

New Preemption Issue Created by Revision to San Antonio Paid Sick and Safe Leave Ordinance

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While attempting to avoid the same fate as the Austin paid sick leave ordinance, the City of San Antonio inadvertently created a new preemption issue with its October revision of the San Antonio paid sick and safe leave ordinance.

Whether the Texas Minimum Wage Act preempts a paid sick leave ordinance hinges on one central question: Is paid sick leave wages under the Act? If it is, then the Texas Minimum Wage Act does not allow local governments, such as San Antonio, to pass an ordinance related to paid sick leave. The problem is that the Texas Minimum Wage Act does not define “wages.”

Last year, the Austin Court of Appeals ruled that the Texas Minimum Wage Act preempted the Austin ordinance because paid sick leave is wages. The Austin court reasoned that because paid sick leave compensated employees for time spent not working, it effectively increased compensation for time employees spent working.

Considering this decision by the Austin court, the City of San Antonio has made apparent efforts to distinguish the San Antonio ordinance from the Austin ordinance—namely attempting to distance paid sick and safe leave from wages. On October 3, 2019, the San Antonio City Council voted to approve revisions to its paid sick leave ordinance that tried to do just that.

The revised San Antonio ordinance defines paid sick and safe leave as a “fringe benefit” and “not a wage or a component of salary.” It states that the ordinance “does not require that sick and safe leave be calculated as an increase to salary or wages for an employee.” Finally, the revised ordinance provides that it is not designed or intended to conflict with the Texas Minimum Wage Act. The City will likely use these revisions to argue that the San Antonio Court of Appeals should not adopt the reasoning of the Austin Court of Appeals because the cities’ ordinances are distinct.

However, through its revision of the ordinance, the City of San Antonio accidentally opened the door to a new issue. By defining paid sick and safe leave as a “fringe benefit as defined by the Texas Labor Code,” the challengers to the ordinance can argue that as a “fringe benefit,” this sick and safe leave fits within the meaning of wages and is preempted by the Texas Minimum Wage Act.

In interpreting a statute, such as the Texas Minimum Wage Act, a court should first look to the plain language of the statute to interpret the statute’s meaning. In doing so, the court may apply canons of statutory construction, which are tools that courts have agreed aid in the interpretation of a statute’s meaning. One such canon is called *in pari materia* (Latin for “in equal manner”). This canon provides that statutes that are related are to be interpreted together because they have a common purpose.

The Texas Payday Law and the Texas Minimum Wage Act exist as part of the same statutory scheme, with one following the other within the Texas Labor Code. Both statutes have a common purpose: governing payment of wages. Applying the *in pari materia* canon, in determining what the

undefined term “wages” means under the Texas Minimum Wage Act, the court should look to how the Texas Payday Law defines wages.

The Texas Payday Law defines wages as including sick leave pay.¹ Therefore, for both the original and revised versions of the San Antonio ordinance, under the *in pari materia* canon of construction the Texas Payday Law’s definition of wages applies to the Texas Minimum Wage Act. As such, the Texas Minimum Wage Act preempts paid sick leave ordinances because sick leave pay is within the meaning of wages under the Texas Minimum Wage Act.

But the revisions the San Antonio ordinance make this *in pari materia* argument even more interesting. By defining paid sick and safe leave as a “fringe benefit as defined by the Texas Labor Code,” the ordinance expressly brings sick and safe leave within the meaning of wages. Although the term “fringe benefits” is not defined within the Texas Minimum Wage Act or the Texas Payday Law, the Texas Workforce Commission’s guidance *Especially for Texas Employers* interprets “fringe benefits” as within the definition of wages under the Texas Payday Law:

Little known to many employers and employees, the Texas Payday Law **includes in the definition of “wages” any fringe benefits** promised in a written policy of the employer or in a written agreement (section 61.001(7)(B)). The types of fringe benefits covered by that provision are vacation pay, **sick leave pay**, parental leave pay, holiday pay, and severance pay.

Texas Workforce Commission, *Especially for Texas Employers*, p. 146 (emphasis added).²

Therefore, in a likely attempt to distinguish paid sick and safe leave from the meaning of wages under the Texas Payday Law and the Texas Minimum Wage Act, the revised ordinance brings paid sick and safe leave within “wages” by defining it as a “fringe benefit.” And by doing so, the revised San Antonio paid sick and safe leave ordinance may be one step closer to preemption.

¹ The relevant portion of the Texas Payday Law states:

“Wages” means compensation owed by an employer for:

(A) labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and

(B) vacation pay, holiday pay, **sick leave pay**, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under a written policy of the employer.

Tex. Lab. Code § 61.001(7) (emphasis added).

² The complete version of *Especially for Texas Employers* is found at <https://twc.texas.gov/news/eft/eft.pdf>.