

Management Alert



If Pain, Yes Gain—Part 51: Texas Continues to be Hotbed for Paid Sick Leave Activity

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Seyfarth Synopsis: Last week ended with a flurry of paid sick leave developments in multiple Texas municipalities. On Thursday, August 16, the San Antonio City Council passed a paid sick leave ordinance, making it just the second city in Texas to do so. The ordinance is set to become effective for most employers in August 2019, although expected judicial or legislative efforts may interrupt this schedule. The following day, Friday, August 17, the Texas Court of Appeals for the Third District granted a request to enjoin the Austin paid sick leave ordinance's effective date, originally set for October 1, 2018, pending the court's decision on an appeal of a lower court's order denying a temporary injunction application.

After years of successfully avoiding the ongoing paid sick leave wave that has infected dozens of jurisdictions since the start of 2014, Texas has become a hotbed of paid sick leave activity in 2018. Last week marked the peak of this activity, as sick leave developments took place in both San Antonio and Austin.

On August 16, the San Antonio City Council voted and passed the Earned Paid Sick Time Ordinance (the "SA Ordinance"). The SA Ordinance is scheduled to go into effect for most employers on August 1, 2019,¹ and is just the second such ordinance to be passed in the state. Earlier this year, Austin became the first Texas municipality to enact a paid sick leave ordinance.²

Austin's paid sick leave ordinance made news last week as well. On August 17, the Texas Court of Appeals for the Third District (the "Third District") granted a request to enjoin the Austin ordinance's October 1, 2018 effective date. The Third District's order notes that "the ordinance is enjoined from taking effect while the appeal is pending" and that "the appeal is from an order denying an application for temporary injunction" of the Austin ordinance. For more information on Austin's paid sick leave ordinance, see our [prior alert](#).

¹ The SA Ordinance will have delayed implementation for employers with no more than five employees at any time in the prior 12 months. For any such employer, the SA Ordinance does not become effective until August 1, 2021.

² San Antonio joins a growing list of states and municipalities that impose paid sick leave obligations on employers. The existing statewide paid sick leave laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; (5) Vermont; (6) Arizona; (7) Washington; (8) Maryland; (9) Rhode Island; and (10) New Jersey. The New Jersey paid sick leave law goes into effect on October 29, 2018. The existing municipal paid sick leave ordinances include: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) New York City, NY; (7) Jersey City, NJ; (8) Newark, NJ; (9) Passaic, NJ; (10) East Orange, NJ; (11) Paterson, NJ; (12) Irvington, NJ; (13) Los Angeles, CA; (14) Oakland, CA; (15) Montclair, NJ; (16) Trenton, NJ; (17) Bloomfield, NJ; (18) Philadelphia, PA; (19) Tacoma, WA; (20) Emeryville, CA; (21) Montgomery County, MD; (22) Pittsburgh, PA; (23) Elizabeth, NJ; (24) New Brunswick, NJ; (25) Santa Monica, CA; (26) Plainfield, NJ; (27) Minneapolis, MN; (28) San Diego, CA; (29) Chicago, IL; (30) St. Paul, MN; (31) Cook County, IL; (32) Berkeley, CA; (33) Morristown, NJ; and (34) Austin, TX. The 13 municipal ordinances in the state of New Jersey will be preempted as of October 29, 2018 when the New Jersey statewide paid sick leave law goes into effect. Los Angeles, CA has two paid sick leave ordinances, one of which only applies to certain "hotel employers." The Long Beach, CA and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015; however, it is not currently in effect due to an ongoing lawsuit challenging the validity of the ordinance under Pennsylvania law.

The fate of the Austin ordinance likely will dictate whether the SA Ordinance goes into effect as scheduled. While the final prognosis is currently unknown, here are some of the highlights of the SA Ordinance:

- **Covered Employers:** “Employer” is defined to include “any person, company, corporation, firm, partnership, labor organization non-profit organization or association that pays an employee to perform work for an employer and exercises control over the employee’s wages hours and working conditions.” This excludes federal, state and local government entities.
- **Eligible Employees:** Employees who perform at least 80 hours of work for pay in the city of San Antonio in a year will be entitled to earned paid sick time (“EPST”).
- **Accrual of EPST:** Employees will be entitled to begin accruing EPST at the later of the start of their employment or the SA Ordinance’s effective date. Employers must allow EPST to accrue at a rate of at least one hour of EPST for every 30 hours worked in the city of San Antonio. The SA Ordinance states that employers must allow employees to accrue either 64 or 48 hours of EPST per year depending on the employer’s size.³
- **Usage Waiting Period and Cap:** As with the Austin paid sick leave ordinance, the SA Ordinance states that an employer can set a 60-day EPST waiting period for new hires if the employer establishes that the employee’s employment term is at least one year. Also consistent with the Austin ordinance, the SA Ordinance does not require employers to allow employees to use more than eight days of EPST in a year.⁴
- **Carryover and Frontloading:** The SA Ordinance states that employers will need to allow up to either 64 or 48 hours of earned, unused EPST to carryover at year-end (the amount depends on the employer’s size). However, as with many paid sick leave laws, the SA Ordinance contains an exception to this requirement. Specifically, employers that frontload at least 64 or 48 hours of EPST (again, depending on the employer’s size) to employees at the beginning of each year are not subject to year-end carryover.
- **Reasons for Use:** Under the SA Ordinance, employees can use EPST for the following covered absences:
 - 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 physical or mental illness, preventative medical or health care, injury or health condition; or
 - The employee’s or their family member’s need to seek medical attention, seek relocation, obtain services of 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.
- **Covered Family Member:** The SA Ordinance defines “family member” to mean an employee’s spouse, child, parent or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.
- **Non-Sick Paid Leave Policies:** Employers are not required to provide additional EPST to employees who receive paid time off, such as PTO, “under conditions that meet the purpose, accrual, yearly cap, and usage requirements” of the SA Ordinance.
- **Payment of Sick Time:** Under the SA Ordinance, employers must pay an employee for used EPST in an amount equal to what the employee would have earned if the employee had worked the scheduled work time. This does not include overtime, tips, or commissions.
- **Verification:** Employers will be allowed to impose reasonable verification procedures on employees who are absent for covered EPST reasons for more than three consecutive workdays.

³ Employers with more than 15 employees at any time in the prior 12 months must allow eligible employees to accrue up to at least 64 hours of EPST based on their hours worked. Smaller employers are subject to the 48-hour annual EPST accrual cap.

⁴ The SA Ordinance defines “year” as a regular and consecutive twelve (12) month period as determined by the employer.

- **Employee Notification:** The SA Ordinance mandates that employers allow employees to use available EPST if the employee makes a timely request to use the leave before their scheduled work time. That being said, employers cannot prevent employees from using available EPST for unforeseeable qualifying absences.
- **Reinstatement of Unused EPST Upon Rehire:** If an employee is rehired within six months of separation of employment, employers must reinstate any earned, unused EPST to the employee upon rehire.
- **Monthly Notice to Employees:** On no less than a monthly basis, an employer must provide electronic or written notice to each employee showing the amount of the employee's available EPST.
- **Posting and Handbook Notice:** The SA Ordinance comes with two additional notice requirements. First, employers who provide an employee handbook to their workers must include a notice of employee rights and remedies under the SA Ordinance in the handbook. Second, if the Director of the San Antonio Metropolitan Health District (the "Director") makes a model paid sick leave poster available on its website, the employer must display the poster in a conspicuous place where notices to employees are customarily posted. The poster must be displayed in English and other languages determined by the Director.
- **Recordkeeping:** Employers must retain records establishing the amount of EPST accrued and used by each employee for a period of time consistent with Title 29, Section 516(a) of the Code of Federal Regulations.
- **No Retaliation:** Employers are prohibited from retaliating against an employee who requests or uses EPST, or otherwise exerts any rights afforded under the SA Ordinance.

San Antonio employers should begin preparations to comply with the SA Ordinance's August 1, 2019 effective date. These are among the actions to consider:

- Monitor judicial and potential legislative developments involving the Austin paid sick leave ordinance and SA Ordinance.
- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the SA Ordinance.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the SA Ordinance.
- Develop a new paid sick leave policy that complies with the SA Ordinance for any employees who are not covered under existing paid sick leave or PTO policies.
- Monitor the San Antonio Metropolitan Health District website for further information on the SA Ordinance, including regulations, model notice, etc.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list. Companies interested in Seyfarth's paid sick leave laws survey should reach out to sickleave@seyfarth.com.

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