

# Employment Law Update

## Austin Paid Sick Leave Ordinance



**Devon D. Sharp**  
Shareholder

D. 214.855.7539  
E. [dsharp@munsch.com](mailto:dsharp@munsch.com)



**Aynsley K. Young**  
Associate

D. 214.855.7502  
E. [ayoung@munsch.com](mailto:ayoung@munsch.com)

**Update as of August 17, 2018:** As noted below, a coalition of local and national business associations (in addition to the State of Texas, as an intervening party) filed a state court lawsuit seeking, among other things, a temporary injunction blocking the Austin paid sick leave ordinance, arguing that it violates the Texas Constitution and conflicts with existing state law by effectively raising the minimum wage. The injunction request was denied by the trial court in late June. The plaintiffs filed an interlocutory appeal and asked that the Austin Court of Appeals enjoin the ordinance from taking effect during the pendency of the appeal, in order to preserve the parties' rights. On Friday, August 17, the Court of Appeals granted the plaintiffs' request.

**Consequently, the ordinance will NOT take effect on October 1.** Munsch Hardt's Labor & Employment team will continue to monitor this developing issue and keep you informed.

On February 16, 2018, Austin became the first major southern city in the United States to enact a paid sick leave ordinance for private employers (the "Ordinance"). The Ordinance generally requires employers to accrue paid sick time for employees who have worked a certain period of time within Austin's city limits, and to allow those employees to request payment for using earned sick time for the illness or injury of the employee or the employee's family members.

### WHO IS COVERED UNDER THE ORDINANCE?

"Earned Sick Time" is defined in the Ordinance as a period of paid leave from work accrued by an employee. An **"employee" is defined as any individual who works at least 80 hours per year within the city of Austin for an employer.** The definition of employee includes individuals who work for an employer through the services of a temporary or employment agency. Independent contractors and unpaid interns are not considered employees and are not eligible to accrue Earned Sick Time. **The Ordinance is applicable to any employer whose employees work at least 80 hours per year within the city limits of Austin—even if the employer is located outside of Austin.**

Because the Ordinance employs such a broad definition of employee and does not place any restrictions on the location of the employer, it implicates a great many employers and employees located **outside** the city 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 Earned Sick Time for the amount of time he or she works in Austin. The employee then is entitled to use this Earned Sick Time at any time—regardless of the fact that the employee is based in Dallas.

The Ordinance would also cover an Austin-based employee of an employer located outside the city of Austin. In addition, many seasonal and part-time workers will qualify as employees under the Ordinance and thus are entitled to accrue and use Earned Sick Time. **As long as the individual works at least 80 hours per year within Austin's city limits, the Ordinance entitles the individual to accrue and use Earned Sick Time.**

### ACCRUAL AND USE OF EARNED SICK TIME

An employer is required to provide a qualifying employee with one hour of Earned Sick Time for every 30 hours the employee works for the employer within the city of Austin. Earned Sick Time accrues in hourly increments, meaning that an employee must work a full 30 hours to earn one hour of Earned Sick Time. Employees can accrue Earned Sick Time up to a yearly maximum of 64 hours (the "Yearly Cap").<sup>1</sup>

<sup>1</sup>This Yearly Cap applies to employers with more than 15 employees at any time during the preceding 12 months, excluding family members. For employers with fewer employees than this, the yearly cap is 48 hours.

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In the event that an employee does not use all of his or her Earned Sick Time in a year, then any remaining hours, up to the Yearly Cap, must be carried over to the next year. However, if an employer chooses to automatically provide its employees at least 64 hours of Earned Sick Time at the beginning of the calendar year, then the employee will not be entitled to carry over unused Earned Sick Time.

An employee can use Earned Sick Time as soon as it is accrued. Earned Sick Time will begin to accrue on October 1, 2018 for current employees, or at the commencement of employment for employees hired after October 1, 2018. An employer may restrict an employee from using Earned Sick Time during the first 60 days of employment, *but only if* the employer establishes that the employee's term of employment is at least one year. The Ordinance does not explain how an employer could establish that an employee's term of employment is at least one year. In the absence of further guidance or clarification from the Austin City Council or the courts, an employer should not prohibit the use of Earned Sick Time during an employee's first 60 days of employment.<sup>2</sup>

An employee can request to use Earned Sick Time for an absence from the employee's scheduled work time for any qualified purpose. A qualified purpose is an absence caused by:

- The employee's physical or mental illness or injury, preventative medical or health care, or health condition;
- The employee's need to care for a family member's<sup>3</sup> physical or mental illness, preventative medical or health care, injury, or health conditions; or
- The employee's need to seek medical attention, seek relocation, obtain services from a victim services organization, or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or the employee's family member.

An employer must compensate the employee at the employee's normal wages for an absence from scheduled work time as long as the employee:

- Has available Earned Sick Time; and
- Makes a timely request to use Earned Sick Time before the employee's scheduled work time.

In addition, an employer cannot require an employee to find a replacement to cover the employee's absence as a condition of using Earned Sick Time.

<sup>2</sup>There is a timing discrepancy in the Ordinance related to the accrual of Earned Sick Time. An individual can begin accruing Earned Sick Time on October 1, 2018 or at the commencement of employment (as applicable), and Earned Sick Time accrues at a rate of one hour for every 30 hours worked. However, under the Ordinance, an "employee" is defined as any individual who works at least 80 hours within the city of Austin. Under a strict reading of the Ordinance, this means that an individual would accrue two hours of sick time before the individual meets the definition of an employee who is entitled to accrue and use Earned Sick Time. This timing issue is further complicated by the Ordinance's mandate that Earned Sick Time begins accruing at the commencement of employment, and the prohibition on an employer's ability to limit the use of Earned Sick Time for the first 60 days of employment. The assumption in the Ordinance seems to be that most individuals will work more than 80 hours in the city of Austin and thus will be entitled to accrue Earned Sick Time. Due to this ambiguity, our recommendation is to assume that each newly hired employee in Austin will work 80 hours and allow Earned Sick Time to accrue from the beginning of employment.

The ambiguity presents a more significant issue for employers who periodically send employees to Austin—especially if those employees do not end up working in Austin for more than 80 hours per year. In this situation, the ambiguity may support an employer's argument that an employee who works periodically in Austin is not entitled to Earned Sick Time until the employee works more than 80 hours in Austin. Whether or not courts go with this reasoning is a different story. A more cautious approach, given the uncertainty in the Ordinance, would be to simply allow Earned Sick Time to accrue for the hours that an employee works in Austin.

<sup>3</sup>The Ordinance defines "family member" to include an employee's spouse, child, parent, any individual related by blood or a person whose close association with the employee is the equivalent of a family member.

The Ordinance does not specify what constitutes a “timely” request to use Earned Sick Time. The only explicit parameter is that the request must be made “before [the employee’s] scheduled work time.” To avoid any potential issues regarding whether an employee’s request is timely, an employer should implement a policy specifying the required method and timing of an employee’s request to use Earned Sick Time. However, even if an employee does not make a timely request to use Earned Sick Time, an employee is still entitled by the Ordinance to use Earned Sick Time in the event of an “unforeseeable” qualifying absence. The employer’s policy should account for this situation.

Generally, the Ordinance does not provide a mechanism for employers to verify that their employees are using Earned Sick Time for a qualified purpose. However, if an employee requests to use Earned Sick Time for more than three consecutive work days, an employer may adopt and use reasonable verification procedures to ensure that an employee’s absence is for a qualified purpose.

An employer is not required to permit an employee’s use of Earned Sick Time on more than eight days per calendar year. Despite the apparent breadth of the employee’s ability to accrue and use Earned Sick Time, employers’ enforcement of this limitation will help reduce any potential abuse of Earned Sick Time.

An employee’s accrued Earned Sick Time and right to use Earned Sick Time transfers with the employee in the event of a transfer to a different facility, location, division, or job position with the same employer. In addition, employees who are rehired within six months following a separation are entitled to have their prior Earned Sick Time reinstated.

#### **ADDITIONAL REQUIREMENTS FOR EMPLOYERS**

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An employer must display signage regarding the Ordinance, in all appropriate languages, in a conspicuous place or in a place where employee notices are typically posted. However, an employer is not required to post any signage until the City of Austin provides the signs on its website. As of July 19, 2018, the City of Austin’s website has not posted the required signage.<sup>4</sup> Employers must also provide each employee with a monthly statement showing the amount of the employee’s available Earned Sick Time.

If an employer provides an employee handbook to its employees, the handbook must include a notice of the employee’s rights to Earned Sick Time and remedies available in the event of a violation of the Ordinance.

Employers may provide more Earned Sick Time than the Ordinance requires. In addition, if an employer’s existing paid time off policies meet or surpass the requirements of the Ordinance, the employer is not required to provide additional Earned Sick Time to its employees.

#### **ENFORCEMENT OF THE ORDINANCE**

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An employer is prohibited from retaliating against an employee for requesting or using Earned Sick Time, for reporting a violation of the Ordinance or for participating in an administrative proceeding under the Ordinance. Retaliation includes transferring, demoting, discharging, suspending, reducing an employee’s hours or directly threatening any of these actions against an employee.

The City of Austin Equal Employment Opportunity/Fair Housing Office (“EEO/FHO”) is responsible for enforcing the provisions of Ordinance.

The Ordinance provides the EEO/FHO with the ability to investigate complaints alleging a violation of the Ordinance and the ability to adopt further rules to implement and otherwise enforce the Ordinance.

<sup>4</sup>The website where the City of Austin will post the required signage may be found at: <http://www.austintexas.gov/EarnedSickTime>

An employee has two years to file a complaint with the EEO/FHO for an alleged violation of the Ordinance. The EEO/FHO then investigates the validity of the employee's complaint to determine whether a violation has occurred. In the event that the EEO/FHO finds a violation of the Ordinance, the EEO/FHO can assess a civil penalty of up to \$500.00 per violation. The EEO/FHO must provide written notice of the violation to the employer and seek voluntary compliance from the employer to remedy the violation. After receiving the notice from the EEO/FHO, the employer has 10 business days to correct the violation. If the employer corrects the violation within the 10-day period, then the employer will not be required to pay the civil penalty assessed by the EEO/FHO. The EEO/FHO will not begin assessing civil penalties for violations of the Ordinance, other than violations involving retaliation against employees, until June 1, 2019.

### LEGISLATIVE AND JUDICIAL CHALLENGES

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State legislators opposing the Ordinance say they will seek to repeal it during the 2019 legislative session. Additionally, a coalition of local and national business associations (in addition to the State of Texas, as an intervening party) 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 injunction request was denied in late June, however. Consequently, the Ordinance will, in all likelihood, take effect this fall.

Similar initiatives are being pushed in other Texas cities. Paid sick leave advocates in Dallas attempted to collect enough valid petition signatures to get a mandatory paid sick leave ordinance on the ballot in November but fell just short. Paid sick leave advocates in San Antonio made a similar attempt and were successful. The future of the San Antonio initiative (and any other initiatives that may be advanced) will depend in large part on the actions of the Texas Legislature in January.

### HOW EMPLOYERS SHOULD PREPARE

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The Ordinance is drafted to provide standardized paid sick leave to individuals working within the city of Austin, and to reach as far as possible in its scope. In addition, the Ordinance encourages employees to use Earned Sick Time by limiting the employer's oversight of the process. The Ordinance does, however, provide employers with some meaningful tools, such as limiting the number of days per year that an employee can use Earned Sick Time, and allowing the employer to use reasonable verification procedures to ensure that absences exceeding three consecutive work days are, in fact, qualified absences. In addition, while the civil penalties associated with violating the Ordinance are severe, the EEO/FHO is required to seek voluntary compliance with the Ordinance before assessing a civil penalty against an employer.

With this in mind, affected employers should:

- Update their business processes and employee handbooks to include Earned Sick Time standards;
- Implement procedures to track their employees' accrued Earned Sick Time and send monthly updates of accrued hours; and
- Hang appropriate signage once it is available.

We are happy to help with any and all of these steps. As noted above, **while there is a possibility that the Texas Legislature could pass a bill repealing the Ordinance, the next legislative session does not begin until January 2019. Consequently, employers with more than five employees should be prepared to comply with the Ordinance by October 1, 2018.**

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Munsch Hardt's Labor & Employment team has extensive experience advising and defending employers of all sizes and types. We are equipped to handle the full range of employment law issues, from advice and counsel on day-to-day HR matters to government audits, litigation and arbitration.

For more information, visit: <https://www.munsch.com/Services/Labor-Employment>