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## **2022 Update on Selected Topics in Texas Public Sector Employment Law**

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## **I. Introduction<sup>1</sup>**

### **A. Legal Protections Applicable Only to Public Employees.**

Attorneys working on public sector legal issues in Texas learn quickly that labor and employment law is often significantly different – and in some cases, much broader – in the public sector than in the private sector. 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 such as their support for political candidates and their union association;
- 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 laws that create specific employment rights and protections for covered employees, e.g., fire fighters and police officers;<sup>2</sup>
- 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.

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<sup>1</sup> 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. The authors gratefully acknowledge the past contributions to this paper made by **Craig Deats**, **Phil Durst**, **Brian East**, **Lee Crawford**, and **Monika Arvelo** of Austin, and **Margie Harris** of Houston. Copies of those papers may be available through the Office of Continuing Legal Education of the UT School of Law.

<sup>2</sup> 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. However, many civil service statutes in Texas are found in the Texas Local Government Code, e.g., Chapters 143 & 158.

Additionally, while some of the same core employment discrimination laws and rules concerning at-will employment generally apply to both public and private workplaces, there are some important distinctions and differences. Public sector practitioners are frequently 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.

This paper provides an overview and recent case updates 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. Consistent with the format of 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;
2. First Amendment protection of the association and political affiliation rights of public employees;
3. The effect of Fifth and Fourteenth Amendment due process rights on public employees who have a property interest in their jobs;
4. The effect of Fourth Amendment and state law privacy rights on public employee drug testing, workplace searches, and employee surveillance; and
5. Texas state labor and employment laws uniquely applicable to public employment.

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.

## **B. Immunity Issues for State Employers and Employees.**

While employment law protections in some circumstances are broader for public employees, there are also some important immunity issues that limit employment law claims of state employees, including employees of state agencies and governmental entities that are considered “arms of the state.” A number of decisions by the Supreme Court have held that states and state entities have immunity from certain federal employment laws, notably the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Family and Medical Leave Act. *See e.g. Kimel v. Florida Board of Regents*, 528 U.S. 62, 72-73 (2000); *Board of Trustees v. Garrett*, 531 U.S. 356, 363 (2001); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 43-44 (2012).

According to these cases, all decided with 5-4 majorities split along ideological lines, states have immunity under the 11<sup>th</sup> Amendment to the United States Constitution from suits brought against them by citizens of their own state from these federal laws. While the Court stated that Congress “must have wide latitude” in its authority to remedy and to deter violations of certain rights, the

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