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## **2018 Update on Selected Topics in Texas Public Sector Employment Law**

**Prepared by:**

**B. Craig Deats & Natalie DeLuca**

**Author contact information:**

**B. Craig Deats**  
**Deats Durst & Owen, PLLC**  
**707 W. 34<sup>th</sup> Street**  
**Austin, Texas 78705**  
**(512) 474-6200**  
[\*\*cdeats@ddollaw.com\*\*](mailto:cdeats@ddollaw.com)

**Natalie DeLuca**  
**Metropolitan Transit Authority of  
Harris County**  
**P.O. Box 61429**  
**Houston, Texas 77208**  
**(713) 615-6743**  
[\*\*Natalie.DeLuca@ridemetro.org\*\*](mailto:Natalie.DeLuca@ridemetro.org)

## Table of Contents

Page

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>FIRST AMENDMENT FREE SPEECH IN THE PUBLIC WORKPLACE.....</b>	<b>2</b>
	A. Overview of the Law and Key Court Decisions .....	2
	B. Case Summaries Involving First Amendment Free Speech Issues .....	6
<b>III.</b>	<b>EMPLOYMENT DECISIONS BASED ON POLITICAL PATRONAGE OR ASSOCIATION .....</b>	<b>12</b>
	A. Overview of the Law and Key Court Decisions .....	12
	B. Case Developments Involving Political & Association Claims.....	19
<b>IV.</b>	<b>DUE PROCESS RIGHTS IN PUBLIC EMPLOYMENT .....</b>	<b>23</b>
	A. Overview of the Law and Key Court Decisions .....	23
	B. Case Summaries Involving Due Process Issues.....	26
<b>V.</b>	<b>THE PRIVACY RIGHTS OF TEXAS PUBLIC EMPLOYEES .....</b>	<b>31</b>
	A. Overview of the Law and Key Court Decisions .....	31
	B. Overview of State Privacy Law Affecting Public Employees .....	34
	C. Summaries of Cases Involving Privacy Issues.....	38
<b>VI.</b>	<b>TEXAS PUBLIC SECTOR EMPLOYMENT LAW .....</b>	<b>41</b>
	A. Overview of the Texas Whistleblower Act.....	41
	B. Recent Whistleblower Act Developments .....	43

## 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 such as 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>1</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.

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. 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.<sup>2</sup> Copies of those papers may be available through the Office of Continuing Legal Education of the UT School of Law.

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<sup>1</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.

<sup>2</sup> The authors gratefully acknowledge the past contributions to this paper made by Margie Harris of Houston, Lee Crawford of Austin, Phil Durst of Austin, and Monika Arvelo of Austin.

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 association and political affiliation rights of public employees (Page 12);
3. The effect of Fifth and Fourteenth Amendment due process rights on public employees who have a property interest in their jobs (Page 23);
4. The effect of Fourth Amendment and state law privacy rights on public employee drug testing, workplace searches, and employee surveillance (Page 31); and
5. Texas state labor and employment laws uniquely applicable to public employment (Page 41).

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**

### **A. Overview of the Law and Key Court Decisions.**

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, discharging or otherwise discriminating against a public employee based on the employee's speech (or other form of expression) constitutes unlawful retaliation for exercising First amendment rights and actionable under 42 U.S.C. §1983.<sup>3</sup>

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 not 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).

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<sup>3</sup> As a practical matter, these cases will normally need to be brought under the U.S. Constitution rather than the free speech provisions of the Texas Constitution, i.e., Texas Constitution art. I, §§8 (speech, press) and 27 (petition, assembly). While 42 U.S.C. §1983 creates a damages cause of action for violation of federal constitutional and/or statutory rights, Texas has no corresponding state statute applicable to state constitutional and/or statutory violations. Further, the Texas Supreme Court has declined to imply such a cause of action for violations of free speech rights under the Texas Constitution. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147 (Tex. 1995). Employees can, however, sue under the Texas Constitution for equitable and injunctive relief. E.g., *City of Houston v. Downstream Environmental, LLC*, 444 S.W.3d 24, 38 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2014, pet.denied).

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