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### The New Dallas Paid Sick Leave Ordinance and Your Business

On April 24, 2019, the City of Dallas passed an ordinance that sets up a requirement for private employers to provide paid sick leave to their workers.

Beginning August 1, 2019, any employer who has more than five employees who work for more than 80 hours a year within the City of Dallas should be prepared to comply with the ordinance. The same requirements will come into effect for employers with less than five employees who work for more than 80 hours a year in Dallas on August 1, 2021.

In taking this action Dallas joined a growing national trend towards similar mandatory paid sick leave policies. Other Texas cities such as Austin and San Antonio have recently passed similar laws.

The Dallas Sick Leave Ordinance (City Ordinance No. 31181) will require employers to provide their employees who work in Dallas for more than 80 hours a year in Dallas with one hour of paid sick leave for every 30 hours of time they have worked in Dallas.

#### **Who does the Dallas Ordinance apply to?**

The Dallas Ordinance applies to any private employer who has five or more employees who perform 80 hours of work (or more) a year for the employer in Dallas. The way the ordinance is written it seems to apply to full and part time employees, paid interns, and paid apprentices. Under the ordinance the definition of employee specifically includes leased employees, so Dallas employers will need to discuss implementation of the ordinance with their employment agencies.

The ordinance specifically does not apply to unpaid interns, independent contractors, or employees who do not perform at least 80 hours of work a year for the employer in Dallas.

#### **What are the Requirements of the Dallas Ordinance?**

Under the Dallas Ordinance any employee who is covered by the ordinance is able to use earned paid sick time if:

- The employee is physically or mentally ill
- The employee needs to seek preventative health care
- The employee is caring for a family member who is physically or mentally ill needs to assist a family member who is seeking preventative health care
- The employee or one of their family members needs to seek medical care or services resulting from an incident of sexual assault, domestic abuse, or stalking. This requirement includes instances where the employee or employee's family member needs to participate in legal proceedings or any court ordered action

Employers must grant their eligible employees one hour of paid sick leave for every 30 hours the eligible employee works in Dallas. Over the course of a year an eligible employee can build up the following amounts of paid sick leave:



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- For an employer with 16 or more eligible employees: 1 hour for every 30 hours worked in Dallas up to 64 hours of paid sick leave
- For an employer with 15 or less eligible employees: 1 hour for every 30 hours worked in Dallas up to 48 hours of paid sick leave

If your company already provides, at a minimum, the same number of hours of paid sick leave, to the same types of employees, for the same categories of events, then you are compliant and don't need to do anything else under the statute.

The ordinance also states that:

- an employer does not have to allow an employee to use paid sick leave hours on more than 8 days in a year
- eligible employees may carry over up to a year's worth of earned paid sick time into the following year (therefore no employee will ever be eligible for more than 128 hours of paid sick leave)
- that employers cannot stop an employee from unexpectedly using paid sick leave they have already earned (for instance, an employer can't require an employee who was fine on Monday, but who is sick or has a sick family member on Tuesday morning, to report to work)
- if an employee uses all of their paid sick leave the employer is not required to pay the employee in excess of the paid sick leave the employee has earned
- employers are explicitly banned from retaliating against any employee who uses their paid sick leave and the city is empowered to investigate complaints an employer has violated the ordinance
- employers must once a month provide each eligible employee with statement (electronic or in writing) showing how much paid sick leave the employee has earned.
- employers who have an employee handbook must update their handbooks to provide a notice of the rights provided by the ordinance.
- employers will also be required to post a sign describing the ordinance requirements once the City of Dallas has designed templates for the sign and posted them to the city website.
- the ordinance also requires employers to maintain records of the amount of paid sick leave earned by, used by, and available to each eligible employee.
  - However, the time for which such records must be maintained is unclear as the ordinance cites to a length of time contained in Title 29 Section 516(a) of the Code of Federal Regulations (CFR), a section of the CFR that is not in existence. This was probably a typographical error that the city council will at some point fix, as Title 29 Section 516.6(a) of the CFR provides for records to be preserved for two years. Alternatively, Title 29 Section 516.5 of the CFR provides for records to be preserved for three years.

### **What if an employer is not in Compliance with the Ordinance?**

Each violation of the ordinance by an employer is punishable by a civil fine of up to \$500 from the City of Dallas, which can be appealed. However, an employer has 10 days after they have been given written notice of a violation from the city in which to correct the alleged mistake before



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a civil penalty can be collected. Also, no penalties will be levied before April 1, 2020, except for a violation of the anti-retaliation prohibition in the ordinance.

### **What about the Courts?**

Austin's paid sick leave ordinance has been fought over in court for over a year and is on hold while that case is on its way to the Texas Supreme Court. Similarly, the San Antonio ordinance, which was set to come into effect on August 1, 2019, is likely to be put on hold due to a similar lawsuit filed on July 15, 2019. In both lawsuits the plaintiffs argue that the cities have violated the Texas Minimum Wage Act by requiring businesses to pay employees for hours they have not worked. The plaintiff's argument is that the Texas Minimum Wage Act prevents localities from requiring private employers to pay more than the Texas minimum wage. The plaintiffs appear to be making this argument because while Texas' employment laws do not require employers to provide paid sick leave, they also do not stop or preempt cities or counties from mandating benefits greater than what Texas law requires. Because Texas has no employment benefits preemption statute, current Texas law provides the floor of minimum requirements and cities and counties can, theoretically, require more than Texas law as long as their requirements do not conflict with another Texas law. That being why the plaintiffs in the Austin and San Antonio cases are alleging their cities have violated the Texas Minimum Wage Act.

While a similar lawsuit might block Dallas's ordinance, none has yet been filed, and as such employers with more than five employees who work more than 80 hours a year in Dallas should still be ready to comply with the Dallas paid sick leave ordinance on August 1, 2019.



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### What Does Your Business Need To Do To Comply With The New Dallas Paid Sick Leave Ordinance?

1. Evaluate your Paid Time Off (“PTO”) policy to determine if it complies with the bare minimums in the new Dallas paid sick leave ordinance:
  - For any full or part time employee, paid intern, paid apprentices, or leased employee who works more than 80 hours a year in the City of Dallas provide:
    - For an employer with 16 or more eligible employees:
      - 1 hour for every 30 hours worked in Dallas up to 64 hours of paid sick leave
    - For an employer with 15 or less eligible employees:
      - 1 hour for every 30 hours worked in Dallas up to 48 hours of paid sick leave
  - Which can be used on up to 8 different days in a year if:
    1. The employee is physically or mentally ill
    2. The employee needs to seek preventative health care
    3. The employee is caring for a family member who is physically or mentally ill needs to assist a family member who is seeking preventative health care
    4. The employee or one of their family members needs to seek medical care or services resulting from an incident of sexual assault, domestic abuse, or stalking. This requirement includes instances where the employee or employee’s family member needs to participate in legal proceedings or any court ordered action.
  - And which provides that eligible employees may carry over up to a years’ worth of earned paid sick time into the following year
2. If your PTO policy meets these minimums you are already in compliance.
3. If you do not already provide the minimum requirements you will need to:
  - Provide the above benefits to any employee who works more than 80 hours in Dallas in a year
  - Provide notice of the requirements of the ordinance by:
    - adding information about it to your employee handbook (if you have one), and
    - by posting a sign with information about the notice (as soon as Dallas issues one)
  - Once a month provide each employee with a written or electronic statement showing them how much paid sick leave they have earned
  - Not penalize or retaliate against any employee who uses any earned paid sick leave, and
  - Maintain records showing the amount of paid sick leave earned by, used by, and available to each eligible employee for up to three years.



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### STATUS OF THE ORDINANCES – COURT CHALLENGES

The genesis of this ordinance was the passage by the city of Austin of a very similar (almost identical) ordinance in February, 2018. The Austin ordinance, and the ordinances which are followed in San Antonio and Dallas, are the handiwork of the questionably-named "Workers Defense Project, an Austin-based group which is dominated by organized labor advocates. Their fingerprints are also on the mandatory rest break ordinances with which I am sure you are well familiar.

#### COURT CHALLENGES

Shortly after the City of Austin passed its Paid Sick-Leave Ordinance, a consortium of private-party employers, led by the Texas Association of Business, filed a lawsuit in state District Court in Travis County, Texas, seeking an injunction against enforcement of the ordinance and, following trial, an order declaring the ordinance invalid. A number of grounds were cited, including the important assertion that the ordinance violates the Texas Minimum Wage Act (and, concurrently, the federal Fair Labor Standards Act). Subsequently, the state of Texas intervened in the suit, as well, also seeking an injunction preventing the ordinance from taking effect, on a state law preemption basis.

The trial court (the 459th District Court, Travis County, Texas), denied the injunctive relief sought, after which the matter was appealed to the Third Court Of Appeals, in Austin. The Third Court Of Appeals, sitting in Austin, ultimately granted the injunction preventing the ordinance in Austin from taking effect until trial on the merits of the case, but also, including some very powerful findings of law which would effectively bind the trial court and thus, make the ordinance likely unsupportable at trial.

As a result, the City of Austin requested rehearing by the entire Third Court Of Appeals (rather than the three-justice panel that heard it), a request which was denied, so the City of Austin subsequently filed a Petition for Review before the Supreme Court, State of Texas.

The Supreme Court has received the Petition for Review, as well as replies to the Petition for Review and petitions for additional review by the employer-friendly places group.

Because the essential underpinnings of the ruling mandating the injunction against the ordinance going into effect is a finding that the ordinance, and its effect, is preempted by state law (the Texas Minimum Wage Act), and because other cities have passed essentially identical ordinances (San Antonio last year, and of course, Dallas this year), the intent is to secure a ruling by the Supreme Court of Texas, as the court of last resort for such matters, that the ordinance (and others like it) cannot be passed by a city.

That is where the matter stands, now, and oral argument before the Supreme Court has not yet been scheduled; we will notify when this happens.



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Also, a new lawsuit has just been filed (July 15) in Bexar County, challenging the San Antonio ordinance on similar grounds, adding a claim that the ordinance violates the Texas Constitution. It is likely that an injunction will follow.

### WHAT WILL HAPPEN IN THE COURTS?

We believe that the ruling by the Third Court Of Appeals is correct, because the net effect of the mandatory paid sick leave ordinances is to compel private employers to pay employees who utilize mandatory sick leave at a higher rate than those do not, and thus, strays into the territory of the state law on the subject of minimum wage.

It is interesting that the Third Court Of Appeals, which sits in Austin, reached the ruling that it did, because, while its territory of influence and electorate is broader than Austin/Travis County exclusively, Travis County nonetheless makes up the largest proportion of voters electing Court of Appeals justices.

We expect that the Supreme Court will ultimately uphold the ruling of the Third Court Of Appeals, Thus rendering nearly all of the issues in the original lawsuit moot, and effectively preempting enforcement of mandatory paid sick leave ordinances by cities; while the ruling technically applies only to the ordinance passed by the City of Austin, once the Supreme Court has ruled, it would be folly for other cities, San Antonio and Dallas, to attempt to enforce their ordinances.

### LEGISLATIVE PREEMPTION

It was generally expected, before the beginning of the recently-ended legislative session, that the state legislature would pass a law to explicitly preclude cities from passing such ordinances, and a game effort is so doing was made it. As you may have heard, however, it was a stupid legislative session, with lots of back fighting and, to be blunt, little of great substance accomplished. No such law passed, so the court action continues.

We look forward to visiting with you further about this, as it is a subject which is keenly interesting and very important to all of our clients, and the industry as a whole.

Call us with any questions!

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