

## **Legal Q &A**

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

### **Q. What is nepotism?**

**A.** Nepotism is the hiring of family or relatives. Anti-nepotism laws prohibit a governmental entity from hiring certain close relatives of a public official. The nepotism laws are contained in chapter 573 of the Government Code. The nepotism statutes prohibit a public official from appointing, confirming the appointment of, or voting for the appointment or confirmation of the appointment of a close relative to a paid public position. Tex. Gov't Code Ann. § 573.041. A close relative under nepotism laws is someone who is related to the official within a prohibited degree by consanguinity (relationship by blood) or a prohibited degree by affinity (relationship by marriage). *Id.* § 573.002.

### **Q. What types of local government officials are subject to the nepotism laws?**

**A.** The nepotism statutes apply to any public official who is the final hiring authority or is a member of the governing body that has final hiring authority. *Id.* § 573.041. A public official is:

- a. an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
- b. an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
- c. a judge of a court created by or under a statute of this state. *Id.* § 573.001(3).

If the governing body is the hiring authority, then nepotism limitations would apply to close relatives of any members of the governing body. However, if an employee, such as the city manager, possesses the final hiring authority, then the nepotism limitations relate to persons who are close relatives of that employee. It should be noted that the determination of who is the hiring authority depends on whether an officer may exercise control over hiring decisions. Op. Tex. Att'y Gen. No. GA-226 (2004). For example, a governing body or public employee would still be considered the hiring authority if either may exercise control over a hiring decision, even though such authority may have been delegated to another individual or entity.

### **Q. What types of actions are generally prohibited under the nepotism law?**

**A.** The nepotism statutes prohibit a public official from appointing, confirming the appointment of, or voting for the appointment or confirmation of the appointment of a close relative of certain public officials to a paid public position or employment. Tex. Gov't Code Ann. § 573.041.

### **Q. What relatives of a public official are covered by the statutory limitations on relationships by consanguinity (blood)?**

**A.** A public official may not vote on the appointment of an individual who is related to the official within the first, second, or third degree by consanguinity (relationships by blood). *Id.* § 573.002. Such relationships occur if the official and the potential hire share either a common ancestry or where one is the descendant of the other. *Id.* § 573.022. The following relatives of a

public official would fall within the prohibited first, second, or third degree of consanguinity: *Id.* § 573.023(c)(1) - (3).

Relatives related within the first degree by consanguinity include a public official's mother, father, sons, and daughters.

Relatives related within the second degree by consanguinity include a public official's brothers, sisters, grandmothers, grandfathers, grandsons, and granddaughters.

Relatives related within the third degree by consanguinity include a public official's great-grandfathers, great-grandmothers, aunts, uncles, nephews, nieces, great-grandsons, and great-granddaughters.

A public official's adopted child is considered to be the child of the public official under the nepotism laws. *Id.* § 573.022(b).

**Q. What relationships by affinity (marriage) are covered by the statutory limitations?**

A. A public official is prohibited from voting on the appointment of an individual who is related to the official within the first or second degree by affinity (marriage). *Id.* § 573.002. Such relationships occur if the official and the potential hire are related to each other by marrying each other or the spouse of one of the individuals is related blood (consanguinity) to the other individual. *Id.* § 573.024(a). The following relatives of a public official would fall within the prohibited first or second degree of affinity: *Id.* § 573.025.

Relatives related within the first degree by affinity include a public official's husband, wife, father-in-law, mother-in-law, sons-in-law, daughters-in-law, stepsons, and stepdaughters.

Relatives related within the second degree include a public official's sisters-in-law (brother's spouse or spouse's sister), brothers-in-law (sister's spouse or spouse's brother), spouse's grandmothers, spouse's grandfathers, spouse's granddaughters, and spouse's grandsons.

**Q. What actions must a public official take if he or she has a nepotism conflict?**

A. If a governing body member has a nepotism conflict, neither the governing body nor its members may employ or contract with a close relative of that member, unless there is a specific statutory exception allowing such an action. *Id.* §§ 573.041, .061. Similarly, if a city manager or other officer who has final hiring authority has a nepotism conflict, the governing body may not appoint or vote for the individual who is the close relative of that city officer unless there is a specific statutory, or possibly a city charter exception that allows such an action. *Id.* State law does not require any specific procedural steps or documentation of a nepotism conflict.

**Q. Do the nepotism laws apply to cities with a population of less than 200?**

A. No. The nepotism statute does not apply to cities with fewer than 200 people. *Id.* § 573.061(7). However, a city may adopt local prohibitions in its home-rule charter, ethics ordinances, or personnel policies that would prevent hiring a close relative.

**Q. May a close relative be appointed to an unpaid position?**

A. Yes. The nepotism laws apply to paid positions only. A paid position is one that is directly or indirectly *compensated* from public funds or fees. *Id.* § 573.041; Tex. Att’y Gen. LO-96-10. If the individual holding the position is merely reimbursed for actual expenses, it is not a paid position.

**Q. May other members of a governing body vote to hire a person who is a close relative of a public official if the official with the nepotism conflict abstains from deliberating and/or voting?**

A. No. Other members of the governing body may not vote to hire a person who is a close relative of a public official. The abstention of a public official with the nepotism conflict does not relieve the remaining members from the prohibition against hiring a close relative of another public official. Op. Tex. Att’y Gen. No. JC-184 (2000).

**Q. Who is considered the hiring authority for purposes of potential nepotism violations?**

A. For nepotism purposes, the hiring authority is the individual or entity that may exercise control over the hiring decision. Op. Tex. Att’y Gen. Nos. GA-415 (2006); GA-226 (2004). If the governing body is the hiring authority, then nepotism limitations would apply to close relatives of any of the members of the governing body. If an employee, such as the city manager, possesses the hiring authority, then the members of the governing body may not hire persons who are close relatives of that employee.

**Q. May a city council or a city manager delegate the power to hire to avoid a nepotism problem?**

A. The “applicability of the nepotism law depends on whether an officer or the governing body may exercise control over hiring decisions.” Op. Tex. Att’y Gen. No. DM-2 (1991) at 1. A city council would still be considered the hiring authority if it could exercise control over a hiring decision, even though it delegated the hiring decision to another person or entity by ordinance. In one instance, the attorney general reviewed a city council’s attempt, by city ordinance, to delegate the hiring authority for city staff to a city administrator. The attorney general concluded that this delegation did not relieve the members of the city council from being considered the hiring authority for purposes of the nepotism statutes. *Id.*

Texas law distinguishes between the power of a home-rule city to delegate hiring authority through its city charter versus a delegation that is done by city ordinance. *Id.* If the delegation of the hiring authority is contained in the city charter, it is recognized for nepotism purposes as a valid delegation of the hiring power. However, if a city simply delegates the hiring authority by ordinance, it would not, for nepotism purposes, change who was considered the hiring authority. Op. Tex. Att’y Gen. Nos. JC-336 (2001); DM-2 (1991). This conclusion is based on the fact that the council could amend or repeal an ordinance at any time, while it would take an election to amend a city charter. For example, the attorney general has concluded that the nepotism statutes did not preclude a city from hiring a relative of a city council member where the city charter provided that the city manager was the final hiring authority and the council members reserved

no authority to participate in the hiring decision. Op. Tex. Att’y Gen. Nos. GA-595 (2008); O-5274 (1943).

**Q. Do the nepotism laws apply to the appointment or hiring of an independent contractor by the governing body if the contractor is a close relative of an official?**

A. Yes. The nepotism laws prohibit the appointment or hiring of an independent contractor by the governing body if the contractor is a close relative of one of the members of the governing body. Nonetheless, the nepotism prohibition would not prohibit the governing body from executing a contract with a corporation that employs the close relative unless the corporation is in actuality the “alter ego” of an individual who is closely related to an official. Tex. Att’y Gen. LO-88-44.

**Q. Do the nepotism laws prohibit close relatives from being hired to work together for the same entity?**

A. The nepotism laws do not generally prohibit close relatives from being hired to work together for the same entity. The nepotism laws do not apply unless either relative has the final hiring authority like a public official. Local governmental entities might prohibit such arrangements by charter, ordinance or policy.

**Q. Do the nepotism laws apply to the appointment of a public official’s close relatives to serve as board or commission members?**

A. The nepotism laws prohibit the appointment of a public official’s close relatives to serve as a board or commission member only if the position is a paid position. Tex. Gov’t Code Ann. § 573.041. The term “position” is defined to include “an office, clerkship, employment, or duty.” *Id.* § 573.001(2). If the local entity paid such appointees, nepotism statutes would become applicable.

**Q. Do the nepotism laws prohibit close relatives from being elected to serve together on the same governing body?**

A. No. The nepotism laws do not prohibit close relatives from being elected to serve together on the same governing body. The nepotism laws limit actions only by the governing body or the entity’s employee with final hiring authority. They do not limit the ability of the electorate to elect close relatives to the same governing body.

**Do the nepotism laws prohibit close relatives of a member of a governing body from being appointed by that body to serve on the governing body?**

A. The nepotism laws would prohibit close relatives of a member of a governing body from being appointed by that body to serve on the governing body, but only if the members of the governing body are paid. While the electorate could elect close relatives to the same governing

body, the governing body itself could not appoint close relatives of its members to a paid office or employment.

**Q. Do the nepotism laws prohibit a person from running for a governing body if the candidate has a close relative who is currently a public employee?**

A. No. The nepotism laws do not prohibit a person from running for a governing body if the candidate has a close relative who is currently an employee of the local entity. Nonetheless, the nepotism law may force the employee to resign if the candidate is elected, depending on how long the employee has worked in his or her present job.

**Q. May an employee continue employment if a close relative of the employee is elected or appointed to the governing body?**

A. An employee of a local entity may continue employment if the employee has been continuously employed for a sufficient time period immediately prior to the appointment or election of the close relative. *Id.* § 573.062. If the employee's close relative was appointed to the governing body, the employee must have been continuously employed by the local entity for at least 30 days prior to the appointment in order to retain his or her job. *Id.* § 573.062(a)(1), (2)(A). If the employee's close relative was elected to a non-county local governing body, the employee must have been continuously employed by the local governing body for at least six months before the member assumed office. *Id.* § 573.062(a)(1), (2)(B). If the employee's close relative was elected to a state or county office, the employee must have been continuously employed by that state or county office for at least one year before the public official assumed office. *Id.* § 573.062(a)(1), (2)(C).

**Q. What is considered “prior continuous employment” for purposes of the nepotism law?**

A. Prior continuous employment for purposes of the nepotism law is considered to be immediately prior and uninterrupted employment. *Id.* § 573.062. Additionally, in counting back the required time period, 30 days, six months or one year, the critical date is the date the public official assumes office (sworn in and qualified to serve). *Bean v. State*, 691 S.W.2d 773, 775 (Tex. App. — El Paso 1985, pet.ref'd). In an attorney general opinion, the attorney general concluded that a teacher who retired from a full-time, certified teacher position had broken her employment with the school district and did not qualify for the prior continuous employment exception to the anti-nepotism statute. Op. Tex. Att’y Gen. No. JC-442 (2001).

**Q. May an employee receive a pay raise or promotion in the future if the employee kept his or her job under the prior continuous employment exception?**

A. Yes. An employee of a local entity is eligible to receive pay raises and promotions after being permitted to keep his or her job under the prior continuous employment exception. Op. Tex. Att’y Gen. Nos. GA-121(2003); DM-132 (1992). The public official who is a relative of the employee generally may not participate in any deliberation or voting on the employee's status or compensation. Tex. Gov't Code Ann. § 573.062(b). Nonetheless, the nepotism laws would not

prevent an official from voting on a class or category of employees. *Id.* For example, an official may participate in a decision to give all employees a cost-of-living raise even though an official's close relative is an employee. Op. Tex. Att'y Gen. Nos. DM-46 (1991) at 233-234, JM-1188 (1990).

**Q. May a home-rule city provide more restrictive nepotism limitations?**

**A.** A home-rule city may generally provide more restrictive nepotism limitations, with one exception. A city is specifically forbidden from adopting a local nepotism provision that would provide a tougher threshold for qualifying under the prior continuous employment exception. Tex. Gov't Code Ann. § 573.062(a). For example, the attorney general concluded a home-rule city charter provision could not prohibit a son of a council member who had four years of employment with the city from receiving a promotion. Nonetheless, the related council member could not participate in any deliberation or voting on the promotion of her son. Op. Tex. Att'y Gen. No. JC-546 (2002).

**Q. May a general-law city (Type A, Type B or Type C city) provide further and more restrictive nepotism limitations?**

**A.** Arguably, a general-law city may pass a more restrictive nepotism limitation provided such an ordinance did not conflict with state law and the authority to do so was fairly implied from some other power of the general law city. Tex. Loc. Gov't Code Ann. § 51.012. No court or attorney general opinion has discussed this question.

**Q. May a person be charged with a crime if he or she violates the nepotism laws?**

**A.** Yes. An official who violates the nepotism laws commits official misconduct and a misdemeanor punishable by a fine of not less than \$100 or more than \$1000. Tex. Gov't Code Ann. § 573.084.

**Q. Must a public official be removed from office if he or she has violated the nepotism laws?**

**A.** Yes. An official must be removed immediately from office if he or she is convicted of violating the nepotism laws and the conviction becomes final. *Id.* § 573.081. State law provides "the removal from the position shall be made immediately and summarily by the original appointing authority" when a criminal conviction becomes final. *Id.* § 573.081(b). If the official is not removed within 30 days after the conviction becomes final, a proceeding by the local prosecutor may be brought to remove the official. *Id.* §§ 573.081(a), .082.