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PAID SICK LEAVE REQUIRED BY LAW? AUSTIN IS "KEEPING IT WEIRD"

by Michael Kelsheimer, Fred Gaona and Jake Lewis
Gray Reed & McGraw LLP
March 14, 2018



In February 2018, the Austin, Texas City Council approved an ordinance requiring employers with at least five employees to offer paid sick leave to employees who work at least 80 hours in a year. The new rule goes into effect in October, but pundits are expecting the Texas Legislature to try to stop the rule before it gets out of the gate.

With this new city ordinance, Austin joins the cities of Chicago, New York, Seattle, and San Francisco in requiring paid sick leave. Of course, Austin's ordinance is one of the strongest created thus far. Whereas other cities have carve outs for certain industries, Austin's ordinance applies to all private-sector businesses. Austin's rule is the first in Texas and even the first in the southern United States.

Whether you approve of the measure or not, clients with employees in Austin must prepare and adapt to the change.

The Ordinance

The Austin ordinance provides mandatory paid sick leave for all employees of private employers without regard to industry or size. Every employee working within Austin city limits will be entitled to paid leave if they perform at least 80 hours of work each year in Austin. Employees will earn one hour of sick leave for every 30 hours worked in Austin. The ordinance does take employer size into account with respect to the cap on paid sick leave—employers with more than 15 employees must allow employees to accrue 64 hours of leave per year, while smaller employers must only allow employees to accrue 48 hours of leave per year. Notably, all earned leave must carry over to the following year, though an employee may not use paid sick leave on more than eight calendar days in a calendar year.

The permissible uses for paid sick leave outlined in the ordinance are likely much broader than an ordinary employer-developed policy would allow. It includes time taken due to an employee's own illness or injury, but it also allows for the use of paid sick leave for the care of a relative (including a person "whose close association with the employee is the equivalent of a family relationship") or even preventative care for the employee or the employee's relative. Further, the ordinance mandates that an employee may use paid sick leave if the employee or a relative is a victim of domestic abuse and the time will be used to seek medical care, to relocate, to attend legal proceedings, or to secure victim's services. As a matter of practice, the ordinance may have the collateral effect of curtailing employer-designed paid time off policies used to provide both sick leave and vacation/personal leave, as the law is unclear as to whether employers can authorize the use of accrued sick leave for purposes outside the scope of permissible uses.

The ordinance will go into effect on October 1, 2018, for employers with more than five employees. Employers with five or fewer employees get a larger window in which to prepare for the ordinance before it takes effect for them on October 1, 2020. Once the ordinance is effective, employers will be required to post a notice—once Austin's Equal Employment Opportunity/Fair Housing Office (EEO/FHO) has developed and released it—and any employee handbook will be required to contain a notice outlining employees' rights and remedies under the ordinance.

Enforcement of the ordinance is limited to a notice of penalty with a 10-day window for voluntary compliance. Once the 10 days have expired, the EEO/FHO may assess a \$500 penalty for each violation. Employees have up to two years to file a grievance with the EEO/FHO.

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The Future

As revolutionary as the ordinance may be (at least in the South), the revolution may be short lived. Republican members of the Texas Legislature have already come out in force against the measure, identifying it as a burden on small businesses and a government overreach. State Representative Paul Workman, whose district includes parts of Austin, has vowed to introduce legislation preempting the ordinance on the first day of the next legislative session, which begins January 2019. State Senator Donna Campbell took to Twitter to announce her willingness to reverse the Austin City Council's action, stating she is "fully prepared to pass statewide legislation to stop Austin's intrusion into the private-sector and protect small businesses in Texas."

Austin is no stranger to clashes with the state legislature. Last year, the legislature stepped into a very public rift between the City of Austin and ride-sharing giants Uber and Lyft. In that instance, Austin had passed an ordinance requiring more stringent background check requirements for ride-sharing drivers, and Austin citizens later defeated a ballot proposition that would have overturned the measure. Enter the Texas Legislature, which passed HB 100, which stripped municipalities of the authority to regulate ride-sharing companies.

Despite the public protests of certain state legislators, however, the political road to preemption of municipal paid sick leave remains rocky. Unlike the ride-sharing statute, which brought back to Austin the major ride-sharing services, state action to override the sick leave ordinance would require stripping Austin citizens of a valuable benefit.

Considerations for Austin Employers

Although the ordinance's long-term future is in doubt, one thing is certain: the ordinance will go into effect several months before the legislature has an opportunity to preempt it. As such, employers must make preparations for implementation of the ordinance, from revising employee handbooks to ensuring management staff understand the details of the required policy. Whether a company employs ten, a hundred, or a thousand employees in Austin, mandatory paid sick leave will be the law come October. It simply remains to be seen just how long it will stay that way.

ABOUT THE AUTHORS



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Michael focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients. He earned his J.D. from Baylor University School of Law.



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