PRESENTED AT

31st Annual Labor and Employment Law Conference

May 30-31, 2024
Austin, TX

What's Weird About Texas

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Supplemental Written Materials

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Introduction

The state of Texas is widely considered to be one of the best states in the country for businesses and to have employer-friendly laws (especially in comparison to states like California, New York, and Colorado).[1] However, it does have certain employee-friendly laws, including regarding sexual harassment, non-competition agreements, and firearms in the workplace. This paper discusses these laws and provides some tips for counsel for advising clients regarding these laws.

I. Sexual Harassment

In September 2021, Texas enacted a new sexual harassment law, Tex. Lab. Code §§ 21.141 and 21.142 (each referred to *supra* as "Section 21.141" and "Section 21.142"), by amending the Texas Commission on Humans Rights Act ("TCHRA"). Under Section 21.142,

> [a]n employer commits an unlawful employment practice if sexual harassment of an employee occurs and the employer or the employer's agent's or supervisors: (1) know or should have known that the conduct constituting sexual harassment was occurring; and (2) fail to take immediate and appropriate corrective action.

Thus, as amended the TCHRA arguably "provides two causes of action for workplace sexual harassment": (1) a claim under the newly enacted Section 21.142 and (2) a claim under Tex. Labor Code § 21.051 (which pre-existed the September 2021 amendment) that the employer "engaged in sex discrimination so pervasive that it constituted sexual harassment and created a

[1] Press Release, Office of the Texas Governor, Texas Named Best State For Business For Record-Breaking 20th Year (April 24, 2024); *see also See* Michale Royal and Alyssa Peterson*, Texas Expands Protections for Employees Asserting Sexual-Harassment Claims* (August 6, 2021), https://www.shrm.org/topics-tools/employment-law-compliance/texas-expands-protections-employees-asserting-sexual-harassment-claims (stating that Texas "has historically been an extremely employer-friendly state")

hostile work environment." *Brown-Steffes v. Avis Budget Group, Inc*., 2023 WL 6386510, at *3 (N.D. Tex. Sept. 29, 2023).

With the enactment of Section 21.141 and Section 21.142, the TCHRA—as it relates to sexual harassment—is more favorable to employees in three main ways than its federal-law counterpart—Title VII of the Civil Rights Act of 1964 ("Title VII").

A. All Employers in Texas are subject to the new sexual harassment law under the TCHRA.

First, the provisions of the TCHRA as amended pertaining to sexual harassment cover any "person who . . . employs one or more employees." Section 21.141. In other words, most employers will be subject to these provisions. The remainder of the TCHRA continues to apply to employers with 15 or more employees during a relevant time period. Tex. Labor Code § 21.002. As does Title VII, which applies only to employers with 15 or more employees. *See* 42 U.S.C. § 2000e ("the term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."). Even California's sexual harassment law applies to private employers only if they "regularly employ[] five or more individuals." Cal. Code Regs. tit. 2, § 11008.

B. Individuals may be held personally liable under Section 21.142.

Second, certain individuals, such as supervisors or managers of an employer, may be held personally liable for violating Section 21.142. Before the September 2021 amendment to the TCHRA, Texas courts had held that individuals could not be liable in their individual capacity for sexual harassment under the TCHRA. *See, e.g., Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 580 (Tex. App. 2004, no pet.) ("It is well established in Texas that an individual cannot be held personally liable under the TCHRA."). That remains true under Title VII: the Fifth Circuit has held that "[o]nly 'employers,' not individuals acting in their individual capacity who do not otherwise meet the definition of 'employers,' can be liable under title VII." *Moye v. Tregre*, 2024 WL 65424,

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First appeared as part of the conference materials for the
31st Annual Labor and Employment Law Conference session
"What's Weird About Texas"