

CAUSE NO. 2019CI13921

ASSOCIATED BUILDERS &  
CONTRACTORS OF SOUTH TEXAS,  
INC., AMERICAN STAFFING  
ASSOCIATION, BBM-ONLINE, LLC  
D/B/A BBM STAFFING, THE BURNETT  
COMPANIES CONSOLIDATED, INC.  
D/B/A BURNETT SPECIALISTS,  
CARDINAL SENIOR CARE, LLC D/B/A  
CARDINAL MED STAFFING, CHOICE  
STAFFING, LLC, EEMPLOYERS  
SOLUTIONS, INC., HAWKINS  
ASSOCIATES, INC. D/B/A HAWKINS  
PERSONNEL GROUP, LEADINGEDGE  
PERSONNEL, LTD., STAFF FORCE, INC.  
D/B/A STAFF-FORCE PERSONNEL  
SERVICES, SAN ANTONIO  
MANUFACTURERS ASSOCIATION, SAN  
ANTONIO RESTAURANT  
ASSOCIATION

Plaintiffs

V.

CITY OF SAN ANTONIO, TEXAS, RON  
NIRENBERG, MAYOR OF THE CITY OF  
SAN ANTONIO, ERIK WALSH, CITY  
MANAGER OF THE CITY OF SAN  
ANTONIO, and COLLEEN BRIDGER,  
DIRECTOR OF THE SAN ANTONIO  
METROPOLITAN HEALTH DISTRICT,

Defendants

IN THE DISTRICT COURT

408th  
TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**ORIGINAL PETITION, APPLICATION FOR TEMPORARY AND  
PERMANENT INJUNCTIVE RELIEF, REQUEST FOR DISCLOSURE,  
AND NOTICE OF HEARING**

Plaintiffs Associated Builders & Contractors of South Texas, Inc., American Staffing  
Association, BBM-Online, LLC d/b/a BBM Staffing, The Burnett Companies Consolidated, Inc.  
d/b/a Burnett Specialists, Cardinal Senior Care, LLC d/b/a Cardinal Med Staffing, Choice  
Staffing, LLC, eEmployers Solutions, Inc., Hawkins Associates, Inc. d/b/a Hawkins Personnel

Group, LeadingEdge Personnel, Ltd., Staff Force, Inc. d/b/a Staff-Force Personnel Services, San Antonio Manufacturers Association, San Antonio Restaurant Association (collectively, “Plaintiffs”), file this Original Petition, Application for Temporary and Permanent Injunctive Relief, Request for Disclosure, and Notice of Hearing against Defendants City of San Antonio (the “COSA”), Ron Nirenberg, in his official capacity as the Mayor of the City of San Antonio, Erik Walsh, in his official capacity as City Manager of the City of San Antonio, and Colleen Bridger, MPH, PhD., in her official capacity as Director of the San Antonio Metropolitan Health District (collectively, “Defendants”), and in support show the Court as follows:

## **I. INTRODUCTION:**

1. On August 16, 2018, the City of San Antonio enacted Ordinance No. 2018-08-16-0620 mandating that all private employers provide employees paid sick leave to their employees (the “Ordinance”).<sup>1</sup> The Ordinance requires employers to pay minimum-wage employees “earned paid sick time” equal to what the employee would have earned if the employee had worked when the employee has not actually worked. By compensating employees for time not worked, the effect of the Ordinance is to require employers to pay hourly wage above the minimum-wages set by Texas law. As a consequence, the Ordinance conflicts with the laws adopted by the Texas legislature as set forth in the Texas Minimum Wage Act (“TMWA”). The TMWA specifically incorporates the federal standards set forth in the Fair Labor Standards Act (“FLSA”) and requires that an employer pay each employee the federal minimum wage set by

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<sup>1</sup> The Ordinance is substantially similar to other ordinances passed in other municipalities in Texas, including the Ordinance No. 20180215-049 passed by the City of Austin, Texas on or about February 15, 2018 (“PSL-Austin”) and Ordinance No. 31181 passed by the City of Dallas, Texas on or about April 24, 2019 (“PSL-Dallas”). PSL-Austin was challenged, *Texas Association of Business, et al. v. City of Austin, Texas, et al.*, Cause No. D-1-GN-18-001968, 459<sup>th</sup> Judicial District Court, Travis County, Texas. On appeal to the Third Court of Appeals, the Court concluded that “the Texas Minimum Wage Act preempts local regulations that establish a wage, that the Ordinance establishes a wage, and that, accordingly, the TMWA preempts the City’s Ordinance as a matter of law, thus making the Ordinance unconstitutional.” *Texas Assoc. of Business, et al. v. City of Austin, Texas, et al.*, 565 S.W.3d 425, 440 (Tex. App.—Austin 2018, pet. filed).

the FLSA. By its own terms, the TMWA expressly supersedes wages established in any ordinance, order, or charter governing wages in private employment.

2. Due to its conflict with the TMWA and its heightened requirements, the Ordinance is preempted, invalid, and of no force or effect. Further, the Ordinance violates Plaintiffs' rights under the Texas Constitution, including the Due Course of Law Clause, equal protection, and the right to be free of unreasonable search and seizures.

3. By this suit, Plaintiffs seek a declaratory judgment that the Ordinance is preempted by Texas law and its implementation would violate Plaintiffs' constitutional rights. Plaintiffs request temporary and permanent injunctive relief to prevent the Ordinance from going into effect.

## **II. DISCOVERY CONTROL PLAN**

4. Plaintiffs intend to conduct Level 2 discovery under Rule 190 of the Texas Rules of Civil Procedure.

## **III. PARTIES**

### **A. Plaintiffs**

1. Associated Builders & Contractors of South Texas, Inc. ("ABC-South Texas") is a Texas non-profit corporation and is the San Antonio chapter of the Associated Builders and Contractors, a national construction industry trade association with 69 separate chapters representing more than 21,000 members across the United States. Headquartered in San Antonio, ABS-South Texas represents over 200 large and small companies across South Texas. ABC-South Texas' constituents are composed, primarily, of general contractors, specialty contractors, subcontractors, and industry professionals. In part, ABC-South Texas is dedicated to governmental representation and legal advocacy to ensure its members and members of all trades who want to conduct business in an unrestricted market regardless of labor affiliation have a

competitive advantage, add value, and promote a safe work environment in the construction industry. At any given time, ABC-South Texas has members employing personnel performing work within the City of San Antonio and surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, ABC-South Texas' members will be affected by the Ordinance.

2. American Staffing Association ("ASA") is a District of Columbia non-profit corporation and the leading voice for interests of the staffing, recruiting, and workforce solutions industry. ASA and its affiliated chapters advance the interests of the industry across all sectors through advocacy, research and education. The ASA Texas Council, an ASA committee, is the voice of the staffing industry in Texas. ASA's members include staffing businesses operating in the City of San Antonio who will be affected by the Ordinance. ASA has members with employees who are not subject to a collective bargaining agreement and join in this action on behalf of its members operating in the City of San Antonio or otherwise subject to the Ordinance.

3. BBM-Online, LLC d/b/a BBM Staffing ("BBM") is a Texas limited liability company headquartered in San Antonio, Texas providing for placement of temporary and permanent employees across multiple industries. BBM offers temporary to permanent staffing solutions, direct-hire staffing solutions, payroll solutions, and onsite management in and around San Antonio and across the State of Texas. BBM is a member of the ASA. At any given time, BBM has employees serving customers performing work within the City of San Antonio and surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, BBM will be affected by the Ordinance.

4. The Burnett Companies Consolidated, Inc. d/b/a Burnett Specialists ("Burnett") is a privately held, employee owned, Houston-based recruiting, temporary staffing, and

headhunting company established in 1974 with offices in San Antonio, Houston, The Woodlands, Austin, El Paso, and Dallas. Burnett have dedicated teams focused on specific fields including accounting, administrative-clerical, convention support, engineering, healthcare, human resources, information technology, legal, light industrial, management-professional, manufacturing, medical administration, mortgage-banking, sales-marketing, supply chain, customer service, and corporate training. Burnett is now Texas' largest employee-owned staffing and recruitment agency as ranked by the National Center for Employee Ownership. Burnett is a member of ASA. At any given time, Burnett has temporary employees serving with customers performing work within the City of San Antonio and surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, Burnett will be affected by the Ordinance.

5. Cardinal Senior Care, LLC d/b/a Cardinal Med Staffing ("Cardinal") is a Texas limited liability company headquartered in San Antonio, Texas and offers healthcare and home-care staffing in and around San Antonio as well as in California. Cardinal maintains as many as one-hundred and twenty employees depending on the time of year. Cardinal is a member of ASA. At any given time, Cardinal has temporary employees serving with customers performing work within the City of San Antonio and surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, Cardinal will be affected by the Ordinance.

6. Choice Staffing, LLC ("Choice Staffing") is a Texas limited liability company headquartered in San Antonio, Texas. Choice Staffing is a temporary staffing agency – specializing in manufacturing and administrative placement. Choice Staffing is a member of ASA and SAMA. At any given time, Choice Staffing has approximately one hundred and fifty temporary employees serving customers performing work within the City of San Antonio and

surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, Choice Staffing will be affected by the Ordinance.

7. eEmployers Solutions, Inc. (“eESI”) is a Texas corporation founded in 1998 with its principal place of business in San Antonio, Texas and Texas offices in Houston, Corpus Christi, and Dallas-Fort Worth. eESI is a Professional Employer Organization managing the employer-employee relationships and responsibilities by serving as a co-employer with the customer and assuming human resources roles, including payroll and employee benefit programs. eESI is a member of ASA. At any given time, eESI has temporary employees serving with customers performing work within the City of San Antonio. These employees are not subject to a collective bargaining agreement. Accordingly, eESI will be affected by the Ordinance.

8. Hawkins Associates, Inc. d/b/a Hawkins Personnel Group (“Hawkins”) is a corporation organized and existing under the laws of the State of Texas. Hawkins offers temporary, temp-to-hire, direct hiring, and payroll staffing services in San Antonio, New Braunfels, San Marcos, Austin, Seguin, Temple, and Austin in light industrial, project management, administrative support, engineering-technical, human resources, accounting-finance, call centers, convention staffing, professional, marketing, specialty staffing, and IT support. Hawkins maintains branches in San Antonio, New Braunfels, and Temple. Last year, Hawkins placed approximately 3500 people in employment positions. Hawkins is a member of ASA and SAMA. At any given time, Hawkins has temporary employees serving customers performing work within the City of San Antonio and surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, Hawkins will be affected by the Ordinance.

9. LeadingEdge Personnel, Ltd. (“LeadingEdge”) is a Texas limited partnership which offers temporary, temp-to-hire, and direct hiring staffing agency services to various industries and customers in San Antonio and Austin. LeadingEdge is a member of ASA. At any given time, LeadingEdge has approximately 300 temporary employees serving customers performing work within the City of San Antonio and the surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, LeadingEdge will be affected by the Ordinance.

10. Staff Force, Inc. d/b/a Staff-Force Personnel Services (“Staff-Force”) is a Texas corporation headquartered in Katy, Texas with 21 offices in 8 cities in Texas, including San Antonio. Staff Force is a temporary staffing company offering temporary, direct hire and light industrial staffing services in and around the City of San Antonio. In 2018, Staff Force employed approximately 27,700 men and women in Texas. The San Antonio office paid over 40,000 hours in wages to its employees. Staff-Force is a member of ASA. At any given time, Staff-Force has temporary employees serving customers performing work within the City of San Antonio and the surrounding areas. These employees are not subject to a collective bargaining agreement. Accordingly, Staff-Force will be affected by the Ordinance.

11. San Antonio Manufacturers Association (“SAMA”) is a Texas non-profit corporation headquartered in San Antonio dedicated to strengthening the local and regional manufacturing industry through advocacy, workforce development, and networking. SAMA proactively monitors manufacturing related issues and participates in local government to ensure municipal and regional officials understand what is important for the manufacturing industry, and examines workforce and economic development issues to sustain manufacturing companies within the San Antonio Metroplex and the development of a future labor pool with skills necessary to support the manufacturing industry. At any given time, members of SAMA have

employees serving within the City of San Antonio, who are not subject to a collective bargaining agreement. Accordingly, SAMA's members will be affected by the Ordinance.

12. San Antonio Restaurant Association ("SARA") is a Texas 501(c)(6) non-profit corporation headquartered in San Antonio and is one of the twenty chapters of the Texas Restaurant Association, with its constituent members made up of restaurants and restaurant owners. SARA aims to unify the local restaurant and hospitality industry through education, operational support, and advocacy related to issues impacting its members by promoting legislation and regulations that benefit the restaurant industry and challenging legislation and regulations which could negatively impact the restaurant industry. At any given time, members of SARA have employees serving within the City of San Antonio, who are not subject to a collective bargaining agreement. Accordingly, SARA's members will be affected by the Ordinance.

**B. Defendants**

13. The City of San Antonio ("COSA") is a home rule municipality headquartered in Bexar County, Texas.

14. Defendant Ron Nirenberg ("Nirenberg") is the duly elected Mayor of COSA.

15. Defendant Erik Walsh ("Walsh") is the City Manager of COSA and responsible for the day-to-day operations of COSA.

16. Defendant Colleen Bridger, MPH, PhD. ("Bridger") is the Director of the San Antonio Metropolitan Health District and responsible for implementing certain health policies for COSA.

17. Pursuant to Texas Civil Practice and Remedies Code Section 17.024(b), Defendants COSA, Nirenberg, Walsh and Bridger may be served by serving the mayor, clerk,

secretary, or treasurer of the City at 115 Plaza de Armas, 2<sup>nd</sup> Floor, San Antonio, Texas 78205. Plaintiffs request that the Clerk issue citation and service of process on all Defendants.

18. This suit raises a constitutional challenge to the Paid Sick Leave Ordinance, which requires that Ken Paxton, the Attorney General of Texas, be served with process. Plaintiffs request that the Clerk issue citation to Ken Paxton, Attorney General of Texas at 300 W. 15th Street, Austin, Texas 78701, as required by Texas Civil Practice and Remedies Code Section 37.006(b).

#### **IV. JURISDICTION AND VENUE**

19. Jurisdiction is proper in this Court pursuant to Article V, Section 1 and 8 of the Texas Constitution and Sections 24.007 and 24.008 of the Texas Government Code. This Court has subject matter jurisdiction because Plaintiffs seek to vindicate their rights under the Texas Constitution via the Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.003.

20. Venue is appropriate in Bexar County pursuant to Sections 15.002(a)(3), 15.005, 15.011, and 65.023 of the Texas Civil Practice and Remedies Code because all or a substantial part of the events giving rise to the claim occurred in Bexar County.

#### **V. STATEMENT OF FACTS**

##### **A. The Paid Sick Leave Ordinance**

21. On August 16, 2018, COSA enacted the Paid Sick Leave Ordinance, mandating that private employers provide paid sick leave to their employees. San Antonio, Texas, Ordinance No. 2018-08-16-0620 (the “Ordinance”). The Ordinance is “to require that certain employees in San Antonio be provided earned paid sick time for use if an employee needs to be absent from work because the employee or the employee’s family member experiences illness, injury, stalking, domestic abuse, sexual assault, or otherwise requires medical or health care,

including preventative care and mental health care...” *Id.* The Ordinance imposes notice, posting and recordkeeping requirements as well as establishes enforcement authority and civil penalties for violations. *Id.*

22. To justify the Ordinance, the Paid Sick Leave Ordinance declares:

**WHEREAS**, most workers in the City of San Antonio will at some time during each year need limited time off from work to care for their own health and safety needs or the health and safety needs of a close family member; and

**WHEREAS**, denying earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of the City of San Antonio; and

**WHEREAS**, the lack of earned paid sick time for employees contributes to employee turnover and unemployment, and harms the local economy; and

**WHEREAS**, the City of San Antonio, as a home-rule municipality, has the ability to address matters of public health and safety; and now finds that establishing earned paid sick time requirements is a matter of public health and safety...

*Id.*

23. The Ordinance proclaims its intent to be “[t]o provide employees with the ability to accrue and use earned paid sick time when they need to be absent from work because the employee or the employee’s family member suffer illness, injury, stalking, domestic abuse, sexual assault, or otherwise require medical or health care, including preventative care and mental health care.” *Id.*, §15-270. The Ordinance defines “Employee” as “an individual who performs at least eighty (80) hours of work for pay within the City of San Antonio in a year for an employer including work performed through the services of a temporary or employment agency.” *Id.*, §15-269. Definitions, *Employee*. Per the Ordinance, “Employer” means “any person, company, corporation, firm, partnership, labor organization or association that pays an employee to perform work for an employer and exercises control over the employee’s wages[,] hours and working conditions.” *Id.* §15-269, Definitions, *Employer*. The definition of “Employer” excludes the United States and any corporation owned by the United States, the

State of Texas and any agency thereof, and COSA or any political subdivision of Texas or agency that cannot be regulated by ordinance. *Id.*

24. The Ordinance commands that “[t]he employer shall pay earned paid sick time in an amount equal to what the employee would have earned if the employee had worked the scheduled work time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage.” *Id.*, §15-272(a). The Ordinance compels employers to “grant an employee one hour of earned paid sick time for every thirty (30) hours worked for the employer in the City of San Antonio...” which “shall accrue in one hour unit increments...” “starting at the commencement of employment or the date this Article is effective, whichever is later.” *Id.*, §15-272(b)(1)-(2). Depending on the number of employees the employer has in the preceding twelve (12) month period, a “yearly cap for earned sick time... is (A) Sixty-four (64) hours per employee per year for medium and large employers... and (B) Forty-eight (48) hours per employee per year for small employers...” *Id.*, §15-272(b)(3). “All available earned paid sick time up to the yearly cap... shall be carried over to the following year.” *Id.*, §15-272(b)(4).

25. The Ordinance authorizes that “an employee may request earned sick time from an employer for an absence from the employee’s scheduled work time caused by:

- (A) The employee’s physical or mental illness or injury, preventative medical or health care, or health condition; or
- (B) The employee’s need to care for a family member’s physical or mental illness, preventative medical or health care, injury, or health condition; or
- (C) The employee’s or their family member’s need to seek medical attention, seek relocation, obtain services from a victim’s services organization, or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or employee’s family member.”

Ordinance, §15-272(c)(2).

26. The Ordinance permits an employer verification procedures only “if the employee requests to use earned paid sick time for more than three (3) consecutive work days” but

simultaneously prohibits verification procedures that “would require an employee to explain the nature of the domestic abuse, sexual assault, stalking, illness, injury, health condition or other health need when making a request for earned paid sick time...” *Id.*, §15-272(c)(3). Otherwise, “[a]n employer shall provide earned paid sick time for an employee’s absence from the employee’s scheduled work time if the employee has available earned paid sick time and makes a timely request for the use of earned paid sick time before their scheduled work time” and the “employer may not prevent an employee from using earned paid sick time for an unforeseen qualified absence that meets the requirements of this Section.” *Id.*, §15-272(c)(4).

27. The Ordinance requires that “[o]n no less than a monthly basis, an employer shall provide electronically or in writing to each employee a statement showing the amount of the employee’s available earned sick time.” *Id.*, §15-274(a). The employer is also required to “maintain records establishing the amount of earned paid sick time accrued and used by each employee.” *Id.*, §15-274(c). The Ordinance will require employers to track and record hours worked even for employees paid on a salary basis and exempt from FLSA rules. The Ordinance provides that “[n]either the amount of earned paid sick time nor the right to use earned paid sick time shall be affected by an employee’s transfer to a different facility, location, division, or job position with the same employer.” *Id.*, §15-272(f). Thus, the Ordinance requires employers to track and record the hours of employees who work outside the jurisdiction of the City of San Antonio.

28. The Ordinance requires “[a]n employer who provides an employee handbook to its employees must include a notice of an employee’s rights and remedies under this Article in that handbook” (*id.*, §15-274(b)) and, if available, to “display a sign describing the requirements of this Article...” (§15-274(d)).

29. The Ordinance empowers the San Antonio Metropolitan Health District and its authorized designee to “investigate complaints, including anonymous complaints” (*id.*, §15-276(a)) and to “impose a civil penalty in an amount not to exceed five hundred dollars (\$500.00) per violation” where “[e]ach violation of a particular section or subsection...constitutes a separate offense” (*id.*, §15-278(a)).

30. Unless stayed or abated, the Ordinance will be implemented by COSA on August 1, 2019, except as to employers having no more than five (5) employees at any time in the last twelve (12) months for which the Ordinance goes into effect on August 1, 2021. *Id.*, §15-280.

#### **B. THE TEXAS MINIMUM WAGE ACT**

31. The Texas Minimum Wage Act (“TMWA”) ties the minimum wage in Texas to the federal standard stated in the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §206. TEX. LABOR CODE §62.051.

32. Although the FLSA does not preempt any higher wages set by states or localities, the Texas Minimum Wage Act explicitly prevents localities from requiring private employers to pay more than the wage set by the FLSA. TEX. LABOR CODE §62.0515 (“the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment.”); *id.* §62.151 (“This chapter 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 of 1938 (29 U.S.C. Section 201 et seq.)”).

33. The FLSA and its implementing regulations require that employee pay be evaluated for compliance with the minimum wage by the work week – not by the hour – and only require employers pay for the hours the employee actually worked on behalf of the

employer. Contravening these standards, the Ordinance requires employers to track the hours an employee works – even for employees paid on a salary basis and exempt from FLSA rules.

34. A related provision in the Texas Labor Code, the Texas Payday Law, provides a definition for the term “wages.” That provision, which provides a remedy for employees to recover compensation owed by their employers, defines “wages” as including “compensation owed by an employer for (A) labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and (B) vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under a written policy of the employer.” TEX. LABOR CODE §61.001(7)(B) (underline added).

### **C. EFFECT OF THE PAID SICK LEAVE ORDINANCE ON PLAINTIFFS**

35. In anticipation of the commencement date of the Ordinance, Plaintiffs are being forced to expend resources to comply with the Ordinance’s mandates when it becomes effective, such as hiring additional staff or purchasing software to track compliance. And, once the Ordinance is in effect, Plaintiffs will be forced to adjust the mix of the overall compensation and the scheduling for its employees operating in the City of San Antonio.

36. Under current law, if an employee who normally works 40 hours a week took one 8-hour day off sick, Plaintiffs (and other employers) would only be required to pay the employee at least the minimum wage for the 32 hours actually worked. After the Ordinance goes into effect, the same scenario demands Plaintiffs (and other employers) to pay at least the minimum wage for the full 40 hours if the employee had banked 240 hours. This means that the Ordinance increases wages for the work week beyond that required by the TMWA.

37. If the Ordinance goes into effect, Plaintiffs’ operations in the City of San Antonio will suffer a competitive disadvantage to similar businesses operating exclusively outside the

City of San Antonio where the Ordinance is not applicable. Plaintiffs' operations in the City of San Antonio will also be disadvantaged with unionized employers who may be excepted from the Ordinance's application by contractually modifying the cap on the hours of paid sick leave to be compensated. Because the Ordinance treats unionized employers differently than non-unionized employers, the Ordinance is discriminatory.

38. Staffing companies and restaurants offering catering services will have special recordkeeping and tracking burdens due to the itinerant and mobile nature of their workforce who can be temporarily assigned within the City of San Antonio and the next day work outside the City of San Antonio. Staffing companies will have double the labor costs when employees use the benefits mandated by the Ordinance because of the nature of their business. For example, consider a scenario where a business has an employee out sick, and asks a staffing company to provide a temporary one. If the staffing company calls an employee to see if he is available to work the position for 8 hours that day, and the employee responds that he is ill and will now take his paid sick leave, the staffing company will have to pay him for 8 hours and also pay another employee for 8 hours to work the vacant position.

## **VI. CAUSES OF ACTION**

### **A. The Ordinance is Unconstitutional and Preempted by TMWA**

39. The preceding paragraphs are re-alleged and incorporated by reference.

40. The Texas Constitution prohibits city ordinances from containing any provision inconsistent with the Constitution or the general laws enacted by Texas' Legislature. TEX. CONST. ART. XI, §5(a). The Texas Legislature's intent to preempt local law with the TWMA is readily evident. The TMWA expressly prohibits municipalities from regulating the wages that are subject to the federal minimum-wage requirements stated in the FLSA. "This chapter [the TMWA] 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 of 1938.” TEX. LABOR CODE, §62.151. The TWMA explicitly provides that “the minimum wage provided by this chapter [the TMWA] supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under public contract.” *Id.*, §62.0515(a) (underline added). Under the plain language of the TMWA, the Ordinance is squarely within the TWMA’s scope because it establishes the compensation a person will receive for services rendered. Any employer subjected to the Ordinance must pay employees who take sick leave the same wages for hours they did not work. In application, those employees claiming sick leave will be paid more per hour actually worked. *See also Texas Assoc. of Bus. et al., City of Austin, Texas*, 565 S.W.3d 425, 440-41 (Tex. App.—Austin 2018, pet. filed).

41. Pursuant to the Uniform Declaratory Judgments Act, Plaintiffs request that this Court enter a judgment declaring the Ordinance is unconstitutional and preempted by the Texas Constitution and the TMWA.

**B. The Ordinance Violates the Due Course of Law Clause**

42. The preceding paragraphs are re-alleged and incorporated by reference.

43. Article I, Section 19 of the Texas Constitution protects citizens from the deprivation of “life, liberty, [or] property... except by the due course of the law of the land.” An economic regulation, like the Ordinance, is unconstitutional under Section 19’s substantive due course of law requirement if the regulation is not rationally related to the governmental interest or if it will be so burdensome so as to be oppressive as compared to the government’s interest.

44. Plaintiffs and other employers operating in the City of San Antonio will be forced by the Ordinance to incur significant extra costs for its employees’ work as well as the added record-keeping and employee tracking burdens. The Ordinance will also cause Plaintiffs and

other employers to suffer a loss of competitiveness to those operators who do not operate entirely within the City of San Antonio and will not be as heavily burdened or affected. COSA's interest in mandating paid sick leave is illusory because the FLSA and TWMA already address this field.

45. Pursuant to Texas' Uniform Declaratory Judgments Act, Plaintiffs respectfully request that this Court enter a judgment declaring the Ordinance to be a violation of the substantive Due Course of Law Clause contained in Article 1, Section 19, of the Texas Constitution.

**C. The Ordinance Violates the Equal Protection Clause**

46. The preceding paragraphs are re-alleged and incorporated by reference.

47. Article I, § 3 of the Texas Constitution guarantees that “[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges.” The Ordinance authorizes unionized employers which have contractual obligations regarding paid sick leave to reduce the number of hours that the unionized employer will have to provide to its unionized employees. Non-unionized Plaintiffs’ will be disadvantaged by those unionized employers who are not held to the same standards. Because the Ordinance treats unionized employers differently than non-unionized employers, the Ordinance is discriminatory. The distinction between unionized employers and non-unionized employers is not rationally related to any legitimate governmental interest, and fails to serve a compelling governmental interest sufficient to overcome strict scrutiny necessitated by the discriminatory provision’s burden on the freedom of association.

48. Pursuant to Texas' Uniform Declaratory Judgments Act, Plaintiffs further ask this Court to declare the Paid Sick Leave Ordinance a violation of Plaintiffs’ right to equal protection under Article I, § 3 of the Texas Constitution.

**D. The Ordinance Authorizes Unreasonable Warrantless Searches.**

49. The preceding paragraphs are re-alleged and incorporated by reference.

50. The Texas Constitution protects citizens from unreasonable searches, providing:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEX. CONST. ART. I, § 9.

51. The Ordinance includes mandatory language to require employers to timely respond to record requests and testimony from the San Antonio Metropolitan Health District’s Director or authorized designee without providing for judicial review or oversight before being required to comply. The Ordinance does not provide a means or opportunity to challenge a records request or testimony sought by the Director or the Director’s designee. To the contrary, the Ordinance imposes significant civil penalties on the employers who fail to comply with any section or subsection of the Ordinance – including record requests and testimony – which penalties will be assessed and imposed by the San Antonio Metropolitan Health District.

52. Plaintiffs request this Court to declare that the Ordinance violates Plaintiffs’ freedom from unreasonable search and seizure under Article 1, §9 of the Texas Constitution.

**E. The Ordinance Violates Plaintiffs’ Rights of Association.**

53. The preceding paragraphs are re-alleged and incorporated by reference.

54. “The Citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.” TEX. CONST. ART. I, §27. The right of association grants Plaintiffs the right to associate or not associate without discrimination or recrimination. The Ordinance impinges upon Plaintiffs’ rights by only allowing unionized employers with a contractual agreement regarding paid sick leave to reduce

the annual cap on paid sick leave hours. The disparate treatment of unionized employers and non-unionized employers based on the rights to associate is not rationally related to any legitimate governmental interest and, even if a legitimate government interest exists, the Ordinance fails to overcome the strict scrutiny necessary to inflict an additional burden on the freedom of association with its discriminatory provisions.

55. Plaintiffs request this Court to declare that the Ordinance violates Plaintiffs' freedom from unreasonable search and seizure under Article 1, §27 of the Texas Constitution.

## **VII. APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION**

56. The preceding paragraphs are re-alleged and incorporated by reference.

57. The purpose of a temporary injunction is to preserve the status quo pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The “status quo” is the “last, actual, peaceable, noncontested status which preceded the pending controversy. “ *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). Whether to grant a temporary injunction rests in the trial court’s sound discretion; however, to obtain a temporary injunction, an applicant must plead and prove: (a) a cause of action against the defendants; (b) a probable right to the relief sought; and (c) a probable, imminent and irreparable injury in the interim. *Buntaru*, 84 S.W.3d at 204.

58. When put into effect on August 1, 2019, the Ordinance will violate the Texas Constitution’s guarantees to rights to economic liberty under the Due Course of Law Clause, equal protection, freedom from unreasonable search and seizure, and the rights of association. Further, the Ordinance is preempted by the Texas Constitution and the Texas Minimum Wage Act. Once operative, will deprive Plaintiffs of their constitutional rights, subject Plaintiffs and others to discrimination, expose Plaintiffs to unsupervised investigation and civil fines, and suffer increased expenditures and burdens preparing to comply and then complying with the

unconstitutional demands of the Ordinance for which there is no adequate legal remedy to recover.

59. A temporary injunction against the enforcement and implementation of the Ordinance will preserve the status quo and will not impose an undue burden on COSA and Defendants.

60. Plaintiffs respectfully ask the Court to issue temporary and, following trial on the merits, permanent injunctions against the Defendants enjoining the effectiveness of the Ordinance and enjoining Defendants from enforcing the Ordinance.

#### **VIII. ATTORNEYS' FEES**

61. Under the Uniform Declaratory Judgments Act, Plaintiffs are entitled to recover "costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. §37.009.

62. Plaintiffs seek award of their reasonable attorneys' fees for the preparation of this suit, prosecution of this suit, and all appeals.

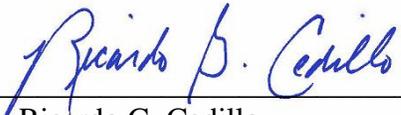
#### **IX. REQUEST FOR DISCLOSURE**

63. Plaintiffs request that Defendants disclose the information and materials described in Rule 194.2 of the Texas Rules of Civil Procedure.

#### **X. PRAYER AND CONCLUSION**

The foregoing considered, Plaintiffs request the Court temporarily and then permanently enjoin the effectiveness of the Ordinance in all respects and enjoin Defendants from enforcing the Ordinance in any manner, declare that the Ordinance is unconstitutional, is preempted by the TMWA, and is unenforceable as a consequence, and award Plaintiffs attorney's fees and costs as allowed by law, and such other legal and equitable relief to which Plaintiffs show themselves to be duly entitled.

Respectfully submitted,

By:   
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Ricardo G. Cedillo  
Texas Bar No. 04043600  
Derick J. Rodgers  
Texas Bar No. 24002857  
Brian L. Lewis  
Texas Bar No. 24060166

**DAVIS, CEDILLO & MENDOZA, INC.**

755 E. Mulberry Ave., Suite 500  
San Antonio, Texas 78212-3149

Telephone: 210.822.6666

Telecopier: 210.822.1151

Email: [rcedillo@lawdcm.com](mailto:rcedillo@lawdcm.com)  
[drodgers@lawdcm.com](mailto:drodgers@lawdcm.com)  
[blewis@lawdcm.com](mailto:blewis@lawdcm.com)