

BUSINESS ASSISTANCE GRANT PROGRAM

Guidelines and Criteria

Section 1 Grantor

Simonton Development Corporation

Section 2 Purpose



To enhance retail and commercial activity in the City of Simonton by providing financial assistance to local businesses for the purpose of improvements to building façades, signs, and property.

Additionally, to promote enhancements which create a visually attractive municipal environment which will serve to attract consumers and investors to the City of Simonton. Such determination of "visually attractive" shall be at the sole discretion of the Simonton Development Corporation.

Section 3 Types of Grants

FACADE IMPROVEMENT:

Improvements to storefronts, including, but not limited to, items such as painting, reconstruction, and aesthetic improvements.

A cash-matching grant up to a maximum match of \$2,000

SIGN IMPROVEMENT:

New signs, renovation of existing signs, and removal of abandoned or unsightly signs

A cash-matching grant up to a maximum match of \$2,000

PROPERTY IMPROVEMENT:

Items such as, but not limited to, landscaping, lighting, and demolition of unsafe, abandoned, and/or substandard buildings

A cash-matching grant up to a maximum match of \$2,000

Section 4 Grant Description

Grants are Reimbursement Grants, such grants being a cash match for funds disbursed by an applicant. The amount of grant will be in amounts not to exceed those provided in Section 3, above. In-kind contributions may not be used as a part of applicant's match. Only applicant's cash expenditures for labor and/or materials may be utilized as a cash match.

Section 5
Funding Cycle

A funding cycle shall be an annual period from October 1st to September 30th. For each funding cycle the Corporation shall designate an amount of funding for that cycle. Upon depletion of those funds the Corporation will be under no obligation to fund additional grants. Likewise, the Corporation is under no obligation to establish future funding cycles.

Section 6
Eligibility

- A. Any new or existing business within Simonton's city limits
- B. New and existing buildings and facilities within Simonton's city limits
- C. Owners of vacant business buildings within Simonton's city limits
- D. Business buildings also serving as a residence are not eligible.

Section 7
Guidelines

- A. Proof of ownership will be required for owned facilities.
- B. An applicant operating in a leased facility must apply jointly with the property owner. Copies of a lease agreement and proof of ownership will be required.
- C. Grant funding will be limited to two (2) of the three (3) grant types to any one applicant during a grant-funding cycle.
- D. Improvements shall be made in accordance with project drawings, specifications, and/or information provided in the application, such having been previously approved by the Corporation. Failure to do so will render the applicant ineligible to receive grant funding. Any modifications must first receive written approval of the Corporation or its designee. Failure to do so will likewise render the applicant ineligible to receive grant funding.
- E. Applicant is obligated to obtain all necessary permits related to the improvement project. Failure to do so will render the applicant ineligible for grant funding.
- F. The improvements as presented in the application must be completed in their entirety. Incomplete improvements will not be eligible for grant funding.
- G. Upon approval of a grant application, and during the implementation of the improvements, a representative or representatives of the Corporation shall have the right of access to inspect the work in progress.

- H. Improvements may not commence prior to having received written approval for a grant.
- I. Improvements must be completed within six (6) months of receiving written grant application approval from the Corporation.
- J. Having received grant funding in a previous funding cycle does not preclude the same applicant from being eligible for grant funding in subsequent grant funding cycles.
- K. Current and/or past members of the Simonton Development Board of Directors are not excluded from eligibility to apply and receive a grant(s). However, in the case of a current Director, such Director shall abstain from voting upon an application(s) which they have submitted.

Section 8
Applicaton and Approval

- A. Application must be made on a form provided by the Corporation, and may be obtained at the Simonton City Hall, 35011 FM 1093, Simonton, Texas 77476, or online at www.simontontexas.org
- B. Applications will be considered on a monthly basis and must be submitted by the tenth (10th) day of the month.
- C. Monthly consideration of applications may be delayed in the event the Corporation fails to seat a quorum for a meeting, elects for any reason not to hold a meeting, requires additional time for application review, or elects for any reason not to consider grant applications at any particular meeting.
- D. One (1) original and one (1) copy of an application must be submitted.
- E. The Corporation reserves the right to utilize whatever outside resources it deems necessary for assistance in its decision-making process.
- F. Applicants will be notified in writing of the Corporation's approval or disapproval of an application.
- G. The Corporation may approve a grant application with certain provisions, conditions, or other requirements as it may from time to time deem appropriate.
- H. **The Corporation reserves the right to exercise its absolute discretion in determining approval or disapproval of an application, whether or not such discretion may be deemed arbitrary, or without basis in fact.**

Section 9
Standards

The following factors, among such others as the Corporation may deem necessary, shall be considered in determining whether or not to award a grant.

- A. The amount of additional funding being provided by the applicant beyond the required cash match
- B. The amount of current deterioration or blight the improvement will alleviate
- C. Traffic levels of roadways adjacent to the improvements
- D. The visual attractiveness and/or historic significance of the improvements as determined by the Corporation's exercise of its absolute discretion in such determination
- E. Health and safety issues which may be mitigated by the improvements
- F. Level of improvement the project will make to the overall appearance of the facility
- G. Thoroughness of information provided in the application
- H. Productive life of the improvements

Section 10
Funding

- A. Funding will only be provided upon the completion of the project in accordance with 7D, above.
- B. Applicant shall provide the Corporation with written notification of project completion. Such notification shall include
 - 1. A letter signed by the applicant stating that all improvements have been completed in accordance with the application and/or approved modifications
 - 2. Copies of paid receipts for materials and/or labor. Also, if applicable, copies of permits and inspection reports
 - 3. In the case of plants included in landscaping, a signed letter stating the recipient warrants the life of the plants for a period of one (1) year after the date of grant payment -- Such warranty letter shall provide that upon notice from the Corporation, the grant recipient shall repay to the Corporation that amount of grant funding having been provided for plants not in place or alive within the warranty period.

- C. Upon receipt of a Notification of Completion letter, an on-site inspection shall be made by a representative or representatives of the Corporation to confirm completion in accordance with the application and/or approved modifications. Such inspection shall take place within thirty (30) days of the receipt of a Notification of Completion letter. Such inspection shall not be construed in any way as the Corporation's attestation as to the quality, safety, or reliability of the improvements, such being the sole responsibility of the grant recipient.
- D. At the next regular Corporate meeting following the on-site inspection, a written statement by the inspector/inspectors shall be provided to the Corporation testifying either to (1) compliant project completion, or (2) non-compliant project completion. In the event of a non-compliant report, the Corporation will review the findings, and if in agreement with the report, a letter shall be issued to the applicant stating the area/areas of non-compliance. Failure to correct the area/areas of non-compliance within sixty (60) days of the date of the "non-compliant letter" shall be cause for the cancelation of grant funding.
- E. At the regular Corporate Board meeting at which a "compliant" inspection report is provided, funding will be authorized. Issuance of payment shall take place within seven (7) days of the funding authorization.

Section 11
Amendment

The Corporation reserves unto itself the right to amend these Guidelines and Criteria at it may from time to time find desirable.

Section 12
Severability

The laws of the State of Texas shall govern the interpretation, validity, performance, and enforcement of this Business Assistance Grant Program. If any provision of this Program shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Program shall not be affected by such determination.

Section 13
Notice

- A. **The provision or delivery of these guidelines and criteria to an interested party does not constitute an offer of an improvement grant to that or any party.**
- B. **The adoption of these Guidelines and Criteria does not limit the discretion of the Corporation to decide whether to provide or not provide a grant to an applicant, and/or elect not to grant the total amount of eligibility, which absolute rights of discretion the Corporation reserves unto itself, whether or not such discretion may be deemed arbitrary or without basis in fact.**

- C. The adoption of these Guidelines and Criteria does not create any property, contract, or other legal rights in any person to have the Corporation provide grant funding.**

- D. The Corporation, its employees, its agents, and designees do not testify to the quality and safety of construction of a project receiving grant funding, both during project implementation or afterward. Therefore, the Applicant, by requesting grant funding, does attest to holding harmless the Simonton Development Corporation, its employees, agents, and designees for any and all claims for personal and/or property damages to themselves or others as a result of the planning, construction, and subsequent existence of any project which has received application approval, or has received actual grant funding.**

RESOLUTION NO. 012009A

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SIMONTON, TEXAS APPROVING THE CREATION OF THE CITY OF SIMONTON DEVELOPMENT CORPORATION, AND APPROVING ARTICLES OF INCORPORATION FOR THE CORPORATION.

WHEREAS, the voters of the City of Simonton, Texas, on November 4th, 2008, did approve the levying of a sales and use tax for economic development under the provisions of Section 4A of the Development Corporation Act of 1979 (the Act), as amended, and

WHEREAS, the Act provides that the City Council establish an economic development corporation to receive and administer the sales and use tax revenues, and

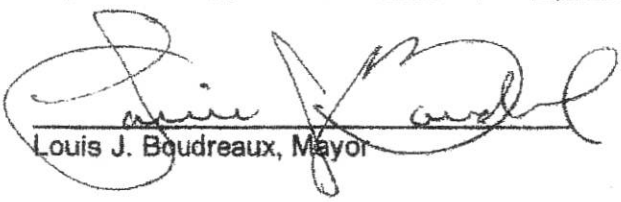
WHEREAS, the establishment of a corporation requires the adoption of Articles of Incorporation.

NOW THEREFORE, BE IT RESOLVED:

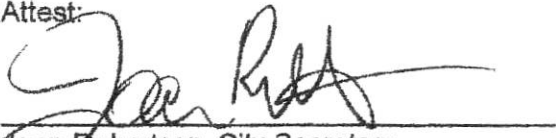
Section 1. That the City Council of the City of Simonton, Texas does hereby approve the creation of the City of Simonton Development Corporation, an economic development corporation, to act on behalf of the City of Simonton in furthering the public purpose of promoting the economic development of the City of Simonton in accordance with the provisions of Vernon's Ann. Civil Statutes, Article 5190.6, Sect 4A of the Development Corporation Act of 1979., and

Section 2. That the City Council of the City of Simonton does likewise hereby approve the Articles of Incorporation for the City of Simonton Development Corporation as attached, and made a part of this Resolution for all purposes.

Signed and approved, this 20 day of JANUARY, 2009.


Louis J. Boudreaux, Mayor

Attest:


Joan Robertson, City Secretary

Resolution4A

BUSINESS ASSISTANCE GRANT PROGRAM

APPLICATION To SIMONTON DEVELOPMENT CORPORATION

Please Note

1. Please submit original and one copy
2. All parties having ownership in the business or facility must be parties to this application
3. Applications must be submitted jointly by the lessee and lessor for business operating in leased facilities
4. Applications may be submitted to: **Bill Knesek**
Southwestern Economics, LLC
3602 Glenmeadow
Rosenberg, TX 77471
Or
City Secretary
City of Simonton
PO Box 7
35011 FM 1093
Simonton, TX 77476
5. Applications must be submitted by the 10th of the month in order to be considered that month
6. For additional information or assistance, please contact: **Bill Knesek**
281-238-0577

(PLEASE PRINT OR TYPE)

1. Applicant/Applicants' name/s _____
2. Type of grant being requested: Façade____ Sign____ Property____
3. Business name: _____
4. Mailing address: _____
5. Applicant contact: Phone _____ Fax _____ Emai _____
6. Physical address of property for which a grant is being requested:

7. The business is: Sole proprietorship___ Partnership___ Corporation___ Other _____
8. Brief description of principal business activity (*Attach additional sheets if necessary*)

9. Is property owned or leased by the applicant? Owned _____ Leased _____
A. If owned, please provide proof of ownership such as deed or tax receipt

B. If leased please provide:

1. Copy of lease agreement

2. Name of lessor

3. Address of lessor _____

4. Lessor contact: Phone _____ Fax _____ Email _____

10. Number of employees: _____

11. A description of proposed project (Attach additional sheets if necessary)
(Items such as plans, specifications, drawings, photographs, etc)

A. For projects involving paint, paint samples must be included

B. For sign projects a color illustration of the sign must be included

12. Total cost of project \$ _____

A. Please provide a minimum of two estimates

13. Amount of grant funds being requested \$ _____

14. Estimated start date of project: _____

15. Estimated completion date: _____

16. Any additional information applicant wishes to supply concerning this grant application

I (We) the undersigned do hereby acknowledge and/or certify, as the case may be, the following:

1. Prior to submission of this application, a copy of the Guidelines and Criteria” for the Business Assistance Grant Program has been obtained, reviewed, and clearly understood.
2. That the submission of this application does not create any property, contract, or other legal rights in any person or entity to have the Grantor provide grant funding.
3. That if grant funding is approved, full compliance will be maintained with all the provisions of the “Guidelines and Criteria”, and/or special provisions attached as a part of the grant, and that failure to do so can be grounds for ineligibility to receive previously approved grant funding.
4. That the Simonton Development Corporation reserves unto itself its absolute right of discretion in deciding whether or not to approve a grant relative to this application, and/or grant less than the total amount of eligibility, whether or not such discretion is deemed arbitrary or without basis in fact.
5. That the Simonton Development Corporation, its employees, its agents, and its designees will be held harmless by me/us for any and all claims for personal and/or property damages to themselves or others as a result of the planning, construction, and subsequent existence of the project (s) that have been approved for, or received grant funding.
6. That the Simonton Development Corporation, its employees, its agents, and its designees shall not be liable for any debts incurred in association with the execution and completion of the subject project(s) of this application.
7. That the laws of the State of Texas shall govern the interpretation, validity, performance, and enforcement of the “Guidelines and Criteria”, and this application, and that if any provision(s) of these should be held invalid or unenforceable, the validity and enforceability of the remaining provisions of these shall not be affected thereby.
8. That the Simonton Development is a public entity, and as such is subject to the Open Records Act of the State of Texas.
9. That the information provided in this application has been provided voluntarily, and may be relied on as being true and correct, and the Simonton Development Corporation may rely on the signatures affixed hereto as if the same had been signed by Applicant(s) before a Notary Public or other authorized officer permitted by law to administer oaths and to take acknowledgements.

Signed this ____ day of _____, 20__

(Print Applicant Name)

(Applicant Signature)

Signed this ____ day of _____, 20__

(Print Applicant Name)

(Applicant Signature)

Signed this ____ day of _____, 20__

(Print Applicant Name)

(Applicant Signature)

8e

Employment Law Manual for Texas Cities



2025 Editors

Stephanie Huser, Legal Counsel

Evelyn Njuguna, Director of Legal Services

Updated April 2025

The following questions and answers provide a layperson's explanation of state and federal employment laws as they apply to Texas cities and city officials and are intended to provide general guidance on the issues. The Texas Municipal League Legal Department is always available to answer questions from city officials. You can contact us at (512) 231-7400 or email us at legalinfo@tml.org. While many people worked on this document, two attorneys previously contributed greatly to the substance of this handbook: Kathryn Hoang, who is now a municipal judge in Dallas, Texas, and Laura Mueller, who is now city attorney of the City of Dripping Springs.

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CHAPTER 1—Hiring and Termination

Who is responsible for hiring city employees?

The type of city will determine who is responsible for hiring city employees. In most cases, in a general law city, the city council is the final hiring authority.¹ In a Type A general law city, most city employees are appointed or hired by the city council.² However, for employees who are not city “officers,” as listed in Section 22.071 of the Local Government Code, the city council is authorized to delegate initial hiring authority to the mayor, city manager, or any other city official. For city employees in Type A cities that are also city officers, such as the city secretary or city treasurer, the city council is the hiring authority.³ While the mayor may appoint an individual to fill a vacancy in an “office,” the appointment is subject to the city council’s confirmation.⁴ For nepotism purposes, a Type A city council has final hiring authority for all officers and employees, even if it has delegated hiring authority to another officer or employee, such as an administrator or department head.⁵

In a Type B general law city, Section 23.051 of the Local Government Code states that the board of aldermen, sometimes called the city council, appoints city officers. The commission (governing body) of a Type C general law city appoints or hires all city officers and employees under Section 24.051 of the Local Government Code.

If a general law city has adopted the city manager form of government under Chapter 25 of the Local Government Code, the city council or commission is required to hire a city manager⁶ and must also adopt a hiring policy by ordinance for each office and employee.⁷ This policy could include granting primary hiring authority to the city manager.⁸

The hiring authority in a home rule city is normally determined by the city charter. Section 26.041 of the Local Government Code gives a home rule city the authority to create offices and to hire individuals to fill the created positions. If the city charter does not state how a city officer or employee is appointed or hired, then the city may adopt an ordinance or hiring policy that is consistent with the charter stating how employees and officers will be hired. The charter, ordinance, or policy may give the city council hiring authority, or may delegate it to a city manager, department head, or whichever officer or employee the charter or policy states.

Do I have to post notice of or advertise a city job opening?

No state or federal law requires a city to post or advertise a job opening, but most attorneys recommend posting job openings for most positions. An applicant, or potential applicant, who

¹ TEX. LOC. GOV'T CODE chs. 22, 23, & 24.

² *Id.*

³ *Id.*

⁴ *Id.* § 22.010.

⁵ Tex. Atty. Gen. Op. No. DM-2 (1991).

⁶ *Id.* § 25.026.

⁷ *Id.* § 25.051.

⁸ *Id.*

is not hired, may bring a charge of discrimination or a lawsuit against the city based on a claim of discrimination. Illegal discrimination in hiring includes not hiring someone on the basis of race, religion, gender, and other factors outlined in Title VII of the federal Civil Rights Act and the Texas Commission on Human Rights Act (TCHRA) found in Chapter 21 of the Labor Code.⁹ Under both Title VII and TCHRA, actions by a city that are not purposely discriminatory can be an issue if their impact on the hiring process means that persons of a certain race, gender, religion, or other protected class are kept out of the hiring process.¹⁰ Not posting a job or posting it in a limited area can be evidence of discrimination if the applicant can show that only certain applicants were interviewed and that the applicants are not the protected class.¹¹ Failing to post a job is not enough for a discrimination claim by itself, but posting a job may be evidence in a city's argument that its hiring practices are nondiscriminatory.

A city's hiring practice of merely advertising an opening to a certain geographic area, or merely by word of mouth, for example, may be used as evidence of discriminatory intent if a claim is filed against the city.¹² To avoid a discrimination claim, an employer should advertise a job opening so that it reaches a large cross-section of the population. Advertising in a general circulation newspaper and on the internet are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper as long as it is pursuant to a consistent policy of doing so. If a city does not have a hiring policy, including a policy regarding the advertisement of a job opening, the city should seriously consider adopting one. Before advertising a job vacancy, an employer should ensure it contains a written job description that provides objective qualifications and responsibilities necessary to perform the job.

Any job posting or notice should be devoid of any reference to sex, race, national origin, age or any other protected class. It should also include those qualifications that are required by the position or, if qualifications are preferred but not required, the job posting should make that clear. The Equal Employment Opportunity Commission (EEOC), the federal agency that investigates and enforces employment discrimination, has assisted in litigation where an employer included qualifications that it later did not require the employed applicant to meet thereby denying a job to a minority applicant that did meet the qualifications.¹³ Also, state law makes it an unlawful employment practice to include discriminatory preferences in job postings where the preference is based on race, color, disability, religion, sex, national origin, or age.¹⁴

If a city chooses to advertise a position, advertising in a general circulation newspaper or internet classifieds are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper so long as it is pursuant to a consistent policy of doing so. The Texas Municipal League offers a free job posting site for city members which can be found at

⁹ See 42 U.S.C. § 2000e et seq.; TEX. LAB. CODE Ch. 21.

¹⁰ See *id.* § 2000e-2(a); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

¹¹ *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. (Tex.) 1982).

¹² See *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 529 (6th Cir. 2001); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998); *Thomas v. Wash. Cty. Sch. Bd.*, 915 F.2d 922, 924-26 (4th Cir. 1990).

¹³ *Autry v. Fort Bend Independent School District*, 704 F.3d 344 (5th Cir. (Tex.) 2013).

¹⁴ TEX. LAB. CODE § 21.059.

<https://tml.careerwebsite.com/>. The State of Texas also has a job posting site at www.workintexas.com.

By taking the time to adopt a hiring policy and to advertise a job opening to a wide range of people, an employer increases its chance of hiring the best qualified person for the job. In addition, an employer may avoid a discrimination claim or lawsuit.

What is discrimination in hiring?

Federal and state laws, and sometimes local ordinances, prohibit hiring practices that discriminate on the grounds of age (40 or older), disability, race (including protective hairstyles),¹⁵ color, religion, sex (including gender identity and sexual orientation),¹⁶ pregnancy, citizenship, union activity,¹⁷ military service,¹⁸ or national origin¹⁹ (a thorough description of antidiscrimination laws that can be implicated in hiring, including Americans with Disabilities Act, Age Discrimination in Employment Act, Pregnancy Discrimination Act, Title VII, and more can be found in other chapters of this manual). State and federal enforcement agencies, such as the Texas Workforce Commission's Civil Rights Division and the federal Equal Employment Opportunity Commission (EEOC) investigate whether an employer's recruitment is wide enough to attract a diverse group of candidates.²⁰ The EEOC provides educational materials for employers to help them comply with federal law but also has the authority to investigate any claim made against an employer and enforce these laws against an employer, including a city, if it finds a violation. Because the EEOC is an integral part of the discrimination claim process and has authority over each city as an employer, following the EEOC's guidance is helpful for a city as an employer to avoid discrimination claims. EEOC describes its view on discrimination in hiring on its website at <http://www.eeoc.gov/laws/practices/index.cfm>.

The Texas Workforce Commission, the Texas counterpart to the EEOC, also provides guidance on hiring and other employment issues based on state and federal law and cases that may be useful to cities. More information about discrimination can be found at both www.eeoc.gov and www.twc.state.tx.us.

Should a city adopt a hiring policy?

A hiring policy is not required by state or federal law, but adopting a valid, nondiscriminatory hiring policy can provide evidence of nondiscriminatory hiring practices if a charge of discrimination is filed by an unsuccessful applicant. These policies are helpful because they can regulate the process that each hiring authority within the city must go through to hire employees. If the process is followed by the city council or hiring authority and the policy is

¹⁵ TEX. LAB. CODE § 21.1095.

¹⁶ See *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination "because of sex" under Title VII of the Civil Rights Act.).

¹⁷ TEX. LAB. CODE Ch. 101.

¹⁸ 38 U.S.C. § 4311 (2021).

¹⁹ See, e.g., 41 U.S.C. § 2000e; TEX. LAB. CODE Ch. 21.

²⁰ Available at <https://www.eeoc.gov/overview>; available at <https://www.twc.texas.gov/programs/civil-rights>.

nondiscriminatory, then the city can present the process as evidence that it did not discriminate on the basis of race, religion, gender, or other protected class as prohibited by federal law.

Can a city require an applicant for employment take a drug test before hiring the applicant?

The Supreme Court has upheld the random drug testing of employees in safety sensitive positions and the drug testing of employees upon adequate individualized suspicion of wrongdoing.²¹ However, a federal appellate court found that a city policy on drug testing, as a condition of a job offer, was unconstitutional as applied to a candidate for a library page position because the city did not demonstrate a special need to screen the prospective page for drugs.²² No similar cases have been brought in the Fifth Circuit, which governs Texas, however based on the Supreme Court cases that have approved random drug testing of employees who are in safety sensitive positions do not differentiate between applicants and employees. As such, the best practice is to drug test only applicants for safety or security sensitive positions after a job offer is made but before the applicant takes the position.²³ City personnel should consult with their city attorney if considering any pre-employment drug testing of applicants for employment.

What can a city ask about prior criminal activity on a job application or in an interview?

At most, a city may ask about convictions but should not ask about arrests. Discrimination charges based on asking about arrest rather than conviction have been upheld by the EEOC who investigates and enforces such claims as having a disparate impact on minority applicants.²⁴ The analysis is that arrests should not be used to show guilt of certain crimes or activities that could affect one's ability to perform a particular position, and that there may be a greater effect on minority applicants if arrests are taken into account.²⁵

Some cities have adopted ordinances restricting the requirement of information about a potential employee's criminal background and an employer's ability to act on the information. For example, the City of Austin adopted a Fair Chance Hiring Ordinance in March of 2016 that states that an employer with 15 or more employees in the City of Austin may not: 1) publish or cause to be published information about a job that states or implies that an individual's criminal history automatically disqualifies the individual from consideration for the job; 2) solicit or otherwise inquire about the criminal history of an individual in an application for a job; 3) solicit criminal history information about an individual or consider an individual's criminal history unless the employer has first made a conditional employment offer to the individual; 4) refuse to consider employing an individual who submits an application for a job because the individual did not provide criminal history information before the individual received a conditional employment offer; and 5) refuse to hire, promote or revoke an offer of employment or promotion because of the individual's criminal history unless the employer has a good faith

²¹ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 630 (1989).

²² 42 U.S.C.A. § 12114; *Lanier v. City of Woodburn*, 518 F. 3d 1147 (9th Cir. 2008).

²³ *Id.*

²⁴ See, e.g., <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

²⁵ See <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> for the EEOC's position and guidance.

belief that the individual is unsuitable for the job based on an individualized assessment of the individual's criminal history.²⁶

Under the ordinance, an employer who uses an individual's criminal history to deny employment or a promotion must inform the individual in writing that the decision to deny employment or a promotion was based on the individual's criminal history. Consequently, questions about an applicant's criminal history may only be asked after a conditional job offer is extended.

Note that although a city may implement similar hiring practices for its own organization, in light of recent legislation, a city should consult with its city attorney before adopting an ordinance applicable to all employers within the city. In 2023, the Texas Legislature passed a bill, H.B. 2127, that among other things, expressly preempts cities from adopting or enforcing ordinances regulating employment leave, hiring practices, breaks, employee benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than the city.²⁷

If a city believes a conviction could be useful in determining whether an individual can perform job duties well, a city should ask about not only convictions but also should ask about guilty or no contest pleas to get a more complete picture. The Texas Workforce Commission has provided an example question for criminal history inquiries: "During the past (fill in the number) years, have you ever been convicted of, or have you pled guilty or no contest to, a felony offense? If yes, please explain in the space below. (Answering "yes" to this question will not automatically bar you from employment unless applicable law requires such action.)"²⁸ To avoid a discrimination-in-hiring claim, the city that uses conviction information to make hiring decisions should ensure that any information used to make a hiring decision is related to the job duties.

Can a person related to a councilmember or mayor be hired by the city?

State nepotism law states that a city may not hire an individual who is related within a prohibited degree to the city's final hiring authority.²⁹ The final hiring authority is the city council in general law cities, but in a city that has adopted a Chapter 25 city manager form of government, the safest course of action is to treat the city manager and the city council both as final hiring authorities for purposes of nepotism. In a home rule city, the city council, city manager, or a department head could be the final hiring authority. This difference in hiring authority between a general law city and a home rule city exists because a general law city council can always change any delegation of hiring authority, making it always the final hiring authority. In contrast, a hiring authority appointed by charter can only be changed by charter amendment election under Chapter 9 of the Local Government Code.

²⁶ City of Austin, Texas: Code of Ordinances §4-15-1

²⁷ TEX. LAB. CODE § 1.005; Tex. H.B. 2127 (88th R.S. 2023), available at <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB02127F.pdf#navpanes=0>.

²⁸ 2024 Texas Guidebook for Employers, TEXAS WORKFORCE COMMISSION, available at <https://www.twc.texas.gov/sites/default/files/busops/docs/texas-guidebook-for-employers-2024.pdf>.

²⁹ TEX. GOV'T CODE ch. 573.

The prohibited degree is within three degrees by blood or two degrees by marriage.³⁰ Hiring someone who is related to a member of council within the prohibited degree is not allowed, even if the related member abstains from voting on their employment or appointment.³¹

It is permissible, under the continuous employment exception, for an employee related to a member of the city council to continue his/her employment with the city if the individual has been working for the city for a certain amount of time (six months or a year depending on the situation) before the related councilmember is appointed or elected to office.³² A home rule charter, city ordinance, or other city policy can be more restrictive than state law.

Can an employee be hired to work more than one job within the city?

A city's personnel policy will ultimately determine if an employee is allowed to hold more than one paid position within the city. There is no law that prevents an employee from holding two distinct positions, each at a different rate of pay, excluding those restricted due to nepotism or conflict of interest concerns. It is also possible for an employee to work for the city and hold another job for which the city would be considered a joint employer, such as a job worked through a subcontractor or temp staffing agency. Cities should be aware that all hours worked in either scenario count toward the 40-hour per week limit for non-exempt employees, and the city must pay overtime for any additional hours. A city and employee can reach an agreement in advance as to how both the regular rate of pay and overtime are calculated.

Can I terminate a poor performing employee?

Cities often struggle with the question of when and how to discharge a poorly performing employee. Even though Texas is an "at-will" employment state, where anyone can be discharged for any nondiscriminatory reason, many federal and state laws protect employees. These laws often prohibit a city from discharging an employee for fear of litigation for discrimination. Sometimes it seems that there are some people you just can't discharge, no matter what their failings are. Many times, supervisors hold back on discharging an employee in fear of a lawsuit. They ask themselves, "How can I safely discharge a poor performer who's pregnant, or on medical leave, or who just filed a worker's compensation claim?" The reality is that any time an employee is terminated the employee can sue the city for discrimination or the violation of some right. However, there are a number of steps you can take to minimize the risks associated with terminating an employee. The following provides some basic information to consider prior to terminating an employee:

- (a) Employment-at-will: First, determine whether the employee is "at-will" or whether the employee has a contract, a collective bargaining agreement, or is subject to civil service. Cities should also review ordinances, resolutions, charters, and other documents as these have been found to sometimes create an employment contract as well. Also, the Local

³⁰ TEX. GOV'T CODE § 573.002.

³¹ *Id.* § 573.041.

³² *Id.* § 573.062.

Government Code puts some limitations on how Type A cities can terminate certain employees who are also officers.³³ If one of these issues arises then the procedure outlined by these items should be followed.

- (b) Documentation: Make a paper trail. This is one of the most important items involved in terminating an individual. Usually, employees are not terminated for a one-time offense, but for poor performance based on violations of personnel policies. Ideally, there will be objective documentation detailing what performance measures the employee has not met or personnel policies he has violated. Written documentation that shows that the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discrimination claim based on some characteristic of the employee, this kind of documentation is good evidence if sued. Also, if an employee is aware of problems, he may be less likely to take action against the city when he is disciplined or terminated because it will be less of a surprise. Finally, keep in mind that there are special documentation requirements for police officers.
- (c) Consistency: Ensure that similarly situated employees are treated the same. For example, if one employee is late every day and is never disciplined but another employee is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure the city's personnel policies and discipline procedures lend themselves to objectivity and consistency. However, there could be a rational basis for treating some employees differently if they are in different departments or have different duties.
- (d) Discrimination and Retaliation: Are there any legitimate claims that the employee or applicant could make? Could an injured employee make a claim under the Family Medical Leave Act, the Americans with Disabilities Act, or Workers' Compensation? Are they part of another protected class? Look at the above acts plus USERRA, the Texas Whistleblower Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action. Also, keep in mind that the EEOC, who is the first handler of discrimination charges in most cases, has started sending discrimination charges to cities and other employers by electronic mail.

With regard to employees with employment agreements, cities should be aware of a process in state law that prohibits a city from paying more than the contracted amount to a current employee or a terminated employee unless the city has an open public meeting regarding the matter and states at the hearing why the payment is being made, the exact amount, and the source of the payment. This process affects all contractual employees but can have a special effect on city managers.³⁴

In addition, if a city is a member of the TML Intergovernmental Risk Pool, it is recommended that the city contact the "Call before You Fire" program at (800) 537-6655 before taking any major action.

³³ TEX. LOC. GOV'T CODE § 22.077.

³⁴ TEX. LOC. GOV'T CODE § 180.007.

Can we terminate an employee if the employee is on workers' compensation leave or other injury leave?

When an employee is injured on the job, the city has three main legal concerns: workers' compensation, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). First, if the employee qualifies for FMLA and has a serious medical condition that warrants time off, the city must give the individual these benefits.³⁵ However, a city policy could require that FMLA and workers' compensation be taken concurrently.³⁶ The next issue involves when the employee wants to return to work or is released by his doctor with some limitations. If the doctor's note indicates some limitations, the city must determine if, under the ADA, the individual has a disability and can perform the essential functions of the job with or without a reasonable accommodation. If the individual cannot perform the essential functions of the job, the city must then determine if there is a reasonable accommodation under the ADA that would enable the employee to perform his or her job without the accommodation being an undue burden on the city.³⁷ If the city decides that no reasonable accommodation can be provided and the individual must be let go, then the city needs to ensure that it has appropriate documentation of this fact because the individual could have a claim under workers' compensation or under the ADA. For more information see the FMLA and ADA sections of this manual.

Rights under the ADA, FMLA, and state workers compensation law could be a factor in litigation if an employee is terminated after exercising these rights. This type of disciplinary action should be discussed with local counsel before taking place.

Can a city terminate an employee who applies for public office or otherwise participates in political matters?

An employee cannot be disciplined or discharged for running for public office under state law.³⁸ However, if an employee's position is funded by federal grants, then the person may be prohibited from running in partisan elections under the federal Hatch Act.³⁹ Also, if the individual is elected, they may have to resign from city employment because of dual office holding restrictions that prohibit an individual from holding two paid public offices at the same time or because the two positions are incompatible.⁴⁰

Other than candidacy, Texas courts generally allow cities to impose reasonable restrictions on political speech engaged in by its employees. For instance, the City of Dallas Charter contained numerous political activity restrictions, including but not limited to the following:

³⁵ 29 U.S.C. § 2601-2654.

³⁶ 29 C.F.R. § 825.702(d)(2).

³⁷ 42 U.S.C. §§ 12101-12117.

³⁸ TEX. LOC. GOV'T CODE § 150.041.

³⁹ 5 U.S.C. § 1502.

⁴⁰ TEX. CONST. ART. 16, § 40; (Note that the concept of common-law incompatibility is derived from a series of court cases and attorney general opinions that have prohibited the holding of multiple public positions in particular situations. Whether the holding of two public offices would violate common-law incompatibility requires a factual consideration of the duties of each position and must be considered on a case-by-case basis).

- (a) No city employee may publicly endorse a candidate for city council;
- (b) No employee may contribute to a city council campaign;
- (c) No employee may wear city council campaign literature at work or in city uniform;
- (d) No employee may circulate petitions for city council candidates, although he may sign such petitions.⁴¹

The Fifth Circuit held that prohibiting an employee from publicly endorsing a candidate was unconstitutional.⁴² However, the additional restrictions were not an infringement on First Amendment rights.⁴³ Prohibiting political activity while on duty is proper, being reasonably necessary to the conduct of city business. However, in *Villejo v. City of San Antonio*, the court held that a city's directive barring employees from participating in any campaign for an "issue" or "measure" related election regarding the city violated the employee's First Amendment rights.⁴⁴

Can a city take adverse employment action against an employee because of the employee's speech?

While government employees do not surrender their constitutional right to free speech by accepting public employment, this right is not unlimited.⁴⁵ A city may take appropriate adverse employment action against an employee for their speech depending on the type of speech the employee is engaging in.⁴⁶

If an employee speaks pursuant to the employee's official duties, the employee does not speak as a citizen and his or her statements are not protected under the First Amendment.⁴⁷ Additionally, speech related to workplace grievances is generally not protected.⁴⁸

When an employee speaks as a citizen (also known as private speech) on matters that are of "public concern," the employee's speech is generally protected.⁴⁹ Whether an employee's

⁴¹ *Wachsman v. City of Dallas*, 704 F.2d 160, 161–62 (5th Cir. 1983).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Villejo v. City of San Antonio*, 485 F. Supp. 2d 777 (W.D. Tex. 2007).

⁴⁵ *Lane v. Franks*, 573 U.S. 228 (2014).

⁴⁶ *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

⁴⁷ *Garceiti v. Ceballos*, 547 U.S. 410, 421 (2006) (finding that an assistant district attorney who wrote a memo attacking the veracity of an affidavit used in a criminal prosecution did not engage in protected speech as he was speaking as an employee and not a private citizen).

⁴⁸ *Connick v. Myers*, 461 U.S. 138 (1983) (finding that a questionnaire circulated among employees concerning internal office affairs was a workplace grievance not protected by the First Amendment); *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 383 (5th Cir. 1999) (police officer's grievance against the police chief concerning police misconduct did not qualify for the First Amendment protection); *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986) (an employee's statements in a secret diary criticizing the chief of police were not protected because they addressed a "wholly intragovernmental concern").

⁴⁹ *Pickering*, 391 U.S. 64 at 574. "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane*, 134 S. Ct. at 2380 (finding that truthful subpoenaed testimony provided in a court of law is a matter of public concern); *Browner v. City of Richardson, Tex.* 855 F. 2d 187, 191092 (5th Cir. 1988) (the disclosure of misbehavior by public officials is

speech pertains to a matter of public concern, will depend on the context, form, content of the statement and the employee's intention regarding the statement.⁵⁰

But there are instances in which an employee's speech even if related to a matter of public concern would not be protected by the First Amendment. The courts have clarified that even though an employee may be speaking on a matter of public concern, an employee's right to speak on such matters must be weighed against a government employer's interests in having a disruptive-free workplace.⁵¹ As such, if a government employer's interests in promoting the efficiency of the public services it performs through its employees outweighs an employee's private speech on a matter of public concern, then that speech would not be protected. Further, an employee's speech on purely personal matters is not protected speech.⁵²

However, cities should keep in mind that state law imposes additional protections on employee speech. The Texas Whistleblower Act prohibits a government employer from taking adverse employment action against a public employee who in good faith reports a violation of law by the employing entity or another public employee to an appropriate law enforcement authority.⁵³ This means that although it's possible that such employee report to a law enforcement agency may be considered work-related speech that may otherwise not be protected by the First Amendment, the Texas Whistleblower's Act protects said employee from adverse employment action. More information about the Texas Whistleblower's Act can be found in Chapter 11.

a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department).

⁵⁰ *Connick*, 461 U.S. at 154.

⁵¹ *Id.*; see e.g., *Rankin v. McPherson*, 483 U.S. 378 (1987) (a non-public facing clerical employee's comment made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President and in a context critical of the President's policies outweighed the employer's interest in maintaining an efficient operation of the office).

⁵² See e.g., *City of San Diego v. Roe*, 543 U.S. 77 (2004) (finding that First Amendment did not prevent the city from terminating a police officer after the officer sold videos of himself stripping out of a police uniform and engaging in sexually explicit acts); *Graziosi v. City of Greenville, Miss.*, 775 F.3d 731, 734 (5th Cir. 2015) (finding that although a police sergeant spoke as a private citizen when she posted social media comments critical of her police chief to the mayor's public Facebook, her speech did not address a matter of public concern).

⁵³ TEX. GOV'T CODE § 554.002.

CHAPTER 2—Independent Contractors

What is the difference between an independent contractor and an employee?

This is one of the most frequent employment law questions received by the TML legal department. It is also one of the most complicated. Simply calling a person doing work for the city an “independent contractor” is not enough to make a worker an independent contractor. While federal and state statutes frequently define the term “independent contractor,” most of the guidance needed to answer this question comes from court opinions and federal regulations.

In March 2021, the U.S. Department of Labor (DOL) issued its first-ever formal regulation that defined the standard for determining whether a worker is considered an employee or an independent contractor.⁵⁴ The regulation provided a framework in which employers could evaluate a worker’s status using a five-factor test, focusing on an employer’s right to control the work and the worker’s opportunity for profit or loss. Subsequently, in January 2024, the DOL rescinded the 2021 rule and issued its final rule revising its prior guidance.⁵⁵ The new rule, the Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA), became effective on March 11, 2024, and provides for a six-factor test that the DOL noted was consistent with longstanding judicial precedent.⁵⁶ The final rule continues to affirm that a worker is not an independent contractor if he is, as a matter of economic reality, economically dependent on an employer for work.⁵⁷ All employers, including cities, are now held to this new rule and should analyze whether a worker is an independent contractor or an employee under the FLSA based on the following six factors:

- (1) opportunity for profit or loss depending on managerial skill;
- (2) investments by the worker and the potential employer;
- (3) degree of permanence of the work relationship;
- (4) nature and degree of control;
- (5) extent to which the work performed is an integral part of the potential employer’s business; and
- (6) skill and initiative.⁵⁸

Additionally, the final rule states that no factor or set of factors among the list has a predetermined weight, and additional factors may be relevant if such factors indicate in some way that the worker is in business for himself, as opposed to being economically dependent on the employer for work.⁵⁹

⁵⁴ 2021 Independent Contractor Status Under the Fair Labor Standards Act Rule, *available at* <https://www.govinfo.gov/content/pkg/FR-2024-01-10/pdf/2024-00067.pdf>

⁵⁵ Independent Contractor Status Under the Fair Labor Standards Act, 89 Fed. Reg. 1,638 (Mar. 11, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-29274.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

For more information the new rule, the DOL has published Frequently Asked Questions website here: <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs#g3>. Some of following questions have been excerpted from the FAQs website.

Are any of the economic reality factors adopted in this rule more important than others when evaluating a worker’s employment status?

No. Different factors might be more or less important in different cases depending on the facts of each individual case. For example, a factor leaning strongly towards one classification outcome (employee or independent contractor status) could be more relevant in the overall analysis for a particular worker than a different factor which might be a closer call. However, this final rule does not categorically weigh certain factors more than others in every case like the 2021 Independent Contractor Rule.

How does the final rule explain “opportunity for profit or loss depending on managerial skill?”

This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker’s economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

How does the final rule explain “investments by the worker and the employer?”

This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers’ labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker’s investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker’s investments do not have to be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if

on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

How does the final rule explain “degree of permanence of the work relationship?”

This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

How does the final rule explain “nature and degree of control?”

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the potential employer's control over the worker include whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose. Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control. As examples of such compliance actions that are not indicative of control, the final rule identifies a publication's requirement that a writer comply with libel law and a home care agency's requirement that all individuals with patient contact undergo background checks in compliance with a specific Medicaid regulation. Actions taken by the potential employer that go beyond compliance with a specific, applicable federal, state, tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. For example, a home care agency's imposition of extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control. More control by the potential employer favors employee status; more control by the worker favors independent contractor status.

How does the final rule explain “extent to which the work performed is an integral part of the employer’s business?”

This factor considers whether the work performed is an integral part of the potential employer’s business. This factor does not depend on whether any individual worker in particular an integral part of the business is, but rather whether the function they perform is an integral part of the business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer’s principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer’s principal business.

How does the final rule explain “skill and initiative?”

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker’s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

When might “additional factors” matter in determining a worker’s employment status?

Under the final rule, additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work. This guidance is identical to guidance provided in the 2021 Independent Contractor Rule and is consistent with judicial precedent.

Under the final rule, does a worker have to satisfy all the economic reality factors to qualify as an independent contractor?

No. Under the economic reality test, no single factor (or set of factors) automatically determines a worker’s status as either an employee or an independent contractor. Instead, the economic reality factors are all weighed to assess whether a worker is economically dependent on a potential employer for work, according to the totality of the circumstances.

Can a worker voluntarily waive employee status and choose to be classified as an independent contractor?

No. Under the FLSA, a worker is an employee and not an independent contractor if they are, as a matter of economic reality, economically dependent on the employer for work. While businesses are certainly able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most suitable for them, if a worker is an employee under the FLSA, they cannot waive FLSA-protected rights

(such as minimum wage or overtime pay). The Supreme Court has explained that permitting employees to waive their FLSA rights would harm other employees and undermine the Act's goal of eliminating unfair methods of competition in commerce.

If a city has questions about worker classifications, who should the city contact?

If a city is trying to determine who is an employee and who is an independent contractor under the law, the city should first contact its city attorney or local legal counsel. For questions about the new rule, the Wage and Hour Division of the Department of Labor may be contacted at (202) 693-0406. The TML Legal Department attorneys may also assist in providing information about the new rule.

Can a worker be an employee for FLSA purposes even if he is an independent contractor for tax purposes?

Because the Internal Revenue Service (IRS) applies its own test to analyze if a worker is an employee or independent contractor for tax purposes, some workers who may be classified as independent contractors for tax purposes may be employees for FLSA purposes.⁶⁰ This could occur if, as a matter of economic reality, the worker is economically dependent on an employer for work.⁶¹

The IRS uses three factors to determine whether an individual is an independent contractor: (1) behavioral control; (2) financial control; and (3) the relationship of the parties.

Behavioral control involves the extent of control over the employee or independent contractor as to how the work is done and what instructions or training is provided.⁶²

Financial control relates to whether the employer provides tools, who buys the equipment and products needed to perform the job, and whether the worker is simply getting paid or might make a profit or loss on the transaction. The timeframe for the employment, whether a set period or indefinite time, is considered.⁶³

The relationship of the parties is also considered. In other words, is there a contract and what benefits, if any, are provided to the worker.⁶⁴

More information on this can be found at: <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

⁶⁰ Myths About Misclassification, DOL.GOV, *available at* <https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail>.

⁶¹ *Id.*

⁶² Behavioral Control, IRS.GOV, *available at* <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Behavioral-Control>.

⁶³ Financial Control, IRS.GOV, *available at* <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Financial-Control>.

⁶⁴ Type of Relationship, IRS.GOV, *available at* <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Type-of-Relationship>.

Can an employee work both as an employee and an independent contractor for the same city?

Yes, but only in very limited circumstances. The Internal Revenue Service (IRS) looks at the job and its duties to determine whether an individual is an employee or an independent contractor.⁶⁵ If an employee performs two different types of services, and one of them meets the independent contractor requirements, the person could be an employee and an independent contractor doing each job.⁶⁶

That being said, this determination should not be made lightly, as the city could be liable for overtime and penalties under the Internal Revenue Code and the Fair Labor Standards Act if it is wrong in allowing a worker to assume both roles. The city may file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, to request an IRS determination of whether an individual worker is an employee or independent contractor.⁶⁷

Should a city give an independent contractor a W-2?

No. An employer is not required to give an independent contractor a W-2 or pay employment taxes on the amount paid to the independent contractor. The city should give the independent contractor a 1099-MISC form for the amount the city pays to an individual so that the person can pay his or her own taxes.⁶⁸

What happens if an employee is misclassified as an independent contractor?

If an employee is misclassified as an independent contractor, a city could owe the federal government, state government, and the individual additional funds. Under the Internal Revenue Code, a city would owe the federal government income tax, unemployment tax, Federal Insurance Contribution Act taxes (including social security and Medicare taxes), and other payments.⁶⁹

Under the Fair Labor Standards Act, a city could owe the employee additional payments if the employee was not paid minimum wage based on the hours required to complete the job and could also owe overtime to the individual if the job took more than 40 hours in a seven day work period and the person is not exempt from overtime.⁷⁰ Other laws, such as the

⁶⁵ Independent contractor (self-employed) or employee?, IRS.GOV, *available at* <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

⁶⁶ Letter from Victoria A. Judson, Div. Counsel/Assoc. Chief Counsel of Tax Exempt & Gov't Entities, to Frank R. Wolf, U.S. Rep. (Sept. 24, 2012), *available at* <http://www.irs.gov/pub/irs-wd/12-0069.pdf>.

⁶⁷ Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, *available at* <https://www.irs.gov/forms-pubs/about-form-ss-8>.

⁶⁸ 26 U.S.C. § 6041A; 2014 Instructions for Form 1099-MISC, *available at* <https://www.irs.gov/forms-pubs/about-form-1099-misc>.

⁶⁹ 26 U.S.C. §§ 3111 (FICA); 3301 (unemployment tax); 3402 (federal income taxes).

⁷⁰ Press Releases: Employee Misclassification as Independent Contractors, DOL.GOV, *available at* <https://www.dol.gov/newsroom/releases?agency=57&state=All&topic=18210&year=all> (noting Department of Labor cases where entities had to pay for misclassification of employees).

Family Medical Leave Act, could be implicated. If the person would have met the definition of an “employee” according to a city’s personnel manual or any benefits contracts, the city may owe the individual benefits such as health benefits and paid time off. Finally, the city may also need to pay unemployment taxes and additional liability insurance in order to cover the person for workers’ compensation purposes.⁷¹

Between 2010 and 2012, about 35,000 workers were misclassified as independent contractors in Texas according to the Texas Workforce Commission and reported by the Legislative Budget Board.⁷² Because this issue is so widespread in Texas, some lawmakers have tried to get laws passed related to misclassification that would create additional penalties.⁷³

However, the IRS provides a safe harbor provision in Section 530 of the Revenue Act of 1978 for when an employer mistakenly classifies an employee as an independent contractor, but only if certain criteria are met.⁷⁴ The criteria include: (1) a reasonable basis for treating the individual as an independent contractor; (2) treating similarly situated workers the same; and (3) filing tax documents for the employer’s independent contractors.⁷⁵ Also, the IRS has a voluntary program under which an employer may avoid some of the past employee tax liability if it has been misclassifying its employees and would like to classify its employees correctly in the future.⁷⁶ A city that takes advantage of the program must properly classify its workers in the future and still pay some of the past employment taxes it missed from misclassifying its employees. The IRS provides additional information on Section 530 relief on its website here: <https://www.irs.gov/government-entities/worker-reclassification-section-530-relief>.

Employers will classify workers as independent contractors partially to find cost savings in personnel, but because of the penalties and costs involved in misclassifying workers, it is important that each employer look beyond possible cost savings and ensure that individuals are properly classified to avoid these costly penalties.

What can a city do to ensure it is classifying its employees and independent contractors correctly?

A city, under the direction of its city attorney, should review its job descriptions and personnel practices as applied to each employee or independent contractor according to the requirements of the IRS and the Fair Labor Standards Act. If the city would like a determination from the IRS, it can file a Form SS-8, Determination of Worker Status for Purposes of Federal

⁷¹ See TEX. LAB. CODE § 204.002.

⁷² Texas State Government Effectiveness and Efficiency Report, *available at* http://www.lbb.state.tx.us/Documents/Publications/GEER/Government_Effectiveness_and_Efficiency_Report_2015.pdf.

⁷³ See <http://www.texastribune.org/2015/03/15/groups-try-again-misclassification-bills/>; TEX. H.B. 1054 (88th Leg. 2023) *available at* <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB1054>.

⁷⁴ IRS PUB. 1976 (REV. 05-07), *available at* <http://www.irs.gov/pub/irs-pdf/p1976.pdf>.

⁷⁵ Section 530 of the Revenue Act of 1976.

⁷⁶ *Voluntary Classification Settlement Program*, IRS.GOV, *available at* <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Voluntary-Classification-Settlement-Program>.

Employment Taxes and Income Tax Withholding.⁷⁷

Is a city liable for the acts of an independent contractor while on city business?

Not typically. Section 101.021 of the Civil Practices and Remedies Code states that a city is liable for a tort only if the act is committed by “an employee acting within his scope of employment. . . .”⁷⁸ However, a city may be liable for damages or injuries caused by an independent contractor if the city or its employees exercise sufficient control over the independent contractor.⁷⁹ For example, if city employees direct the use of the motor driven equipment by a subcontractor, a city could be liable for that activity. Is an independent contractor covered by my workers’ compensation insurance?

A city cannot cover an independent contractor under its workers’ compensation coverage, but a city must ensure an independent contractor covers his or her employees under certain contracts.⁸⁰

Resources

Federal State Local Government Tax Information:

<https://www.irs.gov/government-entities/federal-state-local-governments>

IRS Pamphlet on Independent Contractors:

<http://www.irs.gov/pub/irs-pdf/p1779.pdf>

Federal State Reference Guide (tax and employment laws for public entities):

<http://www.irs.gov/pub/irs-pdf/p963.pdf>

Texas Workforce Commission:

<http://www.twc.state.tx.us/businesses/classifying-employees-independent-contractors>

⁷⁷ Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, IRS.GOV, available at <https://www.irs.gov/forms-pubs/about-form-ss-8>.

⁷⁸ See *City of Houston v. Ranjel*, 407 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2013).

⁷⁹ See *County of Galveston v. Morgan*, 882 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *City of El Campo v. Rubio*, 980 S.W.2d 943, 944 (Tex. App.—Corpus Christi 1998, pet. dismissed w.o.j.).

⁸⁰ See TEX. LAB. CODE §§ 504.014; 406.096 (requiring coverage when an independent contractor is involved in a building or construction project).

SECRETARY POLICY & PROCEDURES

I. POLICY STATEMENT

The City Secretary shall be employed by a majority vote of the City Council with the approval of the Mayor, with no stated term of office and shall only be removed from office by a majority vote of the City Council. Compensation for the City Secretary will be set by the City Council. The City Administrator will perform an annual performance review, which will be considered by the City Council when they consider a compensation adjustment.

The City Secretary will be responsible for the maintenance of all records of the City, both physical and electronic; supervises municipal elections; serves as the secretary to the City Council; personnel directory, and performs other duties as may be required.

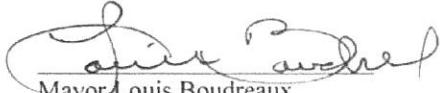
II. ESSENTIAL DUTIES

The City Secretary is responsible for the following duties:

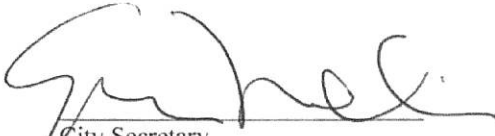
- Maintains custody of the City Seal and official records of the City.
- Serves as records management officer for the City. Issues certified copies of City records and documents.
- Prepares notices and advertises public bids, hearing and meetings.
- Responds to requests for information from the City staff and the general public.
- Attends meetings and public hearings of the City Council.
- Prepares agenda and minutes of all proceedings of the City Council.
- Researches ordinances, resolutions, minutes and other City records.
- Is a conduit for all communications from other municipalities, the county, state and federal government to the Mayor and City Administrator.
- Is responsible for continuing educational pursuits pertinent to the position including attending seminars and training sessions offered by such professional organizations such as TML, HGAC, Texas Municipal Clerks Association or North Texas University.
- Assists in coordinating and conducting municipal elections.
 - Serves as the election judge for absentee voting and early voting by personal appearance.
 - Administers the Oath of Office to newly elected or appointed public officials.
- Position would keep City Hall open five days a week. Is the main contact for all customer service needs.
- Absent of a Deputy City Secretary, the City Secretary will perform the duties of this office.
- Serve as Court Clerk when duty is not delegated to paid vendor or other personnel.
 - Administer to Code Enforcement letters, Complaints, Warnings issued through office.
 - Educated in use of Court forms; summons, docket, etc.
- Serves as administrative support the City Administrator and Mayor.

The above statements are intended to describe the general nature and level of work being performed by individuals employed in this job. They are not intended to be an exhaustive list of all duties and qualifications required of persons in this job. The employer may and reserves its right to change the job description and establish, modify or eliminate job duties and responsibilities and jobs at its discretion with or without notice.

This policy was approved at the Regular City Council Meeting on April 17, 2018.


Mayor Louis Boudreaux

ATTEST:


City Secretary

REVIEW/APPROVALS I acknowledge reviewing this job description.

Employee _____ Date _____



CITY of SIMONTON
DEPUTY CITY SECRETARY
City of Simonton, Texas

II. ESSENTIAL DUTIES

However, not limited to the following:

❖ Clerical Duties

- Archive permanent records.
- Adhere to public records requirements
- Maintain Records Disposition Log.
- Knowledge and use of computer database software
- Greet customers, log messages, if knowledgeable answer questions
- Maintain files
- Open and close City Hall in absence of City Secretary
- Bank deposits and post office upon request
- Semi-monthly municipal code compliance audits
- Monthly municipal court report
- From time to time help organize community events
- Various other clerical duties and requests by City Secretary or Mayor

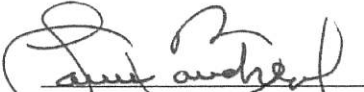
❖ Departmental Objectives

- Building Department
 - Basic training in Simonton's building departmental duties; residential, commercial, small structure, electric, sign, culvert, roadwork, and various other permitting processes
 - Accept permit applications and payments
 - Log all activity all in tracking database on building inspection software
 - Maintain building permit log, sign permit log, culvert permit log, and road work log,
 - As needed, review requests, verify needs and send information to appropriate office
 - Maintain communications between building inspectors and residents
 - Maintain an electric copy and hard copy of all building permits
- Emergency Management Department
 - Support the operation and organization of Simonton Emergency Management
 - Report all activities to City Secretary; use of database software organization and communication tool
 - Update and maintain emergency management plan
 - Facilitate effective communication system between County, city, and residents
 - Trained in operation of AED, maintain monthly audit report, file appropriate reports according to Health and Safety Code chapter 779.
 - Write policies and procedures for Emergency management to be approved by City Secretary and Council.
 - Maintain and prepare reporting requirements from federal, state, and/or county reports or audits.
 - Educate public on emergency management by use of website, email list, volunteer opportunities, etc.
 - Facilitate a list of local volunteers, maintain log volunteer hours on TML insurance
 - When necessary; understand, maintain, and write grant applications for use of emergency management


All Policies and Procedures are subject to change.

- Ensure and facilitate flood pump maintenance, maintenance log, and volunteer training of proper usage.
- Maintain and run updates on city laptops
- Maintain "hand receipts" for City Hall equipment usage
- All other emergency management duties and requests by City Secretary or Mayor
- Other duties as may be assigned by the Mayor or City Council
- Job description subject to change

This policy was approved at the Special City Council Meeting held on 21 of JUNE, 2016.


Mayor Louis Boudreau

ATTEST:


City Secretary S. Elliott



CITY of SIMONTON

DEPUTY CITY SECRETARY JOB DESCRIPTION

for the City of Simonton, Texas

I. POLICY STATEMENT

The Deputy City Secretary shall be employed by the City Council to serve under the direction of the City Secretary. Compensation and hours for the deputy City Secretary will be set by the City Council. The City Secretary will perform an annual performance review, which will be considered by the City Council when it considers a compensation adjustment. Deputy City Secretary should not to go beyond scheduled weekly hours unless directed to do so by the City Secretary or Mayor. In the case weekly hours are going over adjustments to schedule should be made to stay under set hourly schedule.

The Deputy City Secretary will assist the City Secretary and will perform some duties in the City Secretary's absence.

II. ESSENTIAL DUTIES

❖ Clerical Duties

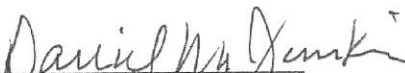
- Archive permanent records.
- Adhere to public records requirements
- Maintain Records Disposition Log.
- Open Meetings
- Facilitate Public Records requests
- Knowledge and use of Asana as task organizer
- Greet residents, log messages, if knowledgeable answer questions
- Maintain files, create folder and mailing labels, make copies, print business cards
- Open and close City Hall in absence of City Secretary
- Bank deposits and post office upon request
- Maintain "to order" office supply list
- Various other clerical duties and requests by City Secretary or Mayor
- Maintain office laptop and use of city email address
- Community event communicator

❖ Departmental Objectives

- Building Department
 - Basic training in Simonton's building departmental duties; residential, commercial, small structure, electric, sign, culvert, roadwork, and various other permitting processes
 - Accept applications and payments
 - Log all activity in asana, on an activity form attached to the building application, and building log

- Maintain sign permit log, culvert permit log, inspection log, road work log
 - As needed, administer tree cutting needs; trimming or removal
 - As needed, review request verify need and send information to appropriate office
 - Maintain communications between building inspectors and residents
 - Maintain an electric copy and hard copy of all building permits
 - Update forms and create policies and procedures for operation of department to be reviewed by City Secretary and City Council
- Emergency Management Department
- Responsible for the operation and organization of Simonton Emergency Management
 - Report all activities to City Secretary; use of asana as organization and communication tool
 - Training in NIMS
 - Update and maintain emergency management plan
 - Facilitate effective communication system between County, city, and residents
 - Trained in operation of AED, maintain monthly audit report, file appropriate reports according to Health and Safety Code chapter 779.
 - Write policies and procedures for Emergency management to be approved by City Secretary and council.
 - Maintain and prepare reporting requirements from federal, state, and/or county reports or audits.
 - Educate public on emergency management by use of website, email list, volunteer opportunities, etc.
 - Facilitate a list of local volunteers, maintain log volunteer hours on TML insurance
 - When necessary; understand, maintain, and write bonds for use of emergency management
 - Ensure and facilitate flood pump maintenance, maintenance log, and volunteer training of proper usage.
 - Maintain and run updates on city laptops
 - Maintain "hand receipts" for City Hall equipment usage
 - All other emergency management duties and requests by City Secretary or Mayor
- ❖ Other duties as may be assigned by the Mayor or City Council
- ❖ *Must be physically able to lift small boxes and perform general office duties*
- ❖ *Job description subject to change*

This policy was approved at the Regular City Council meeting on 20 of January, 2015.


Daniel McJunkin, Mayor

ATTEST:


Shelley Elliott, City Secretary



City of Simonton

sg

Key, Code, & Password Control Policy

Policy & Procedure

Purpose

The purpose of this Key, Code, & Password Policy is to establish reasonable security for members of the City of Simonton community and to ensure the protection of City property through the control of keys to officials, staff, and volunteers.

Personnel Authorized to Issue Keys

Issuance of a key will be authorized by the City Council indicated in Appendix A. Revisions and updates to authorization will be address to City Council. The City Secretary and Mayor is responsible for the maintenance, issuance, and control of all keys. The Mayor and City Secretary have access to the keys through a dual control key box. The Mayor and his designee is assigned the key and the City Secretary and Deputy City Secretary is assigned the code. The Mayor/designee and City Secretary/Deputy City Secretary may only issue keys to established authorizations indicated in Appendix A. Passwords and codes are maintained, issued, and controlled by the City Secretary. The key/code control register Appendix B will be the work order to issue keys, codes, and passwords. This form requires dual control signatures of the Mayor and City Secretary.

Duplication of Keys or Sharing Codes and Passwords

No key will be duplicated except by approval and control of the Mayor & City Secretary office whose responsibility is to maintain, issue, and control all keys and codes. Codes and passwords assigned to the individual should not be shared. The unauthorized duplication of City keys or sharing of codes and passwords can adversely affect the security of persons and property.

Lost/Stolen Keys

1. Lost and stolen keys must be reported to the City Secretary's office.
2. When the key is lost or stolen the locks will need to be modified and replaced.
3. New keys will be ordered and issued to the owners.

Termination, Retirement, Separation from the City

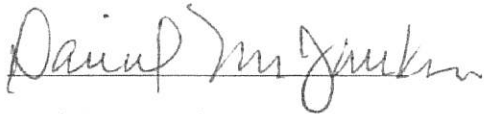
The City requires all keys to be returned to the City Secretary department upon separation, termination, or retirement from the City. The official, staff, or volunteer separation will not be complete until the key(s) assigned have been returned. Any passwords that were assigned to the individual will be changed subsequent to their leave of office.

All Policies and Procedures are subject to change.

Storage of Keys

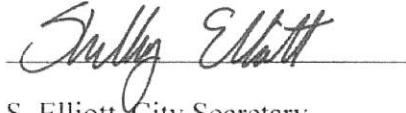
All keys cut and ready for issue will be stored in the City Secretary office lockbox. Codes and Passwords will be archived on the City Secretary computer file titled "City Secretary".

Adopted and approved by Simonton City Council this 26 day of April 2016.



Daniel McJunkin, Mayor

Attest:



S. Elliott, City Secretary

Appendix A

Individuals who are authorized to keys, codes, & passwords:

Position:	Assigned Key(s) and Code(s):	Assigned Password(s):
Simonton Mayor	<ol style="list-style-type: none"> 1. Master Key 2. Front door 3. Front entrance door code 4. Garage door code 5. Council chamber side door 6. Break room (both) 7. Mayor's Office door 8. Key box dual control key 9. Computer safe combo 	<ol style="list-style-type: none"> 1. Mayor simongontexas.gov email address password 2. Mayor dropbox password 3. Others as needed no restriction
Simonton City Secretary Administrator	<ol style="list-style-type: none"> 1. Master Key 2. Front door 3. Front entrance door code 4. Garage door code 5. Council chamber side door 6. Break room (both) 7. City Secretary office 8. City Secretary office desk drawers 9. Deputy City Secretary office 10. Deputy City Secretary desk drawers 11. Key box dual control combo 12. Computer safe combo 	<ol style="list-style-type: none"> 1. No restriction
Deputy City Secretary	<ol style="list-style-type: none"> 1. Front door 2. Front entrance door code 3. Garage door code 4. Break room (both) 5. Deputy City Secretary office 6. Deputy City Secretary drawers 	<ol style="list-style-type: none"> 1. Simonton.texas email account 2. Bureau Veritas account password 3. Deputy City Secretary Dropbox account 4. Deputy office desktop/laptop computer
Simonton Councilmembers	<ol style="list-style-type: none"> 1. Front door 2. Front entrance door code 3. Garage door code 	<ol style="list-style-type: none"> 1. Individual councilmember dropbox account 2. Individual councilmember email account 3. Individual tablet password
Weston Lakes Secretary & Mayor	<ol style="list-style-type: none"> 1. Front door 2. Front entrance door code 3. Weston Lakes office 4. Weston Lakes closet 	N/A
Council Chamber use approval list	<ol style="list-style-type: none"> 1. Front door 	N/A
EDC 4A & 4B Presidents	<ol style="list-style-type: none"> 1. Front door 	N/A

All Policies and Procedures are subject to change.

EOC Coordinator & Board member(s)	1. Front door 2. Garage door code 3. Garage door remote	N/A
Fulshear/Simonton Fire department	1. Garage door code 2. Garage door remote	N/A

