

DENTAL LEGAL UPDATE

Sick Leave Leaving??

by Jeanine Lehman, Attorney

INSIDE THIS ISSUE:

- Sick Leave Leaving.....1
- Speaking Requests.....2
- Sleep Dentistry Rule & More.....3
- Past Issues.....3
- Scam Targeting DEA Registrants.....4
- Year End Planning.....4
- About our Firm.....4

Forcing an employer to provide additional benefits, for example, could force employers to cut employee hours, other employee benefits, or put their employees out of work and close their doors forever.

As I write this newsletter, Austin’s controversial mandatory paid sick leave ordinance continues to be on hold, but its future could change. There are major new developments in court and at the Texas legislature. After losing in November in the Third Court of Appeals, could an appeal by the City of Austin to the Texas Supreme Court be next?

For background on the sick leave ordinance – On February 15, 2018, the Austin City Council adopted a controversial ordinance, the Earned Sick Time Ordinance, requiring private employers (including dental practices) to provide paid sick leave for employees. That Ordinance No. 20180215-049 is at www.austintexas.gov/edims/document.cfm?id=293797 The yearly caps for mandated paid sick leave are: (1) 48 hours per employee per calendar year for employers with 15 or fewer employees and (2) 64 hours per employee per calendar year for employers with more than 15 employees.

The Texas Third Court of Appeals on August 17, 2018 issued a stay to keep the ordinance from taking effect. This was in response to an appeal in the case brought in Travis County District Court by a business coalition and temporary staffing agencies challenging the ordinance on the grounds that it violated

the Texas Minimum Wage Act and the Texas Constitution. Oral arguments were heard by the Third Court of Appeals on October 17, 2018. Then, in the mid-term elections, two of the three justices hearing the case were not re-elected. Those justices have substantial judicial experience and their terms end on December 31, 2018. On November 8, 2018, the Texas Tribune reported that the justices will be working overtime to complete cases in which there have been oral arguments, especially the bigger, more interesting cases. Then, on November 16, 2018, the Third Court of Appeals issued its Opinion finding that the ordinance violated the Texas Minimum Wage Act and was therefore unconstitutional. The Court found that the private parties and the State of Texas, who opposed the ordinance, established that they would suffer irreparable harm if the ordinance goes into effect. The Court remanded the case to the Travis County District Court for issuance of a temporary injunction to keep the ordinance from going into effect, and further proceedings consistent with the appellate court’s opinion. The remand was to the District Court of Travis County, 459th Judicial District, case number D-1-GN-18-001968. For the Third Court of Appeals, see case num-

continued on page 2

Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at **(512) 918-3435** or jeanine@jeanine.com

**Website Favorites**

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of
Dental Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental
Association
www.ada.org

Sick Leave Leaving?? (cont.) --

ber 03-18-00445-CV at www.txcourts.gov/3rdcoa/ The City of Austin is reviewing its options. A possibility is to appeal the case to the Texas Supreme Court.

As of this writing (November 18, 2018), the City of Austin website says: "Based upon the Aug. 17, 2018 Third Court of Appeals Order in No. 03-18-00445-CV; Texas Association of Business et al. and The State of Texas, Intervenor v. City of Austin, Texas et al., the City is temporarily postponing the effective date for the Earned Sick Time Ordinance, No. 20180215-049, which is the subject of the rule. The rule-making process, including the appeals process outlined in section 1-2-10 of the City Code is temporarily abated while the Aug. 17, 2018, Order remains in effect." See: www.austintexas.gov/EarnedSickTime

The paid sick leave ordinance was written to go into effect October 1, 2018. That date was intentionally chosen by Austin's City Council with the plan to have the ordinance go into effect prior to the next session of the Texas legislature.

The Texas legislature goes into session in January 2019. On November 12, 2018, State Representative Matt Krause pre-filed House Bill 222 to preempt municipalities from requiring employers to provide employee paid sick leave. If this bill becomes law, it would take effect on September 1, 2019 and it would strike down Austin's and San Antonio's sick leave ordinances.

Facing the trend of increasing municipal regulation of employment, busi-

ness groups are working together to advocate for new state law. An example is the Alliance for Securing and Strengthening the Economy in Texas (ASSET), a coalition of sixteen business groups, which has recently formed with the mission "To fight for policies that fuel the engines of the economy--small business employers--and protect Texas businesses from invasive and burdensome government regulations." ASSET notes that "California-style labor policies are creeping into Texas and threatening the economic future of our state". ASSET will actively encourage the passage of a statewide Texas law that would preempt local governments from unilaterally enacting local employment and labor laws, including employer benefits, employer hiring practices, scheduling, and other daily operational business practices. Concerns include the creation of a patchwork of regulations across Texas, the legality of municipalities mandating employment regulations, and the impact on small businesses. "These types of restrictive government mandates are very harmful to Texas small businesses. Just because the government mandates something, does not mean a small business can afford it. Small businesses operate on very thin margins and already deal with hundreds of regulations on the Federal and State levels. Forcing an employer to provide additional benefits, for example, could force employers to cut employee hours, other employee benefits, or put their employees out of work and close their doors forever." See: www.assettexas.com

Austin has adopted other ordinances affecting employers. Prior to adopting

the paid sick leave ordinance, in 2016, Austin adopted the Fair Chance Hiring Ordinance colloquially known as the “Ban the Box” ordinance. Generally, this ordinance restricts employers with 15 or more employees in Austin from inquiring about criminal record until a conditional job offer is made to an applicant. Therefore, generally, employers cannot include a question on their job applications inquiring about criminal records. Also, there are requirements for an individualized assessment of a criminal history if criminal background information is received. There are additional compliance responsibilities under the ordinance including on promotions of employees. Dental practices fall victim to various crimes including embezzlement, theft and sale of patient identities (which violates HIPAA), and diversion of drugs. Therefore, dental practices have legitimate concern about criminal records. Nonetheless, Austin dental practices with 15 or more employees in Austin need to comply with the provisions of the ordinance, as well as other applicable state and federal law. See ordinance 20160324-019. The issue is the burden that the Ban the Box ordinance places on employers. If not precluded by applicable law, employers may choose to knowingly hire good employees with criminal histories. Prior to that in 2010, Austin adopted an ordinance mandating rest periods for construction employees. See ordinance 20100729-047.

The State of Texas has a law that prohibits municipalities from adopting their own minimum wage requirements. Therefore, the City of Austin cannot adopt a minimum wage for private employers.

Given the activist Austin City Council, the question arises – will more labor law requirements be imposed on employers, including dental practices, via ordinance? Will rest breaks be mandated for other businesses, such as dental practices? Will other employer paid benefits be mandated, such as health insurance, health care stipends or retirement plans? Where does it end?

From the time of this writing to the time that you read this newsletter, the status of the Austin sick leave ordinance may have changed. Therefore, staying updated on the fate of the ordinance is important, so that you can comply if and when the ordinance goes into effect.

Sleep Dentistry Rule & More

The Dental Practice Committee of the Texas State Board of Dental Examiners (Board) has discussed the concept of changes to Rule 108.12 - Dental Treatment of Obstructive Sleep Apnea. On Tuesday, November 20, 2018, at 1:30 PM, there will be a stakeholder meeting convened by Board staff and open to the public at the William P. Hobby Jr. State Office Building, Tower III, Room 100, at 333 Guadalupe Street, Austin, TX 78701. Concerning the sleep dentistry rule, this meeting will specifically discuss and accept comments concerning the potential need for clarifying changes regarding a dentist’s ability to refer a patient to sleep centers or sleep studies if obstructive sleep apnea is suspected.

In 2014, the Texas Medical Association sued the Texas State Board of Dental Examiners concerning the initial sleep dentistry rule – alleging that the initial rule illegally allowed dentists to engage in the practice of medicine. As a result of that lawsuit, the sleep dentistry rule was substantially rewritten and

continued on page 4

Jeanine Lehman is an Austin, Texas health law attorney who practices dental, health, employment, real estate, and business law.

Past issues of the Dental Legal Update are available at www.jeanine.com

The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally or that is applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2018 Jeanine Lehman.

Sleep Dentistry Rule & More (cont.) --

replaced with Rule 108.12 – Dental Treatment of Obstructive Sleep Apnea. The 2014 TMA lawsuit against the Board was put on hold on August 13, 2015 to allow the parties to work out their differences. At the time this article is written, the status of the lawsuit has not changed.

At the same stakeholder meeting, two other topics will be addressed. First – Teledentistry, specifically current applications and issues related to dental practice, and existing provisions of the Dental Practice Act, Board rules, and related provisions of the Texas Occupations Code will be discussed. Second – Use of Silver Diamine Fluoride, including appropriate delegation by dentist, risk of application and improper use, and existing provisions of the Dental Practice Act and Board rules will be discussed.

Stakeholders may also submit informal input by mail to the Board's General Counsel at 333 Guadalupe St., Suite 3-800, Austin, TX 78701 or by email to stakeholders@tsbde.texas.gov

The next quarterly meeting of the Board will be November 30, 2018.

Scam Targeting DEA Registrants

The U.S. Drug Enforcement Administration (DEA) reports that physicians, pharmacies, and the public have been targeted by criminals posing as DEA

agents. The DEA has issued notices to registrants and has provided the following advisory information:

The United States Drug Enforcement Administration (DEA) is aware that registrants are receiving telephone calls and emails by criminals identifying themselves as DEA employees or other law enforcement personnel. The criminals mask their telephone number on caller ID by showing the DEA Registration Support 800 number.

Please be aware that a DEA employee would not contact a registrant and demand money or threaten to suspend a registrant's DEA registration.

If you are contacted by a person purporting to work for DEA and seeking money or threatening to suspend your DEA registration, submit the information on the DEA Diversion Control Division website www.DEADiversion.usdoj.gov and select the link for "Extortion Scam Online Reporting."

For more information, contact your local DEA Field Office, which may be found at <https://apps.deadiversion.usdoj.gov/contactDea/spring/fullSearch>. You may also contact the Registration Service Center: 1-800-882-9539 or DEA.Registration.Help@usdoj.gov

Year End Planning. Have attorney review your lease renewal options, your corporate minutes, your associate employment agreements, your dental practice succession plan, and other concerns.

**Have you moved?
Please send us a
change of address
to receive future
issues.**

**Please share this
newsletter with
your dentist col-
leagues, office
manager, and ad-
visors.**

Thanks!

**To receive this
newsletter by
email, call
(512) 918-3435.**

About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building purchases/condos, build-to-suits and real estate law, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com