KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 9, 2018

Mayor Ron Nirenberg
Members of the City Council
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

Dear Mayor Nirenberg and City Council Members:

The Office of the Attorney General is aware that a group of citizens submitted a petition to the San Antonio City Clerk to place on the ballot a proposed ordinance requiring employers to provide paid sick leave to their employees. Under the City's Charter, if the citizens submitted a valid and timely petition, the City Council must vote on whether to enact the ordinance as proposed. If it declines to do so, then the Council must place the proposal on the ballot for voters to decide. *See* San Antonio, Tex., Charter art. IV, § 40–41. We write to inform you that that no matter the Council's decision or the result of any ballot initiative, Texas law preempts a municipal paid sick leave ordinance.

As a home-rule municipality, the City of San Antonio possesses the "'full power of local self-government.'" *City of Laredo v. Laredo Merchs. Ass'n*, --- S.W.3d ---, 2018 WL 3078112, at *4 (Tex. June 22, 2018) (quoting Tex. Loc. Gov't Code § 51.072(a)). But ordinances of a home-rule city must not contain any provision inconsistent with the Texas Constitution or the general laws enacted by the Legislature. *Id.* (citing Tex. Const. art. XI, § 5(a)). "A statutory limitation of local laws may be express or implied, but the Legislature's intent to impose the limitation 'must appear with unmistakable clarity.'" *Id.* (quoting *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975)). "An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993). "Absent an express limitation, if 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." *City of Laredo*, 2018 WL 3078112, at *4 (citation omitted).

This preemption framework raises two questions about the proposed San Antonio paid sick leave ordinance: (1) is there a state statute that would preempt the ordinance with unmistakable clarity; and (2) does the proposed ordinance fall within the statute's ambit? Here, the answer to both questions is "Yes."

First, the legislature's intent to preempt local ordinances from regulating wages is unmistakably clear. The Texas Minimum Wage Act ("Act") broadly regulates the payment of wages in Texas by incorporating the standards of the federal Fair Labor Standards Act ("FLSA") into state law. Tex. Labor Code § 62.051. The FLSA sets a minimum wage—currently $7.25/hr.—based on employee hours worked during a workweek. 29 U.S.C. § 206. Thus, the FLSA sets a floor for wages in Texas. But the Act sets a ceiling because it "supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under a public contract." Tex. Labor Code § 62.0515. The Act also states that it "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[.]" *Id.* § 62.151. Thus, the FLSA sets a floor for wages per hour. The Act incorporates the FLSA's wages per hour standard and says that municipalities may not deviate from it. Moreover, the Act incorporates the FLSA's calculation of compensable hours per week. The result is that the FLSA sets a floor for wages—$7.25/hr.—and the Act sets a ceiling by requiring employers to calculate wages by hour *worked* per week. Thus, any pay for hours not worked exceeds the Act's ceiling.

The proposed ordinance would require employers to pay workers for hours not worked—hours taken as sick leave. For example, according to the Act and FLSA, if an employee who normally works a 40-hour workweek takes an 8-hour day off, the employer must only pay the employee the minimum wage for the hours actually worked: 32. Under the proposed ordinance, however, in the same situation, the employer must pay at least the minimum wage for 40 hours. The effect is to push employees' hourly wages above the minimum wage ceiling set by the Act.

Second, the proposed paid sick leave ordinance in San Antonio would conflict directly with the Act by requiring employers to pay a minimum wage to employees for hours not actually worked. Under the FLSA, as applied to Texas by the Act, employers need only pay wages to workers for hours actually worked. For hours not actually worked, the minimum wage is $0.00. *See Naylor v. Securiguard, Inc.*, 801 F.3d 501, 504–05 (5th Cir. 2015) (under the FLSA, "rest breaks" of short duration must be compensated, but "meal periods" ordinarily 30 minutes or longer, are not); *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (holding biomedical technician's off-premises "on-call" time was not "working time" under FLSA, where only restrictions were the use of a beeper, a 20–30 minute response time, and ban on alcohol).

Proponents of the San Antonio ordinance may argue that the Act would not preempt the proposed ordinance because the Act does not define wages and paid sick leave is not wages. The problem with this contention is that it ignores the plain meaning of wages, and common sense.

The Texas Supreme Court instructs us that the "plain meaning of [statutory] text is the best expression of legislative intent[.]" *City of Laredo*, 2018 WL 3078112, at *5 n.41 (quoting *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)). Just last month, the Supreme Court held that the Solid Waste Disposal Act, which regulates "solid waste management purposes," preempted a city ordinance prohibiting merchants from providing single use plastic and paper bags to customers. *Id.* at *1, 6. The statute did not define "solid waste management purposes," so the Court looked to

the law's other constituent parts to define it and concluded that the city's ordinance fell within its ambit. *Id.* at *6. Likewise, the statute did not define what it meant by "container" or "package" when referring to solid waste, but the Court concluded, after applying a plain meaning analysis, that "bag" was included in that definition, despite the fact that the bag may not be solid waste at the time it is delivered to the customer. *Id.* at *7. Thus, despite the lack of definitions of the operative terms, the Court concluded that the Act was unmistakably clear in its preemption of the bag ban.

Here, neither the Act nor the FLSA defines wages. But the plain meaning of "wages" is income paid to an employee as remuneration for work.[1] In fact, the proposed ordinance itself makes paid sick leave accrue at the rate of one hour of paid sick leave for every 30 hours worked. This means that sick leave is to be paid as wages. Moreover, the Texas Payday Law, which provides a mechanism for employees to seek redress of unlawful pay practices, and is located in the chapter preceding the Act in the Labor Code, defines wages to include sick leave pay. Tex. Labor Code § 61.001(7)(B). Furthermore, the entity responsible for defining wages for the federal government—the IRS—embraces a common sense definition of wages that includes sick pay.[2] If the IRS defines wages to include sick pay, and would tax these wages the same as pay for normal working hours, then they are wages under any sense of the word.

The purpose of the Act is uniformity in wage regulation throughout the State. *See Grothues v. City of Helotes*, 928 S.W.2d 725, 728 (Tex. App.—San Antonio 1996, no writ.) ("When construing a statute or ordinance, we consider such matters as the object sought to be attained by the statute . . . [or] the consequences of a particular construction . . . ." (citing Tex. Gov't Code § 311.023 (1988))). Interpreting the Act as not reaching the proposed paid sick leave ordinance would render it a nullity, permitting municipalities a formalistic way to undercut the statewide objective of uniformity. What would be the purpose of the Act if municipalities could increase the minimum pay required in private employment by slapping a new label on it to accomplish the same thing? *See also S. Crushed Concrete v. City of Hous.*, 398 S.W.3d 676, 679 (Tex. 2013) ("If the City's contention were true, a city could almost always circumvent [state law] and vitiate a [state] permit that it opposes by merely passing an ordinance that purports to regulate something other than air quality."). Because the proposed paid sick leave ordinance would have the actual effect of increasing wages for the workweek beyond those permitted by the Act, the Act preempts such an ordinance.

We ask that the City Council reject the proposed ordinance because state law preempts it. Thank you for your consideration of these important issues.

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[1] Black's Law Dictionary 1091 (6th ed. 1990). This edition of Black's was in use during enactment of the Act.

[2] *See* U.S. Dep't of the Treasury, Internal Revenue Service, Publication 17, Your Federal Income Tax for Individuals, p. 48 (2017), *available at https*://www.irs.gov/pub/irs-pdf/p17.pdf.

Very truly yours,

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