The costliest element in the operation of municipal government today is personnel. This cost factor, as well as federal and state requirements, makes it essential that municipal officials practice good human resource management. The first part of this chapter presents ways in which to establish and administer an effective human resource management system. The second defines federal and state laws that regulate the employer-employee relationship.

**HUMAN RESOURCE MANAGEMENT**

Perhaps the most important yet least attended to function of municipal government is human resource management. Human resource costs can exceed 70 percent of a city’s noncapital expenditures but often take a back seat to issues such as taxation, finance, and capital improvements. Human resource management covers a broad range of issues such as recruiting and selecting employees, establishing competitive salary rates for employees, properly training new and veteran employees, motivating employees to achieve desired objectives, and fairly and adequately evaluating employee performance.

This part of the chapter will familiarize elected officials with the basic issues involved in human resource management at the municipal government level. It also suggests appropriate sources of information for officials seeking further information or direct technical assistance. Subjects covered are employee selection, position classification, salary administration, employee benefits, employee training and development, performance appraisal, and personnel policies and procedures.
Employee Recruitment and Selection

In the past, municipal governments recruited their employees by word of mouth. Today, the increasing complexity of the work in which cities are involved, coupled with legal requirements and federal guidelines resulting from legislation such as the Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990, calls for increased attention to employee recruitment and selection practices.¹

Recruitment

A broad-based recruitment program that seeks to incorporate all segments of the community is in the best interest of all concerned. Job announcements should clearly state the duties of the position, minimum and desired qualifications, salary ranges, and special licenses or certificates necessary to adequately perform the major duties of the position. Recruitment activities should be both passive (advertisements on the city’s official Web site and in local newspapers) and active (recruitment visits to schools and colleges), depending on the nature of the position to be filled. Position vacancies should be announced for at least 10 working days to allow those interested to learn of the vacancy and to have the opportunity to apply. When recruiting for positions such as department heads or city managers, a longer recruitment period is required if a city chooses to advertise regionally or nationally with organizations such as the International City/County Management Association (www.icma.org) or the American Society for Public Administration (www.publicservicecareers.org).² It is also strongly advisable to post these positions to Georgia Local Government Access Marketplace (www.glga.org). This Web site is sponsored by the Association County Commissioners of Georgia and the Georgia Municipal Association and is perhaps the best site available for local government recruitment in the state.

Selection

Since the U.S. Supreme Court case Griggs v. Duke Power Company, the selection of employees has come under increasing scrutiny and legal requirements.³ Municipalities should strive to create “selection devices” that help them choose the best-qualified applicants without adversely impacting minority and other protected groups. Selection devices include interviews, training and experience evaluations, written examinations, performance examinations, and assessment centers.

The city councilmembers’ role in employee selection is usually limited to the positions of appointed city managers or administrators and
in some cases department heads. Executive search firms are sometimes
employed by cities to help them find well-qualified applicants for these
high-level positions. Technical assistance is also available through the
Carl Vinson Institute of Government.

Open Meetings and Open Records Law Requirements

There are a few special open meetings and open records laws that affect
hiring municipal employees. A city council may interview applicants in
closed executive sessions, but the vote must be taken in public. When
a city is hiring certain employees such as city managers or administra-
tors or department heads and wants to protect applicants from possible
retribution from their current employers, it must observe special rules
under the open records law. Records that would identify applicants for
such positions may be kept confidential until three finalists have been
selected. Fourteen days prior to the final decision, the city must release
the names and applications of the three finalists unless an applicant with-
draws from consideration for the position.

Position Classification

Position classification involves placing like positions together into groups
or “classes.” For example, comparable secretarial positions could be
grouped under the classification of administrative secretary, or similar
equipment operation positions could be grouped under the classification
of heavy equipment operator. Positions with the same position classifica-
tion are assigned the same pay grade and pay range. This practice helps
to ensure that a municipality is providing equitable pay.

Position classification provides the framework for an effective sys-
tem of human resource management and has an impact on recruitment,
selection, and performance appraisal. Job descriptions, which form the
basis of the classification plan, should be up to date and specific in their
listing of the major duties and responsibilities of positions. If job descrip-
tions are timely and specific, they can be used to create announcements
advertising position vacancies and to develop performance standards for
use in appraising employee performance.

The city councilmembers’ role in position classification generally
involves approving new classification plans or approving modifications
to existing ones. For example, a councilmember might be called upon to
approve a new classification and compensation plan. In this process, the
council is not involved in determining individual classification decisions
for employees but rather the level of market competitiveness at which
the new plan will be funded.
Salary Administration

The city council’s most visible role in human resource management is salary administration. The council is called upon to approve new classification plans and to annually update the municipality’s pay plan. An effective pay plan is both internally and externally equitable. Being internally equitable means that positions with similar levels of duties and responsibilities are grouped together in the same pay grade. A pay plan is externally equitable when its pay rates are competitive with its main competitors.

City councils will find various publications and Web sites useful as they consider salary levels for employees. The Georgia Department of Community Affairs publishes an annual salary survey of the most common municipal government positions and makes the data available on the Internet (www.dca.ga.gov/dcawss/default.asp). The Georgia Department of Labor publishes an annual salary survey of the most common manufacturing jobs (www.dol.state.ga.gov). The Bureau of Labor Statistics of the U.S. Department of Labor periodically publishes proprietary salary data for the more populous regions of the state (www.bls.gov). Additionally, the International City/County Management Association publishes proprietary regional salary data concerning city managers, administrators, and department heads (www.icma.org). When relying on any survey, one should exercise care in interpreting the data contained in published salary surveys. For example, job description titles may have been misinterpreted, resulting in incorrect information being reported. City council members should also be sure that they are comparing “apples to apples” and “oranges to oranges.” In other words, are the duties and responsibilities of the municipal positions they are researching sufficiently similar to those reported in the survey? If not, no salary comparison should be made.

An effective pay plan generally has 21 to 29 salary grades. Each of these grades should have a salary range of approximately 50 percent from the minimum to the maximum rate. To make salary administration more manageable, steps can be inserted between the minimum and maximum rates. Progression through the steps can be linked to length of service and/or performance. For example, an employee performing at a competent level might be awarded a one-step increase, whereas an employee whose performance was considered outstanding might receive a two-step increase. In the past, many pay plans had steps with values of 4 percent to 5 percent. However, plans with increments of that size should be avoided because they usually require the city to spend a large
percentage amount on step raises, resulting in less funds being available for general increases that are applied to the entire salary structure. Over a period of time, the practice of granting large step increases and making small overall adjustments will result in a pay plan that may pay tenured employees well but be unable to attract new employees because of low entry rates.

After an equitable classification and pay plan has been implemented in a city, a council’s role in salary administration primarily concerns granting annual and merit increases. Annual (market or cost-of-living) increases should be applied to the entire salary scale and to every employee’s salary. The Consumer Price Index (CPI) or the Employment Cost-Index (ECI), published by the U.S. Bureau of Labor Statistics (www.bls.gov), should be used as a guide in determining the amount of across-the-board increases. A good rule of thumb is to increase your wage scale by 75 percent of the CPI and then to conduct a salary survey every four years or so to gauge the city’s placement in the labor market. Additionally, 2 to 3 percent of the personnel budget should also be set aside for step or merit raises, and merit increases should be separate from cost-of-living raises. Both should be added to base pay.

**Employee Benefits**

One of the fastest-growing areas of personnel-related costs is employee benefits—health-related and retirement benefits as well as benefits that help define terms of employment such as sick and annual leave. Unless a city has a risk manager or human resources director with extensive background in employee benefits, setting up municipal insurance and retirement plans will generally require the services of a benefits consulting firm. The Department of Community Affairs periodically compiles information on leave benefits. Typical municipal leave benefits are one day of sick leave per month and one to one and one-half days of annual leave per month, depending on the length of an employee’s service to the city.

**Employee Training and Development**

The systematic training and development of municipal employees can greatly benefit an organization. Training support can take the form of providing tuition reimbursement for attending college courses; encouraging fire, police, water, and wastewater personnel to seek additional certifications; or sponsoring in-house training courses specifically designed to increase the management and supervisory skills of city employees. The result of an effective training and development program is a more
skilled and motivated workforce, providing better service to the municipality’s citizens. The Vinson Institute of Government provides extensive training resources for local governments (www.cviog.uga.edu/services/education/statelocal.php).

Performance Appraisal

There is no foolproof way to appraise employee performance. However, some methods are more legally acceptable and job related than others. For many years, employee performance appraisal consisted of a manager’s annual assessment of subordinate employees based on characteristics such as dependability, personality, and appearance. However, trait-based performance appraisal devices are no longer acceptable: the courts have ruled that performance appraisals, just as employment tests, must be job related. In many cases, adhering to these standards may necessitate writing different performance standards for every job classification. The appraisal format itself can be kept simple, but it should require that the supervisor and employee define in writing what the acceptable level of performance is for each major duty that the employee performs. This exercise underscores the necessity for accurate, job-specific position descriptions.

Successful employee performance appraisal is a continual process, not just an activity that takes place once a year. Employees who receive constant and constructive feedback concerning their work are much more likely to make desired behavior changes than are those who receive periodic or infrequent information about their performance.

Performance appraisal is most successful when it is used primarily as a communication tool between the supervisor and employee. However, it is being used increasingly to link employee performance and pay. While, on the surface, a pay-for-performance system seems desirable, such a system is very difficult for a city government to implement due to the nature of city jobs. For example, while it is a fairly common practice in the private sector to base an insurance agent’s pay on the number or value of policies he or she sells, basing a police officer’s pay on the number of arrests he or she makes would be inappropriate.

Personnel Policies and Procedures

An up-to-date set of personnel policies and procedures provide the ground rules for city employment. Personnel policies generally contain procedures for employee grievances and appeals, annual and military leave, and a statement of the municipality’s philosophy regarding human resource administration. Due to the changing nature of personnel-relat-
ed law, a municipality should have its personnel policies and procedures reviewed periodically by a labor attorney.

**EMPLOYER AND EMPLOYEE DUTIES AND RIGHTS**

Federal and state legislation and court decisions have given municipal employees a number of rights that their employers must recognize. Municipal officials must consider these rights when making personnel decisions that may adversely affect employees in some way. If they fail to do so, an employee may have a claim against the city and its elected officials for money damages that must be paid by the city and, in some cases, from the personal assets of its elected officials. In recent years, governmental entities have become a popular target for this kind of litigation. Municipalities that act incautiously in making decisions affecting employees increasingly run a risk of becoming involved in federal or state court litigation with disgruntled or terminated employees.

**Constitutional Duties and Rights**

Courts have said that under certain circumstances a public employee may have a property or a liberty interest in his or her job. These interests cannot be adversely affected by a personnel action (a disciplinary action or discharge) without due process of law. This section discusses what property and liberty rights exist in the public employment situation and what is needed to comply with the requirement of due process of law. Also discussed are substantive and procedural due process and First Amendment rights of public employees.

**Property Rights**

Under certain circumstances, the courts consider a public employee’s job to be property belonging to the employee that cannot be taken away (through discharge) or lessened in value (through disciplinary demotion, suspension of pay, reduction in pay, etc.) unless the employee receives due process of law. Whether a public employee has such a “property interest” is determined on the basis of principles of state law. As a general rule, in Georgia, “one in public employment has no vested right to such employment.” However, a number of exceptions have been created. When dealing with personnel matters, municipal officials should be aware of the following:

1. If the city adopts by ordinance, resolution, or other official act a provision that municipal employees may only be removed “for
cause,” an employee may have a property interest in his or her job. It should be noted that some courts have held that a “termination for cause” provision appearing only in an employee handbook or manual is insufficient to create an enforceable property interest, but cities should be cautious in relying on such authority, particularly if the manual or handbook is adopted by official action of the municipal governing authority.

2. If the city hires an employee for a definite period of time and the employee is discharged before the end of that time, he or she may have a property interest.

3. An employee hired for an indefinite period of time—including through a contract for permanent employment—does not have a property interest. This is called employment at will.

4. If an employee serves at the pleasure of the employer or if he or she is terminated because it is determined by a superior to be in the best interest of the city, the employee does not have a property interest.

5. When a municipality provides for an initial trial period of employment (often described as a probationary period), such an employee does not have a property interest in his or her job during the trial period. If employees are subject to being discharged at any time, it is the better practice not to designate any initial period in a job as probationary so as not to give the impression that job rights change after that period.

6. When a municipality abolishes positions for budgetary or other reasons, an employee whose position is abolished generally does not have a property interest in his or her job.

7. Always check a city’s charter to see if employees are “at will” or may have a property interest in employment. The charter overrides ordinances or policies that directly conflict with it.

Liberty Rights

A municipality may not deprive an employee of a protected liberty interest without due process of law. An employee's liberty interest exists regardless of whether the employee is an “at-will” employee or has a property interest in continued employment. If an employee is demoted or discharged without due process of law (including not being renewed at the end of a contract period) and this action imposes a “stigma” or “disability” on the employee that denies him or her the freedom to take advantage of other job opportunities, the employee’s constitutional lib-
erty interest may be implicated. This type of claim usually arises when derogatory information about the employee is released in the course of the discipline or discharge process.

In order for there to be a violation of the employee’s liberty interest, the employee must show the following:

1. The action must have taken place in the context of demotion or discharge from employment.

2. The information about the employee must be false. If the information is true, the employee’s liberty interest has not been violated, even though his or her ability to obtain future employment is damaged.

3. The information must have been made public in an official or intentional manner. The mere presence of derogatory information in a city employee’s personnel files does not infringe on an employee’s liberty interests if it is not released.

4. The information about the employee must be “stigmatizing.” One federal appellate court described this requirement in the following way: “The ‘liberty interest’ is the interest an individual has in being free to move about, live, and practice his profession without the burden of an unjustified label of infamy. . . . [A] charge which infringes one’s liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside of professional life. Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy.”

5. The employee must have been denied a meaningful opportunity to clear his or her name.

**Procedural Due Process**

If a municipal employee’s liberty or property interest is involved, the employee is then entitled to procedural due process. If a municipal employee has a property interest in his or her job, the employee must receive both a pretermination hearing and a post-termination hearing. It is not necessary that a pretermination hearing be elaborate. Its purpose is to serve as an initial check against mistaken decisions. A more thorough review of the discharge can take place at a post-termination hearing. All that is required in the pretermination hearing is that the employee be
given notice (told why he or she is being terminated) and that he or she be given an opportunity to respond to the charges before the adverse action takes effect.\textsuperscript{27}

The following procedures should be followed for an adequate post-termination hearing:

1. Prior to the hearing, the employee should be given (a) written notice of the charges against him or her that contains sufficient detail to enable him or her to show any error that may exist\textsuperscript{28} and (b) the names of all witnesses who will be called by the city, as well as an explanation of their expected testimony.\textsuperscript{29}

2. The hearing must then be held within a “reasonable time.”\textsuperscript{30}

3. At the hearing, the employee must be given an opportunity (a) to be heard,\textsuperscript{31} (b) to present evidence in his or her own behalf,\textsuperscript{32} and (c) to confront (cross-examine) his or her accusers.\textsuperscript{33}

4. The hearing must be held before a tribunal having apparent impartiality to the charges.\textsuperscript{34}

5. The employee must be allowed the right to have a lawyer present to assist him or her.\textsuperscript{35}

The evidentiary portion of the hearing and the final vote of the governing authority are required by the Georgia open meetings law to be open to the public. Only the city council’s deliberations may be conducted in a closed session. Experience has shown that it is best to have post-termination hearings or “appeals” preserved for future evidentiary use and that a court reporter or a good tape-recording system should be used.

In the case of an employee’s liberty interests, the required hearing is not intended to evaluate the correctness of the adverse personnel decision. Rather, a “name-clearing hearing” is a limited procedure through which the employee is given an opportunity to clear his or her name or otherwise explain his or her conduct.\textsuperscript{36} The name-clearing hearing need not be provided prior to the effective time of the adverse action.\textsuperscript{37} However, the employee is entitled to notice of the charges against him or her and an opportunity to refute them, either by cross-examination of his or her accusers or through the presentation of independent testimony and evidence.\textsuperscript{38}

Georgia law has extended to governmental entities, including cities, employer immunity for disclosure of certain information to a prospective employer. This information includes a current or former employee’s job performance, commission of an act that constitutes a violation of state
law, or the ability or lack of ability to carry out the duties of a job. An employer who discloses factual information concerning any of these matters is presumed to be acting in good faith unless there is evidence to the contrary or the information was disclosed in violation of a nondisclosure agreement or was otherwise considered confidential according to an applicable federal, state, or local statute, rule, or regulation. A municipality should maintain factual evidence for any statements made concerning an employee, including those concerning an employee’s job performance in order to prove the truth of the statements.

Georgia law gives public employees the right to petition the state superior courts for review of employment decisions under certain circumstances. A municipality’s failure to follow proper procedures therefore may subject it to suit in state court.

First Amendment Rights

All municipal employees have First Amendment rights, regardless of whether they are at-will employees or have a property interest in their jobs. Public employment has been held to be a valuable governmental benefit that cannot be denied an individual for an unconstitutional reason. A public employee may not be disciplined for reasons such as race, religion, or assertion of other constitutionally guaranteed rights. Nonrenewal of an employee’s contract for such reasons is also constitutionally impermissible.

This section discusses adverse employment action, particularly discharge, because of the assertion of protected rights, particularly the First Amendment right of freedom of speech and association.

Freedom of Speech

Although public employees cannot be required to surrender their right to free speech, a governmental employer does have an interest in regulating the speech of government employees to some extent. The interests of the public employee as a citizen in commenting on matters of public concern must be weighed against the interests of the governmental employer in promoting the efficiency of the public services performed by its employees. A public employee cannot be disciplined for making a public statement that is true, even though it is critical of his or her ultimate employer. Even if the statement is false, it is not grounds for discipline unless made either with knowledge of its falsity or with reckless disregard for whether it is true.

In order for a municipal employee to prevail on a claim based on the right of free speech, the employee must show that (1) he or she was engaged in speech on a matter of public concern, (2) his or her interest in the speech outweighs the municipal employer’s interest in providing
efficient and effective services, and (3) the speech was a substantial or motivating factor leading to discipline.\textsuperscript{47}

\textit{Freedom of Association.} The First Amendment right of freedom of association gives public employees the right to organize and become members of a labor organization.\textsuperscript{48} Advocating membership in a labor union\textsuperscript{49} and even expressing the belief that public employees should have the right to strike\textsuperscript{50} are both constitutionally protected. However, an employee can be discharged or otherwise punished for going on strike.\textsuperscript{51} Moreover, a disciplinary action for picketing in support of a strike probably does not violate an employee’s constitutional rights.\textsuperscript{52} Furthermore, the First Amendment does not impose any affirmative obligation on a city government to listen or respond to, recognize, or bargain with a labor union.\textsuperscript{53}

\textit{Political Belief and Association.} Public employees cannot be disciplined for their affiliation with a political party unless they are in confidential or policy-making positions.\textsuperscript{54} Furthermore, unless they are excepted for these reasons, public employees cannot be disciplined solely because of their political beliefs.\textsuperscript{55} However, even some employees included in the exception may be protected from a disciplinary action.\textsuperscript{56}

These prohibitions apply not only to actual or threatened dismissals but also to actual or threatened reassignments of duties or transfers if this action imposes on the employee a choice between continued employment and forsaking the exercise of protected beliefs and association.\textsuperscript{57} It is also impermissible to require public employees to make contributions for political purposes.\textsuperscript{58}

\textbf{Federal Statutory Duties and Rights}

Numerous federal statutes affect the employer-employee relationship in the public sector. Most of these statutes prohibit one or more types of discrimination against employees. The following are examples of some of the federal laws that may apply to municipal employees.

\textit{Title VII}

Title VII of the 1964 Civil Rights Act, amended by the Civil Rights Act of 1991,\textsuperscript{59} provides that it is an unlawful employment practice for an employer (defined as an employer of 15 or more employees)\textsuperscript{60} “(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, or because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify employees or applicants for employment in any way which would
deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee” on any of the same grounds.\textsuperscript{61}

**Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA) was originally enacted during the Depression to encourage employers to hire more workers rather than simply requiring their existing employees to work longer hours. Important protections established by the FLSA are a minimum wage and the requirement of overtime compensation.

The normal workweek under the FLSA is a period of seven consecutive days, and overtime work is work performed in excess of 40 hours in a workweek. The FLSA sets up a minimum hourly wage and provides for payment of a premium for overtime work equivalent to one and a half times the employee’s regular rate of pay. Municipal employees may be offered compensatory paid leave (i.e., compensatory time, or “comp” time) at the rate of one and a half hours for each overtime hour worked, but compensatory time may be granted only if it is based on an agreement between the city and its employees.\textsuperscript{62}

The FLSA contains a number of exemptions and exceptions. Exceptions and exemptions to coverage provisions are generally construed narrowly against those who seek to advance them in an attempt to avoid overtime pay liability.\textsuperscript{63} Courts have noted that the FLSA is remedial in nature and should be read liberally in favor of workers.\textsuperscript{64} However, the courts have ruled that public employers are free to reduce the number of hours that employees work.\textsuperscript{65}

The act provides a complete overtime pay exemption for individuals employed by a public agency that has fewer than five employees in fire protection or law enforcement activities.\textsuperscript{66} In determining whether a public agency qualifies for the exemption, fire protection and law enforcement activities are considered separately. Thus, if a city employs fewer than five employees in fire protection activities but five or more employees in law enforcement activities, it may claim the exemption for fire protection but not for law enforcement.\textsuperscript{67}

The FLSA provides an exception to the general requirement that overtime be computed on a weekly basis and that a premium be paid for hours in excess of a 40-hour workweek for firefighters and law enforcement personnel.\textsuperscript{68} The exemption allows cities to establish work schedules for firefighters and law enforcement personnel that differ from those of other municipal employees. The regulations base regular and overtime pay on the number of hours worked in a 28-day work period.
Because these regulations are so complex and specific, a city should not attempt to establish a work schedule and pay plan for firefighters and law enforcement employees without professional guidance.\(^6\) Not included in the exemption are the “civilian” employees of fire and police departments who serve as dispatchers, radio operators, repair workers, janitors, clerks, or stenographers.\(^7\) Rescue and ambulance service personnel qualify for the exemption as employees engaged in “fire protection activities” if they “form an integral part of the public agency’s fire protection activities”\(^7\) or serve as employees engaged in “law enforcement activities” if they “form an integral part of the public agency’s law enforcement activities.”\(^7\) Ambulance and rescue service employees may also qualify if they are employees of a public agency other than a fire department or law enforcement agency and if their services are substantially related to firefighting or law enforcement activities.\(^7\)

Although these firefighters and law enforcement employees may accumulate up to 480 hours of compensatory time, other nonexempt employees may accrue only 240 hours. After that maximum is reached, a covered employee must be paid overtime if he or she works more than 40 hours in a workweek. However, the city may require employees to use compensatory time. Employees must be permitted to use their compensatory time within a “reasonable period” of a request unless it would be “unduly disruptive.” Employees protected by the FLSA must be paid any unused compensatory time upon separation from employment with the municipality.\(^7\) Compensatory time cannot be used as a means of avoiding statutory overtime pay. An employee has the right to use earned compensatory time and must not be coerced into taking more compensatory time than a municipality can realistically expect to be able to grant within a reasonable time of the request.\(^7\)

In addition to firefighters and law enforcement employees, the FLSA exempts bona fide executive, administrative, and professional employees from its overtime pay requirements.\(^7\) Such exemptions are construed narrowly, and the burden is on the employer to prove that it is entitled to the exemption. Neither the employee’s job title nor job description is determinative of whether or not an employee is exempt from the overtime pay requirements; the exemption is based solely on actual duties and salary.\(^7\) As with firefighters and law enforcement personnel, the regulations governing the exemptions for executive, administrative, and professional employees are both specific and complex, and no city should seek to address such exemptions without professional guidance.
Equal Pay Act, Fair Pay Act, and Age Discrimination in Employment Act

Two other laws, the Equal Pay Act and the Age Discrimination in Employment Act, were made applicable to state and local governments by 1974 amendments to the Fair Labor Standards Act.\(^78\) The Equal Pay Act prohibits, with certain exceptions, differentials in pay based on sex in jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions.\(^79\) The Equal Pay Act was recently amended by the Lilly Ledbetter Fair Pay Act to expand the length of time an employee has to file a claim of discrimination. The Fair Pay Act amends Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to state that an act of discrimination occurs each time wages are paid to an employee following a discriminatory pay decision. An employee who would have been barred from claiming pay discrimination based on a decision made years or decades ago can now make a claim as long as it is filed within 180 days of when the employee last received a pay check. Thus, municipalities may want to consider revising their records retention policies in order to have the necessary records to defend against pay discrimination cases filed later.

The Age Discrimination in Employment Act protects people who are 40 years old or older from discrimination because of age. Employers may not discharge, fail or refuse to hire, or otherwise discriminate against any individual with respect to compensation, terms, or conditions or privileges of employment because such person is 40 years of age or older unless there is a bona fide occupational qualification based on age.\(^80\)

Americans with Disabilities Act

The Americans with Disabilities Act\(^81\) (ADA) prohibits discrimination by employers against qualified individuals with disabilities in virtually all aspects of employment, including the application process, hiring, advancement, termination, compensation, and training. The ADA contains extensive and sweeping provisions preventing discrimination against persons with disabilities. Examples of conduct specifically prohibited by the ADA include

\begin{enumerate}
  \item segregating, limiting, or classifying on the basis of disability a qualified individual with a disability in a way that would adversely affect employment opportunities or status (for instance paying a disabled
employee an amount less than is paid to a similarly situated non-disabled employee);

2. excluding or denying equal job benefits to a qualified individual because that person has an association or relationship with a disabled person; or

3. using tests or other selection criteria that tend to screen out individuals with disabilities, unless the test is job related and consistent with business necessity.  

The ADA prohibits preemployment inquiries into a person’s disability status. The only acceptable preemployment inquiries an employer may make must pertain to the ability of an applicant to perform job-related functions.

An employer may require a medical examination after tendering an offer of employment and before the applicant begins work. The employer may condition the offer on the results of the examination only if all entering employees in the same job category are subjected to such an examination.

The ADA requires an employer, including a city, to provide “reasonable accommodation” of an otherwise qualified person with a disability, unless the employer can show that it would constitute an undue hardship. This requirement applies not only to persons applying for new employment but also to existing employees who may be or become disabled. An employer must determine the essential functions of a job and examine possible modifications and adjustments to the job and/or the work environment that would allow a person with a disability to perform those functions. Examples of reasonable accommodations include restructuring a job and modifying work schedules or equipment. An employer may challenge an accommodation as being unreasonable on the basis that it constitutes an undue hardship to the employer because it is too costly or would be disruptive to the employer’s operations. Municipalities may be held liable for compensatory but not punitive damages for violations of the ADA.

**Family and Medical Leave Act**

The Family and Medical Leave Act of 1993 (FMLA) requires all public employers to have an FMLA policy for their employees and post a federally mandated notice providing employees and applicants for employment with information about the FMLA. If the public employer has 50
or more employees within a 75-mile radius, the employer must provide up to 12 weeks of unpaid leave during any 12-month period for eligible employees. Eligible employees are those employees who have worked for the city for at least one year and have provided at least 1,250 hours of service in the past 12 months. Leave may be taken for the birth or adoption of a child or placement of a foster child; to care for a spouse, child, or parent with a serious health condition; or due to the employee’s own serious health condition. An employee who takes leave under the FMLA must be returned to the same position that he or she held prior to taking such leave or to an equivalent position, and the employer must maintain group health insurance coverage for the employee during the period of leave, as if the employee had worked. The leave guaranteed by the FMLA is unpaid, although an employer may require that an employee use any available vacation, personal, family, or sick leave before the unpaid portion of the 12-week leave period begins. In addition, leave under the FMLA may be taken intermittently or on a reduced schedule when medically necessary. A city can also be liable under the FMLA if it is found to have retaliated against an employee because he or she engaged in an activity or raised a claim protected by the act.

**Drug Testing**

Drug testing of city employees is considered a search under the Fourth Amendment to the U.S. Constitution. Municipalities may not require employees to take a drug test without reasonable suspicion that the employee is under the influence of drugs or alcohol unless the municipality has a compelling special interest. There are two basic types of drug testing:

1. Drug testing when there is a reasonable suspicion of an employee being under the influence of drugs.
2. Random drug testing of employees in “high-risk” jobs (e.g., bus drivers, mechanics who work on buses or Rideshare vehicles), which is considered a compelling interest.

Municipalities that wish to subject their employees to drug testing must comply with the Fourth Amendment guaranteeing the right against unreasonable searches and seizures. Public employees working in high-risk jobs are subject to random drug testing pursuant to Georgia law.
State Statutory Duties and Rights

*Discrimination*

A state law similar to the federal Equal Pay Act expressly covers municipal employers with 10 or more employees. It prohibits differentials in pay based on sex for equal work “in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions.” The statute provides for arbitration as well as recourse to the courts, where both back pay and attorneys’ fees may be awarded. A copy of the law, provided by the state upon request, must be posted in a conspicuous place.\(^{92}\)

Age discrimination in employment is also prohibited by a Georgia law preventing an employer from refusing “to hire, employ, or license . . . [or] . . . bar or discharge from employment any individual between the ages of 40 and 70 years solely upon the ground of age, when the reasonable demands of the position do not require such an age distinction. . . .” Retirement policies or systems are not affected as long as they are not designed merely to evade this law.\(^{93}\)

When a city employee is terminated and, as a condition of a settlement agreement, the employee’s personnel file is partially or totally purged, the former employee’s personnel records, including the personnel file and any associated work history records, must be clearly designated with a specific notation. This notation must state that the records were purged as a condition of a settlement agreement and must be disclosed to any other governmental entity making an inquiry as to that former employee’s work history for the sole purpose of making a hiring decision.\(^{94}\)

*Other Duties and Rights*

Each city employee must be given time off to vote in any municipal, county, state, or federal election in which he or she is qualified to vote unless the employee’s time of work begins at least two hours after the polls open or ends at least two hours before the polls close.\(^{95}\)

Salaries of municipal officials and employees are subject to garnishment. However, an employee may not be discharged because his or her earnings have been subjected to garnishment for any one debt, even though more than one summons of garnishment is served.\(^{96}\)

*Employee Benefits*

Georgia’s workers’ compensation statute applies to municipal employees.\(^{97}\) The law specifically encompasses “[a]ll firefighters, law enforce-
ment personnel, and personnel of emergency management . . . agencies, emergency medical services, and rescue organizations whose compensation is paid by . . . any municipality . . . regardless of the method of appointment.” In addition, certain volunteer personnel may be covered if the governing authority adopts the appropriate resolution.98

Municipalities are authorized by state law to set up deferred compensation plans for their employees,99 but such plans may not reduce any retirement, pension, or other benefit provided by law.100 Social security benefits are also available if the municipality has a plan of coverage for its employees that is approved by the Employees Retirement System of Georgia.101

NOTES

2. For further information on executive recruitment and selection, see David N. Ammons, Recruiting Local Government Executives (San Francisco: Jossey-Bass, 1989).
8. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Crowell v. City of Eastman, 859 F.2d 875 (11th Cir. 1988); Barnett v. Housing Authority, 707 F.2d 1571 (11th Cir. 1983); Ross v. Clayton County, 173 F.3d 1305 (11th Cir. 1999); (O.C.G.A.) §34-7-1.

14. Bailey v. Dobbs, 227 Ga. 838, 183 S.E.2d 461 (1971); Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979); see also Hagopian v. Trefrey, 639 F.2d 52 (1st Cir. 1981). See Brewer v. MARTA, 204 Ga. App. 241, 419 S.E.2d 60 (1992), in which if a plaintiff's employment is at will, the employer with or without cause and regardless of its motives may discharge the employee without liability.


16. Burnley v. Thompson, 524 F.2d 1233 (5th Cir. 1975); Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970); Drummond v. Fulton County Department of Family and Children Services, 547 F.2d 835 (5th Cir. 1977); Ross v. Clayton County, 173 F.3d 1305 (11th Cir. 1999). See Rankin v. McPherson, 483 U.S. 378 (1987), in which the court held that even a probationary employee who can be discharged for no reason may be entitled to be reinstated if discharged for exercising a constitutional right.


19. Paul v. Davis, 424 U.S. 693 (1976); Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000). See Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984), in which it was ruled that defamation suffered by a fireman during a department investigation was, without more, not a violation of the plaintiff's liberty interest.


21. Bishop v. Wood, 426 U.S. 341 (1976); Thomason v. McDaniel, 793 F.2d 1247 (11th Cir. 1986); Peterson v. Atlanta Housing Authority, 998 F.2d 904 (11th Cir. 1993); Sykes v. City of Atlanta, 235 Ga. App. 345, 509 S.E.2d 395 (1998); Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000). In Buxton v. City of Plant City, Florida, 871 F.2d 1037 (11th Cir. 1989), the court held that the placing of stigmatizing information in a public employee’s personnel file results in the loss of a liberty interest.


23. Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir. 1976) at 366. The court noted that a label that would prevent an individual from practicing his or her chosen profession at all may have consequences so severe that liberty
would be infringed. Whether information about an employee is stigmatizing must be decided almost on a case-by-case basis. However, generally speaking, charges of fraud, dishonesty, mental illness, or racism are considered stigmatizing, while allegations such as incompetence, inability to deal with coworkers, neglect of duty, or sleeping on the job are not stigmatizing. As to charges of dishonesty, see Huffstutler v. Bergland, 607 F.2d 1090 (5th Cir. 1979), which held that the employee was not stigmatized by a form that rated his honesty as “unsatisfactory” because it did not accuse him of property theft but rather correlated with the narrative description on the form indicating that the evaluator considered the employee to be a person who could not be trusted to produce in the workshop or be faithful or prompt in his attendance. The mere act of disciplining and discharging an at-will employee is not actionable. Clemons v. Dougherty County, 689 F.2d 1365 (11th Cir. 1982), in which it was ruled that information about an employee might be stigmatizing even if the charges did not allege dishonesty or immorality; Brewer v. MARTA, 204 Ga. App. 241, 419 S.E.2d 60 (1992); Garmon v. Health Group of Atlanta, Inc., 183 Ga. App. 587 (1987); Hall v. Answering Service, Inc., 161 Ga. App. 874 (1982).


25. Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546 (11th Cir. 1987).


28. Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546 (11th Cir. 1987) overruled on other grounds; Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985) (citing Ferguson v. Thomas, 430 F.2d 852, 856 [5th Cir. 1970]).

29. Ibid.


31. Ibid.

32. Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) overruled on other grounds.

33. Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546 (11th Cir. 1987) overruled on other grounds; Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985).

34. Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) overruled on other grounds.

35. See Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985).

36. Campbell v. Pierce County, Georgia, 741 F.2d 1342 (11th Cir. 1984).

37. Ibid.

38. Ibid.


46. See Pickering v. Board of Education, 391 U.S. 563 (1968). However, when the statement is so without foundation as to call into question an employee’s fitness to perform the duties of the job, the statement would be evidence of the employee’s lack of competence but would not provide an independent basis for dismissal. Rankin v. McPherson, 483 U.S. 378 (1987).
47. See, e.g., Cook v. Gwinnett County School District, 414 F.3d 1313 (11th Cir. 2005) overruled on other grounds.
56. Branti v. Finkel, 445 U.S. 507 (1980). See Kinsey v. Salado Independent School District, 916 F.2d 273 (5th Cir. 1990), in which a school superintendent alleging that his suspension was in retaliation for supporting losing school board candidates had the right to participate in the election of school board members even though he and the school board had a “close and confidential relationship.”
58. Ibid.
60. Ibid.
62. 29 U.S.C.A. §§201 et seq., 207(o); 29 CFR §§553.20 et seq.
63. Bennan v. Sugar Cane Growers Cooperative of Florida, 486 F.2d 1006 (5th Cir. 1973); Atlanta Professional Firefighters Union Local 134 v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991); Avery v. City of Talladega, Alabama, 24 F.3d 1337 (11th Cir. 1994); 29 U.S.C.A. §213 (exemptions).
67. 29 C.F.R. §§553.200.
68. 29 U.S.C.A. §207(k).
69. Ibid.; 29 CFR §553.201.
70. 29 C.F.R. §§553.210(c), 553.211(g).
71. 29 C.F.R. §§553.210(a), 553.215(a).
72. 29 C.F.R. §553.211(b). Rescue and ambulance service personnel may spend no more than 20 percent of their work time in unrelated, nonexempt activities or they will not qualify for the 7(k) exemption. Jones v. City of Columbus, 120 F.3d 248 (11th Cir. 1997); Falken v. Glynn County, Georgia, 197 F.3d 1341 (11th Cir. 1999).
73. See O’Neal v. Barrow County Board of Commissioners, 980 F.2d 674 (11th Cir. 1993), which held that a separate county EMS agency was held to qualify for a 7(k) exemption solely under 29 C.F.R. §553.215 and §553.13 limitations because of the amount of nonexempt work not applicable to exemptions under 29 C.F.R. §553.215.
76. 29 C.F.R. Part 541.
77. Evans v. McClain, 131 F.3d 957 (11th Cir. 1997).
80. 29 U.S.C.A. §621 et seq.
81. 42 U.S.C.A. §12101 et seq.
82. 42 U.S.C.A. §12112(b).
88. 29 U.S.C.A. §2615; 29 C.F.R. §825.220. Strickland v. Water Works and Sewer Board of City of Birmingham, 239 F.3d 1199 (11th Cir. 2001); Smith v. Bell-South Telecommunications, 273 F.3d 1303 (11th Cir. 2001). See Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001), in which the court ruled that the employee failed to present any evidence of a causal connection between her request for FMLA leave and her subsequent termination.
90. See Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987).
92. O.C.G.A. tit. 34, ch. 5.
94. O.C.G.A. §45-1-5.
96. O.C.G.A. §§18-4-7, 18-4-21.
97. O.C.G.A. §34-9-1.
98. Ibid.
100. O.C.G.A. §45-18-34.