

# Monday Memo

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**Jessica Farrar**

House Democratic Caucus Vice Chair

## Just The Facts

Last week, Larry Phillips and Tom Craddick announced that all House members are currently under investigation regarding employment practices, including employment compensation arrangements. Thanks to Mr. Phillips and Mr. Craddick, everyone's Fall opponent will now be saying, "Rep. John Doe has been under investigation by the General Investigating Committee, the Texas Attorney General . . ."

Never mind that the investigation is now discredited and pretty well agreed to be unnecessary. You can call Tom Craddick and Larry Phillips when the mail pieces arrive in your district in October.

The Caucus staff has received many calls asking what exactly is going on. The House leadership has done nothing to advise most Members that they are under investigation since Craddick turned the issue over to General Investigating on April 7. Members were notified almost a month later by the *Austin American-Statesman*.

## How Did We Get Here?

On May 2, the *Austin American-Statesman* reported that "House Speaker Tom Craddick said he has ordered the House General Investigating and Ethics Committee and the state attorney general to look into [employment] practices."

Also on May 2, Chairman Tony Goolsby claimed in a letter that he had learned of employee compensation arrangements via an *Austin American-Statesman* story that same day. This same day, Chairman Larry Phillips stated that Craddick actually referred this matter to him on April 7, almost a full month before most Members read about the issue in the *Statesman*.

On May 3, the *Austin American-Statesman* then reported that "[a]ides to Craddick said he was unaware of the practice and ordered a full investigation immediately after it came to his attention."

On May 6, Craddick's spokesperson refused to acknowledge that Craddick's office in fact receives copies of all Personnel Action Request forms. Alexis DeLee said that a Member's questions about Mr. Craddick's feigned surprise that House Members provide health insurance to on-call staff members did "not merit a response."

On May 7, Craddick's spokesperson made several statements that seem to contradict Craddick's past positions, and those of Chairman Goolsby. DeLee admitted that Goolsby knew that a reporter was

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reviewing House payroll records in early April, and he was well aware of this issue before he claimed it had “come to [his] attention” on May 2.

Furthermore, DeLee confirmed last week Chairman Phillips’ claim that Craddick referred this issue to him on April 7. Yet Craddick and his office have repeatedly claimed to have no prior knowledge of House employment practices; Craddick even went so far as to refuse to admit that his office receives copies of all Personnel Action Request forms; a truly laughable denial, since until recently this was printed on all PAR forms: “Speaker – Green Copy.”

### **What Are The Governing Rules?**

So now that we know how we got here, what is this really all about?

Some smart lawyers were asked to explain the various laws effecting House employment practices. Below is what employment lawyers have pointed out, but you should contact an attorney if you have any specific questions. This is not meant as a legal brief, but there are so many questions out there, it is important you have the benefit of the statute references.

**1. Flexibility to Serve Our Constituents With House Administration Oversight.** State law permits the House to use its appropriated funds for “all salaries, per diem, and other expenditures authorized by law.” Tex. Govt. Code § 301.029(b). Under the Housekeeping Resolution that we adopted in January 2007, “[a] member may employ, with funds from the member's operating budget, such staff as the member deems necessary.” *Housekeeping Resolution*, Tex. H.R. 2 § 4.04, 80th Leg., R.S. (2007).

Under Section 4.06 of the Housekeeping Resolution, a Member is responsible for determining work schedules for the Member’s employees. However, Section 3.04 requires Members’ employment practices and policies to follow general House policies and state law. If a Member’s employment practices or policies violate House policies, House Administration is required by Section 4.16(c) to tell the Member about the violation and give the Member an opportunity to remedy the situation. Finally, House Administration is ultimately responsible under Section 5.09(a) for authorizing all House expenditures.

These provisions are intended to provide the Members with maximum flexibility to organize their offices to provide the necessary and appropriate level of constituent and legislative services. Members can set their own policies, but House Administration must approve them. That is why we fill out “Personnel Action **Request**” forms — they are *requests only* — and are not effective until they are approved. And contrary to what Alexis DeLee says, a copy of every PAR is sent to the Speaker — it says so right on the PAR form.

You may have experienced times in the past when your PARs were refused. For example, I know of members who wanted to raise an employee’s salary for only one month. That request came back denied, as it was tantamount to giving a bonus, which are prohibited by the Texas Constitution, something some members are unaware of. This just shows that House Administration, acting through the House Business Office, looks at our PARs and either accepts or rejects them in

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accordance with House policies. This is how the rules are written, and also how the rules have been followed for as long as anyone can remember.

**2. Flexibility to Get Maximum Value from Stretched Office Budgets.** There are no minimum salaries that must be paid to a Member's employees, employees may be placed on-call, and normal work rules do not apply to legislative employees.

First, under Section 654.011(a), Government Code, the state Position Classification Plan, which sets minimum salaries, does not apply to the Legislature. Similarly, Federal minimum wage laws do not apply to Members' employees because of what is called the "personal staff exemption." (This exemption does have some details that may, in some case, remove the exemption for certain employees in a Member's office. You should consult a lawyer if you have specific questions or concerns.)

Second, under Attorney General's Opinion LO 92-53 (1992), Members "may adopt a policy of providing compensation for time spent on standby or on call status without violating" the Constitutional prohibitions on extra compensation. This is pretty self-explanatory - you can pay someone for being on call or on standby. We all have employees (at least if we are attempting to do any meaningful constituent service we do) who go to community events (church anniversaries, Eagle Scout ceremonies, ribbon cuttings, etc, etc) for us. These events come and go and are heavy one week and light the next. There may be three or more simultaneous events across your district on July 4th, Memorial Day, Veteran's Day, MLK Day, Labor Day, etc., and we try to have employees who can attend the events we cannot personally get to. The understanding is that the Attorney General has ruled that it is acceptable to pay someone for being on call to go to these events and conduct constituent service.

Finally, the provisions of Chapter 658, Government Code, which sets a 40-hour work week for state employees only applies to the executive and judicial branches. Because the Legislature is exempt from this provision, Members don't have to pay people by the hour and evidently we can overwork them whenever we want (i.e., during sessions, holidays, etc.).

However, we must pay employees something, at least during a session. Under Ethics Commission Opinion No. 357 (1997), legislative caucuses were told that they could not accept a contribution of personal services during a legislative session without violating the contribution moratorium. So we can't accept free personal services during session. In other words, we actually must pay people who are giving us personal services something during session or we are in violation.

**3. Part-Time Employees Are Eligible for Health Insurance.** Under Section 1551.003(11), Insurance Code, a part-time employee is any employee "designated" as working less than 40 hours per week. Under Section 1551.319, a "part-time employee receives the benefits of one-half of the amount of the state contribution [for health insurance premiums] received by a full-time employee."

So, unlike what has been erroneously reported over and over, part-time employees are eligible for health insurance, they just have to pay ½ the cost (about \$180/mo). Regardless of the employee's status, all insurance premiums are paid out of the House contingent fund and not by any other

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agency. Whether it comes out of the House contingent fund, a Member's operating account, or the employee's paycheck is simply an accounting gimmick.

Even if insurance premiums were erroneously paid for an employee not eligible for the contribution, the House is not required to seek reimbursement of the erroneously paid premiums and may, in the exercise of reasonable discretion, forego requests for reimbursement. That's what the Attorney General said in Opinion No. JC-0383 (2001). If there is a mistake in classification of employees (and approved by House Administration), reimbursement is optional, not mandatory.

**4. Part-Time Employees Must Join the Retirement System.** Under Sections 812.003(a) and (c), Government Code, all employees must join the Employees Retirement System of Texas, regardless of whether they are full-time or part-time. Every part-time tour guide, sergeant, Senate messenger, etc., is a member of ERS. So unlike what continues to be reported, part-time employees are not only eligible for Retirement, they must participate.

Under ERS rules, each "full or partial" month of employment counts as a full month of creditable service. 34 Tex. Admin. Code § 71.1 (2006) (Employees Ret. Sys. of Tex., Creditable Serv.). That means that if an employee works just one day a month, the employee gets a month's worth of retirement credit. It has nothing to do with full- or part-time status — the ERS still deducts 6 percent of the monthly paycheck. Just listening to the anecdotal evidence, it is my understanding that many legislative employees never put in enough time to get any retirement benefits and close their accounts.

## **What Now?**

Apparently the House Business Office will be inundated now, responding to mountains of open records requests over the coming months. Once that dust settles, and we all learn about every low paid full-time employee who has worked in the House or Senate for the last 10+ years, there will not be one extra dollar spent on public education, one extra child who was thrown off CHIP reinstated, gasoline will not be lower and we will still be faced with real problems of real Texans.

That Craddick has sunk to some Nixonian use of the House Business Office and the Legislative Council to try and dig up dirt on his opponents is a new low. Once again he has demonstrated no regard for the members of the House or the institution of the House. All that matters is his maintaining his tenuous hold on his "absolute power."

Because of Tom Craddick every member of the Texas House is being investigated. Every member is being thrown under the proverbial bus because Craddick shot and missed three of his opponents.

## ***A Note on Open Records Requests***

All of us are receiving open records requests from outside requestors. My understanding is that the requests ask for records in your office's possession. Please have your office take time to perform an adequate search of your records so that you can promptly comply with the Public Information Act timelines. If you have questions about the timelines or specifics on the format of a response, call

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Jeff Archer at the Legislative Counsel or Kevin Vickers in Rep. Dunnam's office. Jeff is the best source. Kevin can also put you in touch with other offices who have responded to open records requests in the past, so you can get some general guidelines.