

Volunteers

Can city councilmembers volunteer for the city?

It depends on the situation. A city councilmember may volunteer for a volunteer fire department or other organization that protects the health, safety, or welfare of the city if the city council adopts a resolution allowing city councilmembers to do so.¹ But the attorney general has stated that a city official cannot volunteer for the governmental entity that it governs if the volunteer position would be: (1) supervised and controlled by the governing body; (2) the volunteer activity would normally be done by a compensated employee; and (3) the activity was not temporary or intermittent.² Thus, a city councilmember may be able to volunteer to plant flowers or help with a park clean up day, but would likely be precluded from regularly performing the duties of the city secretary or a utility employee.

Can city employees volunteer at the city?

A city employee may volunteer for the same city, but only if her job duties are not the “same type of services” as her volunteer work.³ The Department of Labor (DOL) defines “same type of services” to mean similar or identical services. In general, DOL would consider the duties and other factors contained in the definitions of occupations in the Dictionary of Occupational Titles in determining whether the volunteer activities constitute the “same type of services” as the employment activities. For example, police officers can volunteer different work (non-law enforcement related) in city parks and schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed.

Can a city pay for its volunteer police officers’ insurance or certification?

Some cities have concerns that providing TCLEOSE certification for their reserve officers will endanger the officers’ status as volunteers. *Cleveland v. City of Elmendorf* specifically held that TCLEOSE certification, which is required for peace officers engaged in law enforcement in Texas, is not a benefit that violates an officer’s status as a volunteer.⁴

Cities also often ask about insurance for reserve officers. Title 29 C.F.R. section 553.106 specifically states that workers’ compensation is considered to be a “reasonable benefit” that does not jeopardize an individual’s *volunteer status*. Also, state law requires a city to insure or otherwise cover each volunteer police force member against any injury

¹ TEX. LOC. GOV’T CODE § 21.003.

² Op. Tex. Atty. Gen. No. JC-0371 (2001); *see also* Op. Tex. Atty. Gen. No. JM-0386 (1985) (holding that an alderman cannot be on the city’s police reserve force).

³ 29 C.F.R. § 553.103.

⁴ 388 F.3d 522 (5th Cir. 2004).

suffered in the course and scope of the volunteer's duties performed at the request of the city.⁵

Is the city liable for the actions of volunteers?

The Texas Tort Claims Act waives governmental immunity for certain actions of governmental employees, but does not waive governmental immunity for volunteers who are unpaid.⁶ Therefore, the city is arguably not liable for the actions of its volunteers.

However, liability can be predicated on the actions of a paid employee who supervised volunteers even if liability cannot be predicated on the actions of the volunteers themselves.⁷ Cities may be liable for acts of employees and volunteers 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.⁸ There may also be a basis for liability stemming from the negligent screening and hiring of volunteers.⁹

Is the city liable if a volunteer is injured while performing work for the city?

To the extent authorized by the Texas Tort Claims Act, cities 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.¹⁰ Cities owe the same duty of care to volunteers as to others on city property.¹¹ Consequently, cities may want to limit their liability for negligence by obtaining workers' compensation insurance coverage for their volunteers. Cities can opt to cover volunteer fire fighters, police officers, emergency medical personnel, and "other volunteers" that are specifically named under the cities' workers' compensation insurance.¹² With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals.¹³

⁵ TEX. GOV'T CODE § 614.192.

⁶ TEX. CIV. PRAC. & REM. CODE § 101.021(1); 101.001; *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994) (regarding a volunteer deputy sheriff).

⁷ *Smith v. University of Texas*, 664 S.W.2d 180 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

⁸ *El Paso Laundry Company v. Gonzales*, 36 S.W.2d 793 (Tex. Civ. App.—El Paso 1931, writ dismissed).

⁹ *Doe v. Boys' Club of Greater Dallas*, 907 S.W.2d 472 (Tex. 1994).

¹⁰ TEX. CIV. PRAC. & REM. CODE § 101.021.

¹¹ *City of Austin v. Selter*, 415 S.W.2d 489 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

¹² TEX. LAB. CODE § 504.012.

¹³ *Id.* § 408.001.

LM-May 2010