

**Legal Q&A**  
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**May a mayor or councilmember be compensated for his or her service?**

Yes, although the manner may be different depending on the type of city. In a type A general law city, the city council may set the mayor and councilmembers' compensation at any level it decides. TEX. LOC. GOV'T CODE § 141.001. The governing body of a Type B general law city has the same authority. *Id.* §§ 51.035 (known as the "borrowing provision" and providing that a Type B city has the same authority, duties, and privileges as a Type A city, unless there is a conflicting state provision regarding only Type B cities); 141.002 (authorizing the governing body to set the compensation of *appointed* officers).

In a Type C general law city, state law provides that the mayor and councilmembers are entitled to receive \$5 a day for each regular meeting and \$3 a day for each special meeting. *Id.* § 141.003. Alternatively, (1) the city council in a Type C city of 2,000 or greater may set the salary of the mayor and councilmembers not to exceed \$1,200 and \$600 a year, respectively; and (2) the city council in a Type C city of less than 2,000 may set the mayor's salary not to exceed \$600 a year. *Id.*

In a home rule city, state law provides that the city council may set the amount of compensation for the mayor and councilmembers. *Id.* § 141.004. The city's charter may also address this issue. TERRELL BLODGETT, TEXAS HOME RULE CHARTERS 45 (2d. ed. 2010); *see also City of Corpus Christi v. O'Brien*, No. 13-08-00267-CV, 2009 WL 265281 (Tex. App.—Corpus Christi Feb. 5, 2009, pet. denied) (mem. op.) (involving claim that mayor and councilmembers received compensation in excess of the level provided in the charter because of their participation in city's health insurance plan). In a city with a population of 1.9 million or more, the city council may set the compensation by ordinance. TEX. LOC. GOV'T CODE § 141.005.

**Are there limitations regarding when the level of compensation for the mayor or a councilmember may be set or changed?**

In a Type A general law city, the compensation of the mayor and councilmembers should be set on or before January 1 preceding a regular municipal election, and the compensation may not be changed (increased or decreased) during the officer's term. *Id.* § 141.001; *see also City of Uvalde v. Burney*, 145 S.W. 311, 312 (Tex. Civ. App.—San Antonio 1912, no writ) (concluding that the timing requirement is merely directory, but the prohibition against changing the compensation during the term is mandatory); Tex. Att'y Gen. Op. No. JM-442 (1986) (concluding that mayor was prohibited from receiving a salary increase during the term for which the mayor was elected). Under the borrowing provisions, a Type B and arguably a Type C general law city are under the same limitations. *Id.* §§ 51.035–.052.

State law does not address when a home rule city may set or change the mayor and councilmembers' compensation, but a city's charter may address the issue. *See, e.g., Cunningham v. Henry*, 231 S.W.2d 1013 (Tex. Civ. App.—Texarkana 1950, writ ref'd n.r.e.) (finding that city charter provision prohibiting salary increases during a term invalidated increase in mayor's salary).

**What other issues should be considered when deciding whether, or how much, to compensate the mayor and councilmembers?**

The city should consider whether the compensation of the mayor and councilmembers is provided for in the budget because “[a]fter approval of the budget, the governing body may spend municipal funds only in strict compliance with the budget, except in an emergency.” TEX. LOC. GOV'T CODE § 102.009(b). The city should consider whether the compensation of the mayor and councilmembers will be supported or opposed by the citizens and voters of the city. Finally, a city should consider the administrative duties that accompany the compensation of the mayor and councilmembers, as well as the impact this may have on the personal liability of such officials, both of which are discussed below.

**What are some of the administrative duties that accompany the compensation of the mayor and councilmembers?**

For federal income tax purposes, a city will likely treat a councilmember who receives compensation as an employee,\* which often means withholding income taxes, social security, and Medicare taxes, issuing a W-2, and retaining an I-9.

One Internal Revenue Service (IRS) publication explains as follows:

In general, if an individual performs services as an official of a governmental entity and the remuneration received is paid from governmental funds, the official is an employee and the wages are subject to Federal employment taxes. Examples of public officials include, but are not limited to, . . . mayor . . . .

With the exception of fee-based officials, . . . , elected and appointed officials are generally employees for Federal income tax withholding purposes. Under section 3401(c) of the Internal Revenue Code, these officials are subject to income tax withholding. Generally, these individuals are also common-law employees for social security and Medicare purposes under section 3121(d)(2). Any individual covered under a Section 218 Agreement between the employer and the Social Security Administration is subject to social security and Medicare withholding under section 3121(d)(4).

INTERNAL REVENUE SERVICE, FEDERAL, STATE AND LOCAL GOVERNMENTS: QUICK REFERENCE GUIDE FOR PUBLIC EMPLOYERS 7-8 (Feb. 2013), *available at* [http://www.irs.gov/pub/irs-tege/public\\_employers\\_outreach\\_guide.pdf](http://www.irs.gov/pub/irs-tege/public_employers_outreach_guide.pdf).

TML attorneys advise that a city maintain a U.S. Citizenship and Immigration Service I-9 Form for a mayor or councilmember who receive compensation for their service. Employers are required to complete and retain a Form I-9 for every employee hired for employment in the United States. 8 C.F.R. § 274a.2; *id.* § 274a.1 (defining “employee” to mean “an individual who provides services or labor for an employer for wages or other remuneration”; defining the term “hire” to mean “the actual commencement of employment of an employee for wages or other remuneration”; and defining the term “employment” to mean “any service or labor performed by an employee for an employer within the United States”). While it may not be intuitive that this requirement would apply to elected officials, some cities report that the IRS interprets the requirement to apply to elected officials.

\*It is important to note, there is no “one-size-fits-all” answer to the question of whether an elected official is an “employee” of the city. Instead, a city – with the assistance of its legal counsel – must consider the particular legal context in which the issue arises. For instance, while an elected official is generally an employee for federal tax purposes, an elected official is not treated as an employee under the Fair Labor Standards Act. *See* 29 U.S.C. §203(e)(2).

### **Does the receipt of compensation by the mayor and councilmembers impact the officials’ personal liability?**

Yes, under some existing case law. Pursuant to the Texas Tort Claims Act, an employee who is sued individually may file a motion requiring the plaintiff to dismiss them from the suit and name the governmental entity as a defendant in their place, so long as the employee is being sued for an act done in the course and scope of employment. TEX. CIV. PRAC. & REM. CODE § 101.106(f). The term “employee” is defined as “a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.” *Id.* § 101.001(2).

While we find no case in which the Texas Supreme Court has directly addressed the issue of whether a paid elected official is an “employee” for purposes of this statute, at least one intermediate appellate court has concluded that is the case. *See Texas Bay Cherry Hill v. City of Fort Worth*, 257 S.W.3d 379, 398 (Tex. App.—Fort Worth 2008, no pet.) (concluding that a city councilmember in the “paid service of a governmental unit” is an employee for purposes of Section 101.106); *see also Hopkins v. Strickland*, No. 01-12-00315-CV, 2013 WL 1183302 at \*2 (Tex. App.—Houston [1st Dist.] March 21, 2013) (“It is undisputed that [the City of] Liverpool, a governmental unit, employed Strickland as mayor at the relevant time.”). Thus, providing at

least nominal pay to members of the governing body may entitle them to the same protections as paid employees if they are in the course and scope of their work as elected officials, and may lead to the quick dismissal of such individual defendants from a lawsuit.

**Is a city permitted to provide for direct electronic fund transfer of compensation to the mayor and councilmembers?**

Yes. A city may establish and operate an electronic funds transfer system to transfer the following into the mayor or councilmembers' accounts: (1) net pay; (2) payments for travel and subsistence; and (3) any other form of compensation, payment or reimbursement. TEX. LOC. GOV'T CODE § 144.001. The mayor and council must request in writing to participate in the electronic transfer system. *Id.* § 144.002.

**Is an elected official who receives compensation a city employee for purposes of the federal Patient Protection and Affordable Care Act?**

The law is not clear on this point. Under the federal Patient Protection and Affordable Care Act (Act), it's important for a city to know the number of full-time or full-time equivalent employees it has because employers with fewer than 50 such employees are exempt from the new employer responsibility provision. This new provision requires, among other things, that employers provide their employees insurance or be subject to certain penalties (sometimes referred to as "play or pay"). 26 U.S.C. § 4980H. Determining whether an individual is an employee for these purposes requires examining the number of hours served. If your city chooses to forego this analysis, the safest position is to treat elected officials who receive compensation as employees for purposes of the Act. Implementation of the play or pay provision has been delayed until 2015; however, cities should be working with their legal counsel now to calculate their number of employees in order to plan for key decisions they will need to make to comply with the Act.

**Will a councilmember avoid a dual office holding problem by refusing or relinquishing the compensation associated with the office?**

No. Article XVI, Section 40 of the Texas Constitution generally prohibits one person from holding two civil offices of emolument (i.e., two public offices for which either pay or some other benefit, compensation or thing of value is received in exchange for the service). If a state statute or the city council fixes a salary or other form of compensation for the office of councilmember, the compensation attaches to and is inseparable from the office. Thus, a councilmember cannot return the pay or benefits of the office, or simply refuse to accept them, in order to accept and hold a second civil office of emolument. *Morrison v. City of Fort Worth*, 138 Tex. 10, 155 S.W.2d 908, 910 (1941) ("[W]e think it is the law in this State that a public officer cannot estop himself from claiming his statutory salary by agreeing to accept, or by accepting, less than the salary provided by law."); Tex. Att'y Gen. Op. No. JM-333 (1985) (concluding that a municipal judge could not serve as county auditor even though he refused to accept the compensated attached to the office of municipal judge); *but see* Tex. Att'y Gen. Op. No. GA-0250 (2004) (explaining that Texas Government Code Section 574.005(b) allows a local officer

to serve on a state agency governing body without compensation and thus detaches compensation from office).

**May the city council appoint a close relative of a councilmember to fill a vacancy on the council if the governing body receives compensation?**

No. The state nepotism statutes prohibit a public official from appointing, confirming the appointment of, or voting on the appointment of a close relative to a *paid public position*. TEX. GOV'T CODE ANN. § 573.041; *see also id.* § 573.002 (providing that a close relative under nepotism laws is someone who is related to the official within a prohibited degree by consanguinity or a prohibited degree by affinity). Cities with fewer than 200 people are not subject to the state nepotism statutes. *Id.* § 573.061(7). However, a city may adopt local prohibitions in its home-rule charter, ethics ordinances or personnel policies that would prevent appointing a close relative.