

By **Zindia Thomas**, TML Assistant General Counsel

**Q: Can a city give their employees a holiday bonus?**

**A:** A city can give its employees a holiday bonus if the city plans and provides for the holiday bonus. Cities are prohibited from giving retroactive employee pay increases or bonuses that are not agreed upon before work begins. *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App. —El Paso 1971, no writ). Article III, section 53 of the Texas Constitution states that:

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

In order to not violate this constitutional provision, a city must provide for the holiday bonus (1) in its budget; (2) in its personnel policy; and (3) offer it before the work is performed. A city will need to provide a procedure to earn a bonus to its employees, as well as, provide for holiday bonuses during the budget process. A city will want its legal counsel to review its policies and procedures before offering a holiday bonus to its employees.

**Q: Can the city give their employees a holiday gift?**

**A:** A city can provide holiday gifts to its employees if the city determines there is a public purpose for giving holiday gifts. Generally, a city cannot “grant public money or thing of value ... to any individual” unless it is for a public purpose. *See* Tex. Const. art. III, §52(a). To determine if an expenditure of public funds is for a public purpose, a city must follow this three-step test:

- 1) Ensure that the [expenditure’s] predominant purpose is to accomplish a public purpose, not to benefit private parties;
- 2) Retain public control over the funds to ensure that the public purpose is accomplished and to protect the public investment; and

- 3) Ensure that the political subdivision receives a return benefit. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002).

The attorney general's office has already determined that increasing employee morale or productivity is a valid public purpose. *Tex. Att'y Gen. LO-96-136* (1996). Therefore, a city can provide holiday gifts to its employee as long as the city council determines the expenditure will increase its employees moral or productivity. *See Id.* Just like the bonus above, the city should provide for the holiday gifts in the city budget. Also, a city must make sure that the value of the holiday gifts are under \$50 per gift and that the gift is not cash, a cash equivalent (gift card) or negotiable instrument. *See Tex. Penal Code § 36.10(a)(6); Op. Tex. Ethics Comm'n No. 541* (2017).

**Q: Can the city pay for a holiday party for the city employees?**

**A:** Like holiday gifts, the city can pay for a holiday party for its employees if the city can find a public purpose to spend public funds. *See Tex. Mun. League*, 74 S.W.3d at 383. As mentioned above, the enhancement of employee morale and productivity has been determined to be a valid public purpose. *Tex. Att'y Gen. LO-96-136* (1996). Therefore, a city can pay a reasonable amount for a holiday party for its employees. Again, the city should provide for the holiday party in the city budget. Also, the inclusion of a single guest for each employee to the holiday party paid for by the city is acceptable if it is determined that the goal of boosting employee moral and providing recognition to employees will be accomplished. *Tex. Att'y Gen. LO-88=94* (1994).

**Q: Can the city provide its employees extra days off from work during the holiday season?**

**A:** As discussed above concerning holiday gifts and a holiday party, a city must determine a public purpose to provide its employees extra days office during the holiday season. The attorney general's office has determined that improving employee's morale is a sufficient public purpose for granting time off to employees. *Op. Tex. Att'y Gen. Nos. GA-0303* (2005) at 2; *JC-0239*(2000) at 4. Therefore, a city can provide extra days off for the holiday season. A city should

establish a written policy concerning granting employees extra days office during the holiday season.

**Q: Can the city decorate the city hall with holiday lights, decorations, and/or displays?**

**A:** A city needs to determine two issues in order to decorate the city hall with holiday lights, decorations, and/or displays. First, the city, as it does with all expenditures of public funds, must determine the public purpose and clear public benefits for decorating the city hall during the holidays. *See* Op. Tex. Att’y Gen. No. KP-0116 (2016); *Tex. Mun. League*, 74 S.W. 3d at 384; *Edgewood Indep. Sch. Dist. v. Meno*. 917 S.W.2d 717, 740 (Tex. 1995).

Second, a city needs to make sure that its holiday lights, decorations, and especially displays does not contain a religious aspect that would have the effect of endorsing a particular religious belief in violation of the Establishment Clause of the United States Constitution. The Establishment Clause states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” This prohibition is commonly known as the “separation of church and state” and it applies to cities. The United States Supreme court has ruled on many cases concerning holiday displays and the Establishment Clause. Though these cases are very fact-specific, there is a central guiding principle that a city should use to determine if its holiday display will past muster. If a city has any religious components in a holiday display or decoration, it should determine if the religious components have the effect of endorsing religious beliefs in the context of the display as a whole? *See County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593-94 (1989), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014); *Lynch v Donnelly*, 465 U.S. 668, 672-78 (1984); Op. Tex. Att’y Gen. No. KP-0116 (2016). A city could have a holiday display that contains a Christmas tree, a menorah, a Nativity Scene, Santa Claus and a snowman, as long as the religious aspects of the display are not promoting a specific religious belief and is not the dominant theme of the display. *See Lynch*, 465 U.S. at 681-85. A city should consult its local legal counsel when determining the legality of its holiday lights, decorations and displays.

**Q: Can citizens give holiday gifts to city employees or city officials?**

**A:** Generally, section 36.08 of the Texas Penal Code prohibits a city employee or city official from accepting a gift or benefit from a person subject to his/her jurisdiction. A gift or benefit is considered anything reasonably regarded as a monetary gain or a monetary advantage. However, there are exceptions to the prohibition against providing a gift to a public official or public employee. Tex. Penal Code § 36.10. One exception is a token gift. A token gift is an item that has a value less than \$50 and is not given in exchange for any exercise of official discretion. *Id.* §36.10(a)(6). Cash and negotiable instruments, such as gift cards, are excluded as token gifts. *Id.*; see Tex. Bus. & Comm. Code § 3.104(a) (definition of negotiable instruments); Op. Tex. Ethics Comm’n No. 541 (2017). Therefore, city employees and city official can accept a holiday gift from its citizens, as long as it is considered a token gift.

**Q: Can a city accept holiday donations for an employee holiday party or to decorate the city hall?**

**A:** Whether a city can accept holiday donations, depends on whether the city is a general law city or a home rule city. General law cities must have express authority to accept donations and there are certain circumstances in which a general law city does have such authority. See Tex. Loc. Gov. Code § 332.006 (accept gifts used to support of public recreation facilities and programs); § 331.002 (accept gift of historical significance). However, questions arise whether a general law city has broad authority to accept donations. Some city attorneys think that statutes giving general law city’s authority to “hold” property also gives the authority to accept donations. *Id.* §§ 51.015, 51.034. Others question this argument especially since the attorney general has opined that if the legislature allows entity to receive donations in certain limited instances, then it did not intend to grant such authority generally. See, e.g., Op. Tex. Att’y Gen. No. GA-0562 (2007). Before a general law city accepts a holiday donation, it should (1) consult its local legal counsel in making a final decision about its authority to accept a donation; and (2) exercise such authority in compliance with any requirements in the city’s local ordinances or policies.

A home rule city has express statutory authority to “hold property . . . that it receives by gift, deed, devise, or other manner.” Tex. Loc. Gov. Code § 51.076(a). And this authority is often mirrored in the city charter. See, e.g., *Whitley v. City of*

*San Angelo*, 292 S.W.2d 857, 861 (Tex. Civ. App.—Austin 1956, no writ) (“Sec. 9 of the Charter of the City provides that it is authorized to acquire any character of property by gift.”). Of course, this power should be exercised in compliance with any limitations and requirements in the city’s charter, ordinances, or policies.

**Q: If a city sponsors a holiday party for the city employees on city property in which alcohol is served, can the city be held liable for personal injuries?**

**A:** Yes. Texas cities are generally protected from suit by governmental immunity when performing governmental functions. But under the Texas Tort Claims Act, immunity from suit is waived with regard to governmental functions in two instances. First, a city is liable if the wrongful act, omission, or negligence of an employee operating motor-driven equipment within the scope of employment causes property damage, personal injury, or death, and the employee would be personally liable under Texas law. Tex. Civ. Prac. & Rem. Code § 101.021(1). In addition, a city is liable for personal injury and death caused by a condition or use of tangible personal property or real property if the city would otherwise be liable to the claimant as a private person under Texas law. Tex. Civ. Prac. & Rem. Code § 101.021(2).

If an individual brings a claim arising from a premises defect against the city pursuant to Section 101.021(2) of the Texas Civil Practices and Remedies Code, the city owes the claimant only the duty that a private person owes to a “licensee” on private property, unless the claimant pays for use of the premises. Tex. Civ. Prac. & Rem. Code § 101.022. The duty to a licensee is to not injure him by a willful or wanton act or through gross negligence. *See State Dep’t of Highways v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). If the city charges a fee for a guest to enter a social event held on city property, all guests would be considered “invitees” of the city, and the city would be held to a higher standard of care in protecting their welfare under Texas law. *See Clay v. City of Ft. Worth*, 90 S.W.3d 414 (Tex.App.—Austin 2002, no pet.). The invitee standard of care requires a landowner to use reasonable care to reduce, eliminate, or warn of a condition posing an unreasonable risk of harm about which the landowner knew or should have known. *See Payne*, 838 S.W.2d at 237.

In an instance where a city is determined to have waived immunity from suit for the performance of a governmental function, liability of the city is limited to money damages in the maximum amount of \$250,000 for each person, \$500,000 for each single occurrence for bodily injury or death, and \$100,000 for each single occurrence for injury to or destruction of property. Tex. Civ. Prac. & Rem. Code § 101.023. The Texas Torts Claims Act does not limit the liability of a city for damages arising from its proprietary functions, which are defined as those functions “that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality.” Tex. Civ. Prac. & Rem. Code § 101.0215(b).

Liability questions are notoriously difficult to answer, because they depend so heavily upon the facts of a given situation. A city that has questions about its liability arising from a city sponsored social event should seek guidance from its city attorney, in addition to its liability coverage provider.

**Q: If the city holds a holiday party for employees in which alcohol is served, can the city be held liable under the Texas Dram Shop Act?**

**A:** The Texas Dram Shop Act permits a legal action against commercial providers of alcohol for injuries caused by an intoxicated person. Tex. Alco. Bev. Code § 2.02. (A “dram” is defined as a small drink of liquor, and a “dram shop” is an archaic term for a bar.) A court will find liability only upon proof that the person being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that the person presented a danger to himself or others, and that the intoxication of the person was a proximate cause of the damages suffered. *Id.*

Whether the city is liable under the Texas Dram Shop Act depends largely on whether or not the city is considered to be a “provider” under the statute. “Provider” is defined as “a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to an individual.” Tex. Alco. Bev. Code § 2.01(1). If the city sells alcohol at the event, it could fit the definition of a “provider,” and therefore be subject to liability under the dram shop law.

If the event is bring your own alcohol, or if the city otherwise does not sell any alcohol to guests, the city likely would not be considered to have liability under the dram shop statute. The Texas Legislature declined to enact statutory liability

for social hosts. Further, the Texas Supreme Court has declined to impose a common-law duty on a social host who makes alcohol available to an intoxicated adult guest who the host knows will be driving. *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993). Employers generally have been treated as social hosts by Texas courts and typically will not be held liable, so long as they do not exercise control over the activities of the employee guests at a function held by the employer. See *Estate of Catlin v. General Motors Corp.*, 36 S.W.2d 447 (Tex.App. — Houston [14th Dist.] 1996, no writ); *Whitney Crowne Corporation v. George Distributors, Inc.*, 950 S.W.2d 82 (Tex.App. — Amarillo 1997, writ denied).

In order to avoid liability, cities should consider taking a few precautions before hosting any social function for their employees in which alcohol will be consumed. First and foremost, the city should not sell alcohol. The city should make it clear that the event is strictly for the benefit of the employees, and it is not part of their job duties to attend. In addition, the city should play no role in controlling the service of alcohol to employees at the function, and may want to consider holding the event at an establishment that is licensed to serve alcohol under the Texas Alcoholic Beverage Code. Lastly, the city may want to consider arranging for free transportation home for anyone who feels that they are unable to drive safely, and notify all attendees of that option.