

ELECTION WORKER ISSUES

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Introduction

Election judges and clerks are the lifeblood of a county election. Over the years, many questions have arisen concerning the employment status and salary issues of these workers. This publication attempts to address some of the most common.

1. Must a county withhold social security tax from an election worker's pay?

Generally not. However, if the worker is employed through many elections during the tax year or works the entire early voting period for multiple elections, an election judge or clerk might earn enough to go over the threshold amount. The county is only required to withhold social security if the election worker pay exceeds the threshold amount. The Federal Insurance Contributions Act (FICA) tax exclusion for election officials and election workers is \$1,800 a calendar year. If an election worker is paid \$1800 or more, FICA taxes begin from the first dollar paid.

www.ssa.gov/slge/election_workers.htm

2. May election judges and clerks claim unemployment benefits?

Section 201.063(a)(1)(F) of the Texas Labor Code provides that an election official or worker is not considered an employee of a political subdivision for purposes of unemployment compensation if the remuneration received by the official during the calendar year is less than \$1000. This legislative change from 2013 allows state law to track federal law.

They may claim unemployment, but if the county responds to the chargeback letter from the Texas Workforce Commission in a timely manner, per the Secretary of State (SOS) primary administration manual, the county will likely receive a "benefits are not chargeable" determination:

www.sos.state.tx.us/elections/forms/primaryfinance/pefmgcc.pdf

Note that the employee may always claim unemployment. The issue for the employer is the effect of that claim on its unemployment chargeback.

3. May an election judge or clerk decline his or her salary for the election?

Yes, although the election worker may not direct how the waived salary will be used by the county. If the worker wishes the money that would have been used as pay to be used for a particular purpose, it would generally be better for them to accept the pay and donate it directly.

4. May an election worker be paid for work he or she completed prior to the polls opening on election day?

To an extent. A judge or a clerk generally may not be paid for more than one hour of work prior to the opening of the polls. A judge or clerk may be paid beyond that hour of work if the payment is for updating the precinct list of registered voters to integrate the registration correction list under Section 62.014 of the Texas Election Code.

5. Are election judges considered public officers?

Yes, per a recent attorney general opinion, KP-140 (2017). Practically, this means the judges (presiding and alternate) must take the constitutional oath of office under article XVI, section 1 of the Texas Constitution in front of an authority authorized to give the oath. At the county level, persons who may give the oath of office include: notary publics, a judge, retired judge or clerk of a municipal court, a judge, retired judge, senior judge, clerk or commissioner of a court of record, a justice of the peace or clerk of a justice court, and the county treasurer. Counties have addressed this requirement in different ways. Some counties, for example, have someone present to issue the constitutional oath at the same time the judge picks up the supplies prior to election day.

In addition to taking the constitutional oath, polling place officials must also complete the oath required under Election Code §62.003 before the polls open.

6. May a presiding election judge employ a relative to serve as a clerk at the polling place?

Not if the person is related to the judge within the third degree by consanguinity or the second degree by affinity. Because the election judge is considered a public

official, the nepotism prohibitions set out in Chapter 573 of the Government Code apply. For more information on nepotism, see our publication *Pitfalls & Perils of Public Office*.

That said, there is no general prohibition in the Code against spouses or other relatives serving together at a polling place. For example, it would be permissible for a judge to appoint a married couple not related to the judge to serve as clerks at his or her polling place. It also would be permissible for the commissioners court to appoint a related presiding judge and alternate judge.

7. Is there a prohibition against an election worker having a candidate's sign in their yard or otherwise expressing political opinions prior to their service at the polling place?

There is no prohibition against an election worker expressing his or her political opinions prior to service at the polling place. At the polling place, prior to the start of voting, the officials all take an oath to not in any manner seek to persuade or induce a voter to vote for or against any candidate or measure.

8. May an election day judge or clerk serve less than the full day? May they come and go on election day?

Section 32.073 of the Election Code authorizes election day officials to leave and return at the presiding judge's discretion so long as ballots have not begun to be counted at the polling place. Once the ballot count has begun, the election officials must remain at the polling place until the count is complete.

9. Is the county responsible for training election workers for the primary election?

No. The county executive committee of a political party is required to provide training for its election officials using the state's standardized training. Section 32.113(a), Texas Election Code.

10. Is the county responsible for training election workers for local political subdivisions?

No, unless the county contracted with the political subdivision to provide training in a joint election or an election the county has contracted to hold. Counties are required to hold public training sessions from elections ordered by the Governor or a county authority. Section 32.114 Texas Election Code.

11. Must an election worker be paid to attend training?

Section 32.114(e) of the Texas Election Code provides that election judges, early voting clerks, and deputy early voting clerks who attend training are entitled to compensation in a hourly rate fixed by the appropriate authority in an amount equal to or greater than the federal minimum wage.

12. May an election judge be removed for cause from the polling place?

A recent amendment to the Election Code has created a removal process for an election judge serving in a county-held election. Under Section 32.002(g), following an oral warning to the judge and with the concurrence of the chair of that judge's party chair, the county clerk or elections administrator may "remove, replace, or reassign" an election judge who causes a disruption at the polling place or willfully disobeys provisions of the Code. Once the vacancy exists, it is filled in the same manner as an emergency appointment under Section 32.007 of the Code.

13. May an election judge carry a weapon during his or her service at the polling place?

In KP-212 (2018), the Attorney General opined that a presiding election judge may be exempt from the prohibition against carrying a firearm in a polling place set out in Section 46.03 of the Texas Penal Code if the judge is licensed under Chapter 411 of the Government Code. If located on private property, the presiding judge could be prohibited from carrying a handgun in the polling place if the proper notice is given under Sections 30.06 and 30.07 of the Penal Code.

14. How does the county set how election judges and clerks are paid for an election?

The commissioners court determines compensation for elections held by the county. Compensation is set at an hourly rate and must be at least the minimum federal hourly wage, which currently is \$7.25.

In the primary elections, the minimum hourly rate is the greater of the maximum rate provided by the county executive committee or \$7 if the worker attended a training program. It should be noted that for primaries, the amount election workers are paid is effectively set by the Secretary of State based on the appropriation provided by the Texas legislature. In the 2018 primary, this amount was set at \$8.

15. May the election judges and clerks be paid for services at the polling place after the polls close on election day?

In a precinct in which voting machines are used, the judges and clerks may not be paid for more than two hours of work after the polls have closed or after the last voter votes, whichever is later. Texas Election Code §32.091(b). If ballots are being counted by hand at the polling place by the election judges and clerks, they may be compensated for this work. Texas Election Code §32.091(a).

16. Must a county require election judges and clerks to complete I-9 Employment Eligibility Verification forms prior to their service?

The answer to this question has been based upon a 1988 memo exempting election workers from the requirement to complete the I-9 form. On its website, U.S. Immigration and Customs Enforcement (ICE) continues to adhere to this policy. www.uscis.gov/i-9-central/i-9-central-questions-answers/who-needs-complete-form-i-9.

With that said, TAC has heard comments from county officials that their local ICE officials have told them the election officials should in fact complete I-9 forms. At the time of writing, TAC has sent a letter to ICE asking for a clarification of the agency's current position.