

Article

Aynsley Young Discusses Paid Sick Leave with Texas Lawyer

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Labor and Employment attorney Aynsley Young recently contributed an article to **Texas Lawyer** detailing how Austin became the first major southern city in the U.S. to address mandatory paid sick leave at a municipal level by enacting a paid sick leave ordinance for private employers, which was set to go into effect on Oct. 1, 2018, but has been delayed.

“The Ordinance generally requires employers to accrue paid sick time for employees working within Austin’s city limits, and to allow those employees to request payment for using earned paid sick leave for absences caused by illness or injury of the employee or the employee’s family members,” said Young. “In addition, employees may use paid sick time for absences related to an instance of domestic violence, sexual assault, or stalking involving the employee or the employee’s family member.”

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Although the Fair Labor Standards Act and its Texan equivalent, the Texas Minimum Wage Act, create minimum wage standards for employers, there is no federal or Texas state law requiring private employers to provide their employees with paid sick leave.

In 2011, Connecticut enacted a statewide statute requiring private-sector employers to provide paid sick leave to their employees. California followed with its own statewide law mandating paid sick leave in 2014. Since then, nine additional states and the District of Columbia have adopted laws requiring private-sector employers to provide paid sick leave to their employees.

On Feb. 16, Austin became the first major southern city in the United States to address mandatory paid sick leave at a municipal level by enacting a paid sick leave ordinance for private employers. This ordinance was set to take effect in Austin on Oct. 1. However, due to legal challenges discussed below, the effective date of the ordinance has been delayed and the future of the ordinance, and similar municipal paid sick leave laws in other Texas cities, remains uncertain.

The ordinance generally requires employers to accrue paid sick time for employees working within Austin’s city limits, and to allow those employees to request payment for using earned paid sick leave for absences caused by illness or injury of the employee or the employee’s family members. In addition, employees may use paid sick time for absences related to an instance of domestic violence, sexual assault, or stalking involving the employee or the employee’s family member.

As drafted, the ordinance provides maximum coverage, through standardized paid sick leave, for employees working for a private employer within the city limits of Austin. However, because the ordinance broadly defines who qualifies as an employee and does not place any restrictions on the location of the employer, it implicates a great many employers and individuals who are located outside of Austin. For example, if an employer located in Dallas routinely sends one of its Dallas-based employees to work in Austin, that employee may be entitled to

accrue paid sick time for the amount of time he or she works in Austin. The employee then is entitled to use this paid sick time at any time, regardless of the fact that the employee is based in Dallas.

The ordinance requires an employer to provide a qualifying employee with one hour of paid sick time for every 30 hours the employee works within the city limits of Austin. An employee is entitled to accrue and use up to 64 hours of paid sick time each year. The ordinance further requires that the employer compensate its employee at the employee's normal wages anytime the employee uses paid sick time.

Following Austin's adoption of the ordinance, multiple Texas cities are pushing to enact similar paid sick leave initiatives. In August, San Antonio adopted an ordinance implementing a mandatory paid sick leave system for private employees working in the city limits. The San Antonio ordinance is largely based on the Austin ordinance and is currently set to go into effect in August 2019. In addition, paid sick leave advocates in Dallas attempted to collect enough valid petition signatures to place a mandatory paid sick leave ordinance on the ballot for voter approval in the November elections. This effort ultimately fell short, but advocates in Dallas continue to push for the adoption of a citywide paid sick leave system. However, the future of city-mandated paid sick leave in Texas will depend in large part on the legal challenges made to the ordinance, currently pending before the Austin Court of Appeals, as well as the actions of the Texas Legislature in the upcoming 2019 legislative session.

On April 24, a coalition of local and national business associations filed a state court lawsuit seeking, among other things, a temporary injunction blocking the ordinance, arguing that it violates the Texas Constitution and conflicts with existing state law by effectively raising the minimum wage. The state intervened in this lawsuit, asserting that the ordinance undermines state sovereignty and is pre-empted by the Texas Minimum Wage Act. The trial court denied the injunction request in July. In response, the private business plaintiffs and the state filed an interlocutory appeal and asked that the Austin Court of Appeals enjoin the ordinance from taking effect during the pendency of the appeal.

On Aug. 17, the Court of Appeals granted the request and enjoined the ordinance from taking effect while the appeal of the trial court's denial of temporary injunctive relief is pending. Oral arguments were held on Oct. 17 before a panel of three justices and the parties now await the decision of the Austin Court of Appeals. In the event that the Austin Court of Appeals sides with the city the ordinance would likely take immediate effect.

The San Antonio paid sick leave law has not yet faced a legal challenge from either the state or local business associations. However, a coalition of San Antonio businesses filed an amicus brief opposing the Austin ordinance and supporting the position of the Austin businesses. It is likely that San Antonio businesses will wait for the Austin Court of Appeal's decision before initiating their own lawsuit against the San Antonio paid sick leave ordinance.

Regardless of the outcome of the legal challenge to the ordinance, Texas state legislators opposing the ordinance, and similar paid sick leave initiatives in other Texas cities, say they will seek to repeal the ordinance during the 2019 legislative session which begins on Jan. 8. In all likelihood, the legislative efforts to restrict paid sick leave will take the form of a statute expressly prohibiting local governments from enacting ordinances regulating employee benefits, including paid sick leave policies. If this type of law is enacted, then cities will be unable to implement municipal paid sick leave ordinances for private employers, leaving the power to regulate and require private employers to provide paid sick leave for its employees in the hands of the federal government or the state.

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