UNT DALLAS COLLEGE of LAW
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LAW REVIEW

"PAID SICK LEAVE"

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TABLE OF CONTENTS

I. INTRODUCTION

Mandatory paid sick time has arrived in Texas. On February 15, 2018, Austin passed the first of its kind (in Texas) paid sick time ordinance (Austin Ordinance), inspiring virtually identical ordinances in San Antonio and Dallas, despite being embroiled in litigation with none other than the State of Texas. There's just one catch: the Austin, San Antonio, and Dallas ordinances (collectively, City Ordinances) may be unconstitutional.

While the litigation surrounding the City Ordinances raises a number of interesting issues, including questions related to the scope of home-rule municipal authority, sovereignty-based preemption, standing, ripeness, and the tests for irreparable harm for private and governmental actors alike, the ultimate issue is whether the City Ordinances establish or govern wages in violation of the explicit preemption provisions of the Texas Minimum Wage Act (TMWA). If they do, then they are unconstitutional under the Texas Constitution and cannot stand. If they do

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not, the City Ordinances may live to fight another day.[1]

II. BACKGROUND

On February 15, 2018, the City of Austin enacted the Austin Ordinance with an October 1, 2018, effective date.[2] Two months later, the Texas Association of Business, the Texas Public Policy Foundation, and others (collectively, Private Austin Plaintiffs) filed suit against the City of Austin, seeking a declaration that the Austin Ordinance was unconstitutional under a variety of theories and requesting temporary and permanent injunctive relief to prevent it from going into effect.[3] A week later, the State of Texas intervened to seek its own declaratory judgment and injunctive relief to block the Austin Ordinance.[4] Unlike the Private Austin Plaintiffs, however, the State advanced only one argument: the Austin Ordinance is preempted by the TMWA and thus unconstitutional.[5]

On June 8, 2018, the City of Austin answered with a plea to the jurisdiction, arguing the Private Austin Plaintiffs failed to plead causes of action sufficient to overcome its immunity, in part because the Austin Ordinance had not yet gone into effect, such that the controversy was not yet ripe and the Private Austin Plaintiffs lacked standing.[6] The City of Austin also moved to strike the State of Texas as a plaintiff, arguing the City was immune to the State's claims because the Austin Ordinance did not conflict with the TMWA, the State lacked standing because it was not charged with enforcement of the TMWA, and the State was in effect seeking an impermissible advisory opinion.[7]

On July 2, 2018, following a hearing on all pending matters, the Honorable Tim Sulak, of the 459th District Court of Travis County, Texas, denied the City of

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[1] Although the State of Texas is relying solely on the argument that the Austin Ordinance is preempted by the TMWA, the private plaintiffs challenging the City Ordinances have advanced a host of other arguments, including violation of the due-course-of-law, equal protection, freedom of association, and search and seizure clauses of the Texas Constitution. *See* Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425, 435–37 (Tex. App.—Austin 2018, pet. filed) (attacking the Austin Ordinance under the foregoing clauses of the Texas Constitution); Original Petition at 13–15, Associated Builders & Contractors of South Tex., Inc. v. City of San Antonio, No. 2019CI13921 (408th Judicial Dist. Ct., Bexar County, Tex. July 15, 2019) (attacking the San Antonio Ordinance under the foregoing clauses of the Texas Constitution); *see also* Motion for Preliminary Injunction at 7–13, ESI/Employee Solutions, L.P. v. City of Dallas, 4:19-cv-00570 (E.D. Tex. July 30, 2019) (attacking the Dallas Ordinance under similar clauses of the U.S. Constitution).

[2] Austin, Tex., Code of Ordinances, ch. 4-19 (2018).

[3] Original Petition, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. D-1-GN-18-001968); *see also Tex. Ass'n of Bus.*, 565 S.W.3d at 431.

[4] The State of Texas's Original Petition in Intervention, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed (No. D-1-GN-18-001968); *see also Tex. Ass'n of Bus.*, 565 S.W.3d at 431.

[5] *Tex. Ass'n of Bus.*, 565 S.W.3d at 431.

[6] *Id.* at 431–32.

[7] *Id.* at 433.

Austin's plea to the jurisdiction, denied the City of Austin's motion to strike the State of Texas, and denied the temporary injunction applications of the Private Austin Plaintiffs and the State of Texas.[8] On July 5, 2018, the State of Texas and the Private Austin Plaintiffs filed a joint notice of appeal of the order denying their applications for a temporary injunction.[9] A little more than two weeks later, the City of Austin cross-appealed the denial of its plea to the jurisdiction and motion to strike the State of Texas as a plaintiff.[10]

Following the denial of the Private Austin Plaintiffs' application for a temporary injunction, the City of San Antonio passed its own paid sick leave ordinance on August 16, 2018, which was modeled after the Austin Ordinance and scheduled to go into effect on August 1, 2019 (San Antonio Ordinance).[11] The very next day, the Third Court of Appeals stayed enforcement of the Austin Ordinance pending its resolution of the various appeals by the State of Texas, the Private Austin Plaintiffs, and the City of Austin.[12]

A few months later, on November 16, 2018, the Third Court of Appeals affirmed the denial of the City of Austin's plea to the jurisdiction as to all but one of the Private Austin Plaintiffs' claims, denied the City of Austin's motion to strike the State of Texas as a plaintiff, and reversed the trial court's denial of the temporary injunction applications of the State of Texas and the Private Austin Plaintiffs.[13] The Third Court of Appeals then remanded the case back to the trial court with an instruction to enter the requested temporary injunction and conduct further proceedings in a manner not inconsistent with the appellate court's opinion.[14]

On March 29, 2019, the City of Austin filed a petition for review of the Third Court of Appeals' decision with the Texas Supreme Court.[15] On June 28, 2019, the State of Texas filed its response to the City's petition for review and urged the Court to grant the petition so that it could resolve the central issue of whether the Austin Ordinance is preempted by the TMWA, citing the San Antonio and Dallas Ordinances as proof that the issue will continue to arise until it is finally

[8] *Id.* at 431.
[9] Plaintiffs' Joint Notice of Appeal, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed.) (No. 03-18-00445-CV).
[10] City of Austin's Notice of Appeal, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[11] San Antonio, Tex., Code of Ordinances, ch. 15, art. XI, § 15 (2018).
[12] Tex. Ass'n of Bus. v. City of Austin, No. 03-18-00445-CV, 2018 WL 3967045, at *1 (Tex. App.—Austin Aug. 17, 2018).
[13] *Tex. Ass'n of Bus.*, 565 S.W.3d at 433, 437, 441–42.
[14] *Id.*
[15] City of Austin Pet. for Review, Tex. Ass'n of Bus. v. City of Austin (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).

resolved.[16] That same day, the Private Austin Plaintiffs filed their own response and likewise urged the Texas Supreme Court review to resolve the question of TMWA preemption and further to consider the Private Austin Plaintiffs' other arguments, which had not played a role in the Third Court of Appeals' decision.[17]

On April 24, 2019, as the legal battle over the Austin Ordinance seemed to be headed to the Texas Supreme Court, the City of Dallas decided to enter the fray with its own paid sick leave ordinance, which was also modeled after the Austin Ordinance and set to go into effect on August 1, 2019 (Dallas Ordinance).[18] Then, on May 27, 2019, the Texas Legislature ended its regular session after surprisingly failing to pass legislation to specifically preempt the City Ordinances.[19]

With San Antonio and Dallas moving forward with their paid sick time ordinances and the Texas Legislature suddenly failing to resolve the matter, local businesses and associations returned to court. On July 15, 2019, a collection of San Antonio businesses and associations sued the City of San Antonio seeking a declaration that the San Antonio Ordinance was unconstitutional and requesting temporary and permanent injunctive relief to prevent it from going into effect.[20] In face of the Third Court of Appeals decision on the Austin Ordinance, however, the City of San Antonio promptly agreed to an order staying implementation of the San Antonio Ordinance until December 1, 2019.[21]

One week later, on July 30, 2019, the Texas Public Policy Foundation filed suit against the City of Dallas in federal court on behalf of two private employers seeking a declaratory judgment that the Dallas Ordinance was unconstitutional under the U.S. Constitution and requesting preliminary and permanent injunctive relief to block it from taking effect.[22] Thereafter, the State of Texas joined the litigation, seeking a declaration that the Dallas Ordinance was preempted by the TMWA and requesting preliminary and permanent injunctive relief to prevent it from going into effect. Unlike the City of San Antonio, the City of Dallas did not agree to an order staying enforcement, although it did say it would not begin fining employers for noncompliance until April 1, 2020, except for penalties for retaliation

[16] State of Texas Resp. to Pet. for Review at p. 1, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[17] Tex. Ass'n of Bus. Resp. to Pet. for Review at p. xiii, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[18] Dallas, Tex., Code of Ordinances ch. 20, art. I § 1 (2019).
[19] *See* Tex. S.B. 2485, 86th Leg., R.S. (2019).
[20] Original Pet., Associated Builders & Contractors of South Texas v. City of San Antonio, (408th Dist. Ct., Bexar County, Tex. July 15, 2019) (No. 2019CI13921).
[21] Agreed Order Staying Implementation, Associated Builders & Contractors of South Texas v. City of San Antonio, (408th Dist. Ct., Bexar County, Tex. July 24, 2019) (No. 2019CI13921).
[22] ESI/Employee Solutions, L.P. v. City of Dallas, 4:19-cv-00570 (E.D. Tex. July 30, 2019).

against employees.[23] As a result, the private Dallas plaintiffs and the State of Texas moved forward with their requests for a temporary injunction in the Dallas litigation. In the meantime, the Dallas Ordinance went into effect on August 1, 2019, and became the first live paid sick leave ordinance in Texas, purporting to require employers with employees working in Dallas to keep records of their employees' paid sick leave, to reflect that information on those employees' pay statements, to post notices in the workplace, to provide notice in their handbooks, to grant paid sick leave when requested, and not to retaliate against employees for taking or requesting paid sick leave required by the Dallas Ordinance.[24]

III. THE AUSTIN ORDINANCE

The requirements of the Austin Ordinance are not in dispute:

- Employers must grant one hour of earned paid sick time for every 30 hours worked to employees who work at least 80 hours for an employer in Austin during any calendar year;[25]
- Employees begin to accrue earned paid sick time on the start date of employment (in Austin) and must be allowed to use earned paid sick leave as soon as it is accrued, although an employer may restrict the ability of an employee to use paid sick leave during the first 60 days of employment if the employer can prove the employee's term of employment is at least one year;[26]
- An employee may request to use earned paid sick time for an absence from scheduled work time caused by: (1) the employee's physical or mental illness or injury, preventative medical or health care, or health condition; (2) the employee's need to care for a family member's physical or mental illness or injury, preventative medical or health care, or health condition; or (3) 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;[27]
- An employer may adopt reasonable verification procedures to establish that an employee's request for paid sick time meets the requirements above for a request to use earned sick time for more

[23] Memorandum from M. Elizabeth Cedillo-Pereira, to the Mayor Dallas and Dallas City Council (June 28, 2019), https://dallascityhall.com/departments/fairhousing/paid-sick-leave/Pages/default.aspx.
[24] *Id*.
[25] Austin, Tex. Code of Ordinances ch. 4-19 §§ 4-19-1(C), 4-19-2(A) (2018).
[26] *Id.* at §§ 4-19-2(B)-(C).
[27] *Id*. at § 4-19-2(D).

than three consecutive workdays;[28]

- An employer must provide earned paid sick time if the employee makes a timely request to use it before their scheduled work time and cannot require the employee to find a replacement for his or her scheduled work time;[29]
- An employer is not required to allow an employee to use earned paid sick time on more than eight days in a calendar year; [30]
- Employers with more than 15 employees at any time during the preceding 12 months (excluding family members) must allow employees to accrue up to 64 hours of earned paid sick time per year, while employers below that threshold must allow employees to accrue up to 48 hours of earned paid sick time per year, although a unionized employer may negotiate with the union to modify these caps;[31]
- An employee's earned paid sick time carries over from year to year, up to the annual cap, is not affected by transfer to another facility or position, and must be restored to any employee who is rehired within six months of a separation;[32]
- A successor to an employer must provide to each employee who was employed at the time of the acquisition and is hired by the successor all earned paid sick time the employee had accrued as of the date of the acquisition;[33]
- Earned paid sick time must be paid out in an amount equal to what the employee would have earned if the employee had worked the scheduled time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage;[34]
- On no less than a monthly basis, an employer must provide electronically or in writing each employee a statement of the employee's earned paid sick time, must maintain records showing the amount of earned paid sick leave accrued and used by each employee, must provide notice to employees of their rights under the ordinance in any handbook the employer provided to employees, and must post notices advising employees of their rights under the ordinance;[35]

[28] *Id*. at § 4-19-2(E). Although not stated, the implication is that an employer may not adopt *any* verification procedure, reasonable or otherwise, for a request to use three or fewer consecutive days of paid sick time.
[29] *Id*. at §§ 4-19-2(G), (M).
[30] *Id*. at § 4-19-2(I).
[31] *Id*. at §§ 4-19-1(F), (H), 4-19-2(G), (P).
[32] *Id*. at §§ 4-19-2(H), (N)-(O).
[33] *Id*. at § 4-19-2(Q).
[34] *Id*. at § 4-19-2(J).
[35] *Id*. at §§ 4-19-2(K)-(L), 4-19-4.

- An employer is not required to provide additional earned paid sick time to employees if it makes its existing paid time off available to employees under conditions that meet the accrual, purpose, and usage requirements of the ordinance;
- An employer may not transfer, demote, discharge, suspend, reduce hours, or directly threaten these actions against an employee for requesting or using earned paid sick time, for reporting a violation of the ordinance, or participating in an administrative proceeding under the ordinance.[36]
- The San Antonio Ordinance and Dallas Ordinance largely track the Austin Ordinance, with a handful of minor differences.

IV. THE ISSUE

As the Austin, San Antonio, and Dallas Ordinances come into effect, questions of ripeness, standing, and injury will eventually become academic, leaving the question of whether the City Ordinances are inconsistent with the TMWA and thus unconstitutional.

Under the Texas Constitution, the ordinance of a home-rule municipality cannot "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State."[37] Notably, a statutory limitation of municipal authority may be express or implied, but in either case it "must 'appear with unmistakable clarity.'"[38] Moreover, the "mere 'entry of the state into a field of legislation . . . does not automatically preempt that field from city regulation.'"[39] Rather, "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached.[40] In other words, "if the general law and the local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency."[41]

V. THE TMWA

The TMWA contains two provisions explicitly displacing municipal ordinances. First, Section 62.0515 of the TMWA states, "the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or

[36] *Id*. at § 4-19-5.
[37] Tex. Const. art. XI, § 5(a) ("inconsistent").
[38] City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586, 593 (Tex. 2018) (quoting Lower Colo. River Auth. v. City of San Marcos, 523 S.W.2d 641, 645 (Tex. 1975)).
[39] *City of Laredo*, 550 S.W.3d at 593 (quoting City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 796 (Tex. 1982)).
[40] BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 7 (Tex. 2016) (quoting City of Beaumont v. Fall, 291 S.W. 202, 206 (Tex. 1927).
[41] *Tex. Ass'n of Business*, 565 S.W.3d at 439 (quoting *City of Laredo*, 550 S.W.3d at 592).

charter provision governing wages in private employment, other than wages under a public contract."[42] Second, Section 62.151 provides, "[t]his chapter and a municipal ordinance or charter provision governing wages in private employment, other than wages under a public contract, do not apply to a person covered by the Fair Labor Standards Act of 1938."[43]

The scope of the preemption language found in Section 62.0515 is arguably narrower than the preemption language found in Section 62.151. While Section 62.0515 preempts "a wage established in an ordinance . . . governing wages in private employment," Section 62.151 preempts any ordinance "governing wages in private employment," at least with respect to persons covered by the Fair Labor Standards Act (FLSA).[44] In other words, Section 62.0515 preempts the Austin Ordinance if the Austin Ordinance can be said to "establish" a wage, whereas Section 62.151 preempts the Austin Ordinance (at least with respect to persons covered by the FLSA) if the Austin Ordinance can be said to "govern" wages.

The Third Court of Appeals had no difficulty holding the legislature had expressed its intent to preempt municipal ordinances establishing or governing "wages" in Texas, given the explicit statements found in Sections 62.0515 and 62.151.[45] The only remaining question, then, was whether the Austin Ordinance established a wage or otherwise governed wages.[46] With respect to that controlling issue, it is significant that the TMWA does *not* define the term "wages."[47] When a Texas statute does not define a term, the court must endeavor to give the word its "ordinary" meaning.[48] More specifically, when a statute fails to define a term, "that

[42] Tex. Lab. Code Ann. § 62.0515(a).
[43] *Id*. at § 62.151 (internal citations omitted).
[44] The minimum wage provisions of the FLSA applies to any employee who is (1) individually engaged in commerce or in the production of goods for commerce or (2) employed in an enterprise engaged in commerce or in the production of goods for commerce, where "commerce" effectively means interstate commerce. 29 U.S.C. §§ 203(b) (defining "commerce"), 206(a) (minimum wage coverage). In other words, FLSA coverage can be determined at the employee level or at the enterprise level. If an employee is engaged in commerce or the production of goods for commerce, the employer is governed by the minimum wage provisions of the FLSA with respect to that employee, even if the employer is not otherwise subject to the FLSA. Alternatively, if the employer satisfies the test for enterprise coverage, which generally requires annual gross sales of at least $500,000 (except for hospitals, schools, public agencies, and certain other named institutions that are always covered), the employer is governed by the FLSA with respect to all of its employees, whether or not they are individually engaged in commerce or in the production of goods for commerce. 29 U.S.C. §203(s)(1).
[45] *Tex. Ass'n of Bus.*, 565 S.W.3d at 439.
[46] Given the nature of state sovereignty and the supremacy of state legislation under the Texas Constitution, it seems axiomatic that the passage of an ordinance cannot change the meaning of a state statute. In other words, the question is not whether the TMWA can be construed so as not to preempt the Austin Ordinance. The question is whether the Austin Ordinance can be construed so as not to be preempted by the TMWA.
[47] *See generally* Tex. Lab. Code Ann. § 62.151.
[48] *Tex. Ass'n of Bus.*, 565 S.W.3d at 439 (citing *City of Laredo*, 550 S.W.3d at 594).

term is imbued with the plain meaning as commonly understood at the time of enactment."[49]

A. The City's Ordinary

To decide whether the Austin Ordinance established or governed wages, the City of Austin urged the Third Court of Appeals to consider the 1969 edition of the American Heritage Dictionary of the English Language (noting the Texas Legislature passed the TMWA in 1970) and the 1933 edition of Black's Law Dictionary (noting Congress passed the FLSA in 1933).[50] According to the 1969 edition of The American Heritage Dictionary, a wage is a "payment for services to a workman; usually remuneration on an hourly, daily, or weekly basis or by the piece."[51] According to the 1933 edition of Black's Law Dictionary, a wage is "compensation given to a hired person for his or her services . . . . Agreed compensation for services by workmen, clerks or servants . . . whether they be paid by the hour, the day, the week, the month, the job or the piece."[52] The City argued these definitions limited the definition of wage to a regular monetary payment made as compensation for services, which the City believed did not apply to "fringe" benefits like mandatory, earned paid sick time.[53]

The City of Austin also argued the FLSA's definition of minimum wage should educate the Court's understanding of the TMWA's use of the term "wage," given the TMWA references the FLSA directly in Section 62.151 and sets the state minimum wage for employees not covered by the FLSA at the minimum wage established by the FLSA. This is significant, the City argued, because the FLSA does not consider sick pay payments made to an employee when determining whether an employer has paid the employee the required federal minimum wage.[54]

At the same time, the City discouraged the court from considering the statutory definition of wage found in the Texas Payday Act (TPA), arguing the TMWA and the TPA were passed at different times to serve different purposes—with the TPA regulating how and when to pay employees and the TMWA

[49] Thompson v. Tex. Dep't of Licensing and Regulation, 455 S.W.3d 569, 570 (Tex. 2014) (per curiam).
[50] *Tex. Ass'n of Bus.*, 565 S.W.3d at 440.
[51] *Id*. (quoting The American Heritage Dictionary of the English Language 1440 (1st ed. 1969)).
[52] *Id*. (quoting Black's Law Dictionary (3d ed. 1933)).
[53] Cross-Appellee's Opening Brief at 14, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[54] Appellee's Response Brief at 22–23, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV) (citing Copeland v. ABB Inc., No. 04-4275-CV-V-NKL, 2006 WL 290596, at *3 (W.D. Mo. Feb. 7, 2006), *aff'd*, 521 F.3d 1010 (8th Cir. 2008); Estes v. Iron Workers Dist. Council, No 1:16-cv-251, 2016 WL 7664346, at *3 (S.D. Ohio Nov. 4, 2016); Ward v. Costco Wholesale Corp., No. 2:08-CV-2013, 2009 WL 10670191, at *2 (C.D. Cal. May 6, 2009); Chavez v. City of Albuquerque, 630 F.3d 1300, 1308 (10th Cir. 2011)).

regulating what to pay employees—such that they should not be read *in pari materia*, despite their similar subject matter and statutory proximity.[55] The City's aversion to the TPA was presumably due to the fact that the TPA specifically includes "sick leave pay" in the definition of wages to the extent such pay is "owed to an employee under a written agreement with the employer or under a written policy of the employer."[56] Given the Austin Ordinance requires employers to post notices stating they must pay employees their earned paid sick time and state as much in any handbooks they maintain, it seems likely the earned paid sick time due under the Austin Ordinance would qualify under the TPA's definition of a "wage."[57]

Finally, the City argued any understanding of wage that includes "paid sick time" would lead to an unreasonable interpretation of the statute that would allow employers to count any sick pay paid to an employee in determining whether the employer had met its minimum wage obligation to that employee.[58]

B. The State's Ordinary

For its part, the State of Texas pointed to the 1990 edition of Black's Law Dictionary, which defines wages to mean "compensation given to a hired person for his or her services. Compensation paid to employees based on time worked or output of production."[59] As the State noted, the 1990 edition of Black's Law Dictionary further clarifies that "wages" include "[e]very form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses, and reasonable value of board, rent, housing, lodging, payments in kind, [and] tips."[60] The State likewise offered similar definitions from the 2014 edition of Merriam-Webster's Collegiate Dictionary and the 2016 edition of The American Heritage Dictionary.[61] Apart from noting the TMWA was recodified into the Texas Labor Code in 1990, the State made little effort to explain why the Third Court of Appeals should look to

[55] Appellee's Response Brief at 26, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV) (construing Tex. Lab. Code Ann. § 61.001 *et seq*.).
[56] Tex. Lab. Code Ann. § 61.001(7)(B).
[57] *Compare id.*, *with* Austin, Tex., Code of Ordinances ch. 4-19 §§ 4-19-2(F), (J), (L) and 4-19-4(A) (2018).
[58] Appellees' Response Brief at 23–24, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[59] Brief for Appellant the State of Texas at 11–12, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV) (quoting Black's Law Dictionary 1579 (6th ed. 1990) (def. wages)).
[60] *Id.* (quoting Black's Law Dictionary 1579 (6th ed. 1990) (def. wages)). The State truncated the quoted portion of the 1990 Black's Law Dictionary definition to leave off "and any other similar advantage received from the individual's employer or directly with respect to work for him."
[61] *Id.* (quoting Merriam-Webster's Collegiate Dictionary 1405 (11th ed. 2014) and The American Heritage Dictionary 1946 (5th ed. 2016)).

dictionaries published in 1990, 2014, and 2016, when the TMWA was first passed in 1970 and the FLSA was passed in 1933.[62]

With respect to the FLSA, the State smartly noted the FLSA adopts the plain meaning of "wages" but then limits the "wages" that can be considered when determining whether an employer has paid the required "minimum wage."[63] In other words, the FLSA incorporates a broad understanding of the term "wage," but then narrows the kind of wages that can be considered in deciding whether an employer has paid the minimum wage. To the State's point, Section 203(m) of the FLSA states "wage" includes the reasonable cost of board, lodging, or other facilities under certain circumstances but does not otherwise define the term.[64] By contrast, Section 207(h) of the FLSA specifies employers may not consider anything excluded from the calculation of an employee's "regular rate" of pay when determining whether the employer has paid an employee the "minimum wage" required under the FLSA, and further provides a detailed definition of an employee's "regular rate" of pay.[65] As the State explained, "if sick leave pay were not a wage, then there would be no need to exclude that pay when calculating the minimum wage, and the exclusionary language in section 207 [of the FLSA] would be surplusage."[66] In short, the State of Texas turned the City's FLSA argument on its head and simultaneously blunted the City's claim that any interpretation of "wage" that included sick pay would allow employers to circumvent the TMWA by paying sick pay.

With respect to the TPA, the State argued the more limited definition of wage found in the TPA demonstrated the Legislature knew how to limit the term and further indicated the TMWA intended to use a more expansive understanding of the term.[67] The State also pointed to the definition of "wage" under the Professional Employer Organization Act (PEOA) as further evidence that the Legislature knew how to define the term "wage" and knew what it was doing when it left the term "wage" undefined in the TMWA.[68] At the same time, the State of Texas noted the definitions of "wage" under the TPA *and* the PEOA *both*

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[62] *Id*.
[63] State of Texas Reply Brief at 5–7, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[64] 29 U.S.C. § 203(m) (2018) (explaining room and board can be included in the term "wage" without otherwise defining the term).
[65] 29 U.S.C. § 207(h) (2010) (credit toward the minimum wage does not include anything excluded from the calculation of an employee's "regular rate"), 207(e)(2) (excluding from the calculation of an employee's "regular rate" any "payments made for occasional periods when no work is performed due to vacation, holiday, [or] illness.").
[66] State of Texas Reply Brief at 6, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[67] State of Texas Opening Brief at 13, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[68] *Id*.

specifically include sick pay.[69]

C. The Private Austin Plaintiffs' Ordinary

In their opening brief, the Private Austin Plaintiffs joined the State of Texas in pointing to the 1990 edition of Black's Law Dictionary.[70] With respect to the TPA, the Private Austin Plaintiffs deviated from the State's position and argued the TMWA *should* be read *in pari materia* with TPA with respect to the meaning of the term "wage," given the two statutes have similar subject matters and purposes and are situated near one another in the Texas Labor Code.[71] The Private Austin Plaintiffs likewise deviated from the State's position on the FLSA, arguing the TMWA *is* connected to the FLSA and further arguing the Austin Ordinance conflicts with the FLSA by requiring compensation for hours not worked when the TMWA and FLSA only require compensation for hours actually worked.[72]

VI. THE HOLDING

Ultimately, the Third Court of Appeals decided the case with reference to the dictionary definitions offered by the City of Austin and without reference to the TPA, the PEOA, or the FLSA:

> According to the City, these definitions establish that "wage" means a payment regularly made to compensate the worker for his or her services or labor but not the type of paid sick leave granted by the Ordinance. But these definitions simply establish, as we conclude above, that "wage" generally refers to payment or compensation for work done or services rendered. These definitions do not, however, necessarily preclude the inclusion of paid sick leave in the meaning of "wage." More importantly, under the terms of the Ordinance, employees who earn and take paid sick leave will be paid more than employees who work the same hours without paid sick leave. Stated differently, employees who take sick leave will receive more pay per hour than actually worked. Thus, the Ordinance establishes a wage.[73]

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[69] *Id.*; Tex. Lab. Code Ann. § 61.001(7) ("wage" 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) . . . sick leave pay . . . owed to an employee under a written agreement with the employer or under a written policy of the employer."); Tex. Lab. Code § 91.001(17) ("wages" means "compensation for labor or services" and "sick leave pay . . . owed to a covered employee under a written agreement.").

[70] Private Austin Plaintiffs' Opening Brief at 23–24, Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).

[71] *Id*. at 24–29.

[72] *Id*. at 22, 29–30, 33.

[73] *Tex. Ass'n of Bus.*, 565 S.W.3d at 440.

Having concluded the Austin Ordinance established a wage, the Third Court of Appeals resolved the question of the TMWA's preemption as a matter of law: "We hold that the Texas Minimum Wage Act preempts local regulations that establish a wage, that the Ordinance establishes a wage, and that, accordingly, the TMWA preempts the City's Ordinance as a matter of law, thus making the Ordinance unconstitutional."[74]

The Third Court of Appeals further held the Private Austin Plaintiffs and the State had thus shown a probable right of recovery on their claim that the TMWA preempts the Austin Ordinance and had demonstrated an imminent risk of irreparable harm and were, therefore, entitled to a temporary injunction.[75] The Third Court then remanded the case to the district court with the instruction to grant the requested temporary injunction and conduct any further proceedings consistent with its opinion.[76]

VII. THE PRACTICAL REALITY

Although not cited by the Third Court of Appeals, its thinking may have been influenced by the Texas Supreme Court's 2014 decision in *Southern Crushed Concrete, LLC v. City of Houston*.[77] In *Southern Crushed Concrete*, the City of Houston denied Southern Crushed Concrete (SCC) a municipal permit to construct a concrete-crushing facility, despite the fact that Southern Concrete had sought and obtained a permit from the Texas Commission on Environmental Quality (TCEQ) to construct the facility.[78] More specifically, SCC applied for an air quality permit from the TCEQ in October 2003.[79] While its application was pending, an outdoor education center was constructed near the property SCC sought to use for its concrete crushing facility.[80] Thereafter, the City of Houston—who had participated in and opposed SCC's permit application before the TCEQ—passed an ordinance requiring concrete-crushing facility operators to obtain a municipal permit.[81] Significantly, the new ordinance required new concrete-crushing operations to meet certain location requirements, which were more restrictive than those imposed under the Texas Clean Air Act (TCAA) and the TCEQ's rules implementing same.[82] SCC's facility did not meet the City of Houston's location requirements, even though it did meet the TCEQ's location requirements. Accordingly, the City

[74] *Id.* at 440.
[75] *Id*. at 441.
[76] *Id*. at 441–42.
[77] S. Crushed Concrete, LLC v. City of Hous., 398 S.W.3d 676 (Tex. 2013) (analyzed in State of Texas Opening Brief at 16-17, Texas Ass'n of Business v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed) (No. 03-18-00445-CV).
[78] *Id*. at 677.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

of Houston denied SCC's application for a permit.[83]

On appeal, the Fourteenth Court of Appeals held the Houston ordinance was not preempted by the TCAA's express preemption language, which states a city ordinance "may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders."[84] The Texas Supreme Court granted SCC's petition for review, reversed the Fourteenth Court of Appeals, rejected the City of Houston's argument that its ordinance was not preempted by the TCAA because it was designed to regulate land use, not air quality:

> The City further contends that, even if the permit represents the Commission's authorization or approval, such authorization or approval is only for the purpose of protecting air quality, not for general purposes. And, because the Ordinance purports to regulate land use, not air quality, the Ordinance does not actually abrogate the permit. But, the statute does not draw that distinction, nor should it if state regulation is to be effective. If the City's contention were true, a city could almost always circumvent section 382.113(b) and vitiate a Commission permit that it opposes by merely passing an ordinance that purports to regulate something other than air quality.[85]

While there are certainly differences, seen through the lens of the *Southern Crushed Concrete* decision, it is hard to ignore the practical reality of the Austin Ordinance. Any employee who works more than 80 hours in Austin, Texas, is entitled to one hour of earned paid sick time for every 30 hours worked.[86] Although this additional hour of pay is not *necessarily* paid to an employee on the paycheck covering the pay period during which it is "earned" (although it may be), it *must* be reflected on that pay statement *and* the employee is *entitled* to turn it into cash at any time by notifying the employer that he or she is taking time off due to an illness, injury, health condition, or preventative treatment.[87] Notably, the Austin Ordinance offers no definition of or standard for the terms "illness," "injury," or "health condition" (such that their ordinary meaning presumably applies), requires no diagnosis beyond a self-diagnosis, and discourages employers from attempting to verify the employee's assertion that he, she, or a family member is injured or otherwise not feeling well.[88]

Given an employee's earned paid sick time carries over from year to year, is not affected by an employee's transfer or other employment action, must be

[83] *S. Crushed Concrete*, 398 S.W.3d at 677.
[84] *Id*. at 679 (quoting Tex. Health & Safety Code Ann. § 382.113(b)) (alteration in original).
[85] *Id*.
[86] Austin, Tex., Code of Ordinances ch. 4-19 §§ 4-19-1(C), 4-19-2(A) (2019).
[87] *Id*. at §§ 4-19-2(C), (D), 4-19-2(G), (M).
[88] *Id*. at § 4-19-2(E).

assumed by a successor-in-interest of the employer, and cannot be the basis for any transfer, demotion, discharge, suspension, or reduction of hours, the Austin Ordinance effectively *guarantees* an employee will be able to turn the earned sick pay into cash during employment simply by providing notice that he or she needs to take time off due to an unidentified illness, injury, health condition, or treatment of the employee or a family member.[89] Moreover, when the employee does elect to cash out the earned paid sick time, it "must be paid out in an amount equal to what the employee would have earned if the employee had worked the scheduled time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage."[90]

In other words, for every thirty hours an employee works, the employee earns an additional hour of pay which must be reflected on the employee's pay statement and must be paid out to the employee upon notice by the employee that he or she is not coming to work due to an unidentified, undiagnosed, and unverified illness, injury, other health condition, or treatment. Setting aside the question of whether or not such a policy is a good policy, the Austin Ordinance effectively mandates a .033 percent raise for all employees covered by the Austin Ordinance.

VIII. THE PETITION FOR REVIEW

On March 29, 2019, the City of Austin filed a petition for review with the Texas Supreme Court attacking the Third Court of Appeals's rulings on irreparable harm and standing as well as its holding that the TMWA preempted the Austin Ordinance as a matter of law, which the City characterized as an impermissible ruling on the merits at the temporary injunction stage.[91] Notably, the City did not directly request review of the Third Court of Appeals's holding that the Austin Ordinance establishes a wage.

On June 28, 2019, the State of Texas filed its response to the City's petition for review and urged the Court to grant the petition so that it could resolve the central issue of whether the Austin Ordinance is preempted by the TMWA, citing the San Antonio and Dallas Ordinances as proof that the issue will continue to arise until it is finally resolved.[92] That same day, the Private Austin Plaintiffs filed their own response and likewise urged the Texas Supreme Court review to resolve the question of the TMWA preemption and further to consider the Private Austin Plaintiffs' other arguments, which had not played a role in the Third Court of

[89] *Id*. at §§ 4-19-2(H), (N)-(O), (Q), 4-19-5.
[90] *Id*. at § 4-19-2(J).
[91] City of Austin Petition for Review at ix, City of Austin v. Tex. Ass'n of Bus., 565 S.W.3d 425 (Tex. App.—Austin 2019, pet. filed) (No. 03-18-00445-CV).
[92] State of Texas Response to Petition for Review at 1, City of Austin v. Tex. Ass'n of Bus., 565 S.W.3d 425 (Tex. App.—Austin 2019, pet. filed) (No. 03-18-00445-CV).

Appeals' decision.[93]

On August 30, 2019, the Texas Supreme Court requested full briefing on the merits, indicating it is considering granting the petition.[94] The City of Austin's briefing is currently due December 2, 2019, while the responses from the State of Texas and the Private Plaintiffs are currently due December 23, 2019, and any final reply by the City of Austin is currently due January 7, 2019. Given the potential for further extensions of these deadlines and the Texas Supreme Court's schedule, it seems unlikely (although not impossible) it will issue a decision prior to the end of its term in June 2020, assuming it grants the petition for review at all.

IX. A POTENTIAL MIDDLE GROUND

There is at least one potential middle ground for the Texas Supreme Court or any other reviewing Court to consider. As noted above, "[i]f the general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency."[95] As phrased, the foregoing suggests the threshold inquiry is whether the City Ordinance and the TWMA can "coexist peacefully without stepping on each other's toes . . . ." If so, the City Ordinance could "be invalid only to the extent of any inconsistency."[96]

With that in mind, it is worth noting that there is a difference between time off and pay. For example, the federal Family Medical Leave Act (FMLA) mandates protected time off for eligible employees of covered employers but does not require such protected time off to be paid.[97] Rather, the FMLA simply requires a covered employer to allow employees on FMLA leave to use any paid time off the employer otherwise offers.[98] In this way, the FMLA safeguards employees' right to time away from work and gives them the further right to use paid time they otherwise have available without ever forcing employers to offer paid time off.

This is not the path the Austin Ordinance chose, however, and its mandatory grant of *paid* time off may be too ingrained in the ordinance to be separated out rationally. Indeed, it would require a fundamental rewording of the Austin Ordinance and its stated purpose to guarantee employees time off without requiring employers to pay for it. More to the point, if *unpaid* mandatory time off would not serve the City of Austin's objectives, that fact also seems to confirm the Austin Ordinance in fact governs "wages," not just time off.

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[93] Private Austin Plaintiffs' Response to Petition for Review at xiii, City of Austin v. Tex. Ass'n of Bus., 565 S.W.3d 425 (Tex. App.—Austin 2019, pet. filed) (No. 03-18-00445-CV).
[94] Brief on the Merits Requested, City of Austin v. Tex. Ass'n of Bus., 565 S.W.3d 425 (Tex. App.—Austin 2019, pet. filed) (No. 03-18-00445-CV).
[95] *Tex. Ass'n of Bus.*, 565 S.W.3d at 439 (quoting *City of Laredo*, 550 S.W.3d at 593).
[96] *Id*.
[97] 29 U.S.C. § 2612(a)- (d)(1); 29 C.F.R. § 825.200(a).
[98] 29 U.S.C. § 2612(d)(2); 29 C.F.R. § 825.207.