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2017 Update on Selected Topics in Texas Public Sector Employment Law

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I. Introduction

Attorneys working on public sector legal issues in Texas learn quickly that labor and employment law is often significantly different – and much broader – in the public sector than in the private sector. While the same core employment discrimination laws and rules concerning at-will employment apply to both public and private workplaces, public sector practitioners are generally unconcerned with many important private sector laws such as the National Labor Relations Act, the Texas Payday Act, Labor Code Chap. 451, and Executive Order 11246, and most of ERISA, because those laws have limited or no application to government employers in Texas.

On the other hand, there are a number of alternative and complex sources of employment regulation unique to the public sector in Texas, including:

- First Amendment free speech rights that significantly affect the public employer's ability to regulate speech and other forms of employee expression both on and off the job;
- First Amendment association rights that protect public sector employees from discrimination or retaliation based on their political beliefs and affiliations;
- Fourth Amendment privacy protections that restrict drug testing, workplace searches, and surveillance activities in the public sector workplace;
- Fifth and Fourteenth Amendment Due Process rights that apply to public employment when an employee is determined to have a property interest in their job;
- Several types of state law civil service personnel systems that create specific employment rights and protections for covered employees; [1]
- Special rules under the Fair Labor Standards Act that apply only in the public sector workplace; and
- State laws covering public employment such as the Texas Whistleblower Act, Government Code Chap. 617, and state pension and retiree healthcare statutes that have no private sector counterpart.

This paper provides an overview and recent case update in some of the key areas where public sector labor and employment law differs from private sector law – particularly where federal Constitutional law plays a role. This paper builds on prior research compiled for similar papers presented at past Labor and Employment Law Conferences sponsored by the University of Texas School of Law.[2] Copies of those

[1] Civil service laws create statutory personnel systems that apply to covered employees in some federal, state, and local governments. These laws have no real counterpart in private sector labor and employment law. Because of the number of different types of civil service systems, the breadth and complexity of the rules under them, and the specialty nature of civil service law practice, this topic is more appropriately addressed separately and is, therefore, not covered in this paper.

[2] The authors acknowledge the past contributions to this paper made by Margie Harris of Houston and Lee Crawford of Austin.

papers may be available through the Office of Continuing Legal Education of the UT School of Law. Consistent with the format of those earlier papers, this paper is divided into five sections that focus on major areas of employment law unique to public agencies:

1. The effect of First Amendment free speech rights on the public sector workplace (Page 2);

2. First Amendment protection of the political affiliations of public employees (Page 11);

3. The effect of Fifth and Fourteenth Amendment due process rights on public employees who have a property interest in their jobs (Page 16);

4. The effect of Fourth Amendment and state law privacy rights on public employee drug testing, workplace searches, and employee surveillance (Page 22); and

5. Texas state labor and employment laws uniquely applicable to public employment (Page 30).

Each of these five sections includes both an overview of the general law and Constitutional issues (if any) that apply, focusing on seminal Supreme Court decisions, and summaries of federal and/or state cases on that topic relevant to Texas practitioners and decided within the past few years.

II. First Amendment Free Speech in the Public Workplace

The right of free speech in the First amendment (and analogous provisions of the Texas Constitution) creates significant protections for public employees who speak out on matters of public concern. In some circumstances this means that disciplining or discharging a public employee based on the employee's speech (or other form of expression) is unlawful retaliation for exercising First amendment rights and actionable under 42 U.S.C. §1983.

However, it is well-established that not all speech by a public employee is protected. To prevail on a free speech retaliation claim a public employee must establish that: (1) he/she was <u>not</u> speaking pursuant to their official job duties; (2) he/she was speaking as a citizen on a matter of public concern; (3) the employee's interest in speaking outweighed the employer's interest in promoting workplace efficiency; (4) he/she suffered an adverse employment action; and (5) the adverse action was substantially motivated by the protected speech. See, *e.g., Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. 2014) *Hurst v. Lee Cnty., Miss.,* 764 F.3d 480, 484 (5th Cir. 2014), cert. denied, 135 S. Ct. 1179 (2015); see also, *Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. 2011).

A number of Supreme Court and key Circuit Court decisions over the last half century have defined the current parameters of the law on each element of this claim.

- **Was the employee speaking pursuant to their official duties?** In *Garcetti v. Ceballos,* 547 U.S. 410, 126 S. Ct. 1951 (2006), the Supreme Court held that speech by a public employee made "pursuant to official duties" is not constitutionally protected – no matter how great its social significance. In that case a lawyer in the Los Angeles Co. District Attorney's Office employed as

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