § 408.001.

insurance for employees but not for volunteers. Thus, cities should consider obtaining workers' compensation coverage for volunteers. For more details, consult your insurance or risk pool representative.

Taxes

In return for volunteer services, some cities provide various benefits to its volunteers in the form of reimbursements, stipends, or other payments. Generally, a volunteer who provides services without compensation is not considered to be receiving "gross income" when the money he receives is meant to be a reimbursement. However, if the reimbursement is greater than the expenses, the difference is considered gross income and must be reported.¹⁰ And, if a volunteer is actually being paid for his services, he may ultimately lose his "volunteer" status.

The treatment of any payments for federal payroll purposes depends on whether the volunteer is an "employee" or "non-employee" for tax purposes, and what the types of payments are. Generally, a volunteer is not considered an employee of a city. However, a volunteer may be considered an employee if a city retains the "right to direct and control the volunteer's performance, not only as to the results to be accomplished, but also as to the methods by which the results are accomplished."¹¹ In determining whether a city retains a right to control over a volunteer, the Internal Revenue Service looks at facts that fall within three categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties.¹² For example, if a person volunteers to create a database for the city, and the city does not provide any instruction or benefits, then most likely the person is a volunteer rather than an employee. However, if the employer oversees the project, provides instructions, the tools and materials, and sets the hours of operation, then that person might be considered an employee. This is a fact question. Thus, a city should consult with local legal counsel to ensure that the volunteer is truly a "volunteer" and not an employee for payroll purposes.

¹⁰ Rev. Rul. 80-99 and Rev. Rul. 67-30

¹¹ IRC § 3121(d)(2)

¹² *Id.*