



AUSTIN BAR ASSOCIATION

Public Sector L&E Law 101:

Key Differences Between Public and Private
Sector Labor and Employment Laws

For the Labor and Employment Section / Austin Bar Association
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Austin's Largest Employers – 2017

[Source: <https://www.comptroller.texas.gov/transparency/reports/comprehensive-annual-financial/>]

1	Combined State Gov't Agencies (excluding UT)	38,300	} 109,800
2	Combined Local Gov't Agencies*	35,600	
3	University of Texas at Austin	23,100	
4	Combined Federal Gov't Agencies	12,700	
5	HEB	12,200	
6	Dell Computer	12,000	
7	Seton Healthcare Network	10,300	
8	St. David's Healthcare Partnership	8,600	
9	Samsung Austin Semiconductor	6,100	
TOTAL		158,900	

* Includes ACC (5,000), AISD (11,500), City of Austin (13,800), and Travis Co. (5,300)

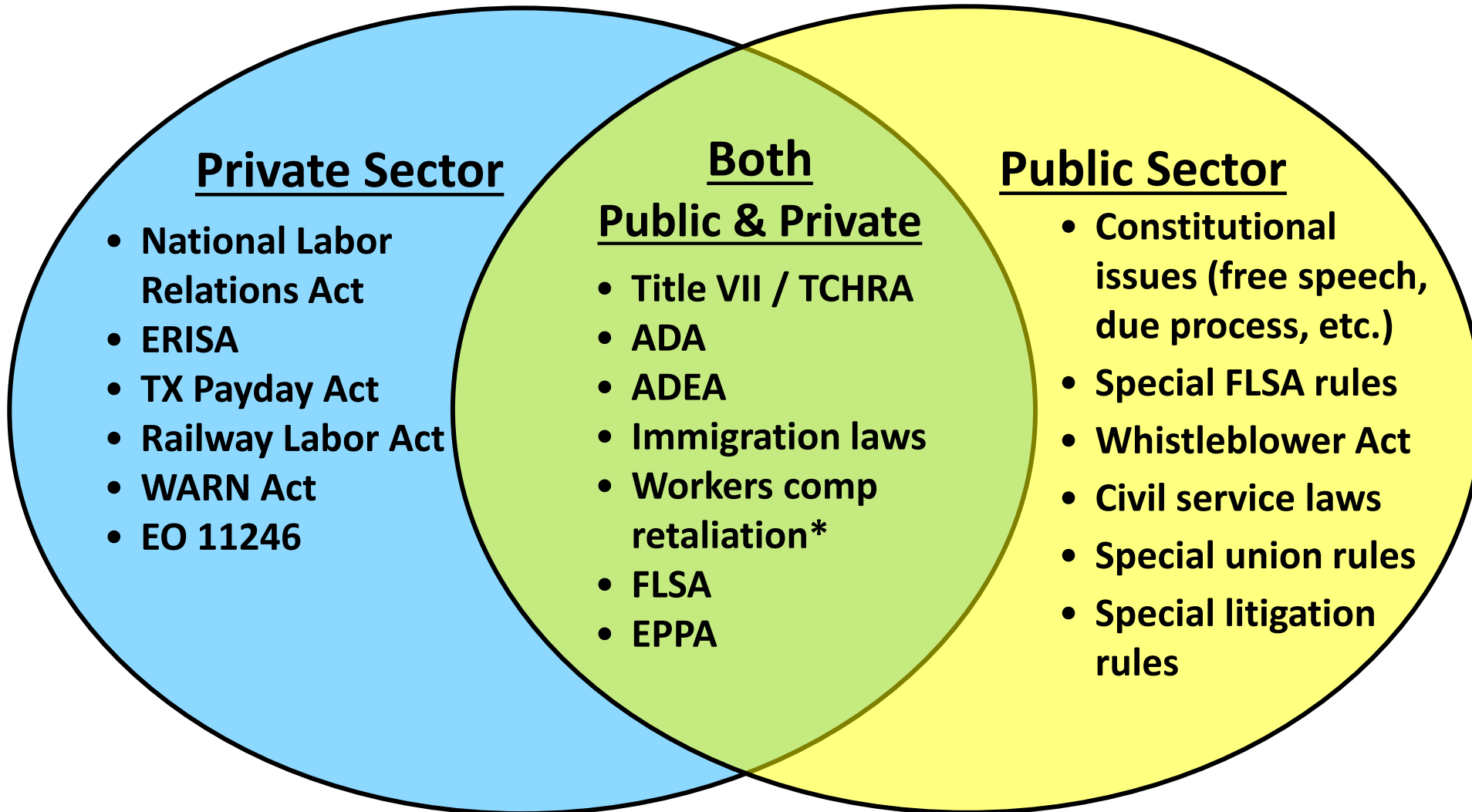
Austin-Round Rock MSA Employment

[Source: TX Workforce Comm. <https://www.tracer2.com>]

- Total employment* for 5-county MSA: 1,008,000
- Four largest employment sectors:
 - Professional and Business Services – 187,000 (18.6%)
 - Trade, Transportation & Utilities – 186,000 (18.5%)
 - **Government – 169,000 (16.8%)**
 - Leisure & Hospitality – 136,000 (13.5%)

* August 2018 TWC “State Workforce Report”

Overview: Private Sector vs. Public Sector L&E Laws



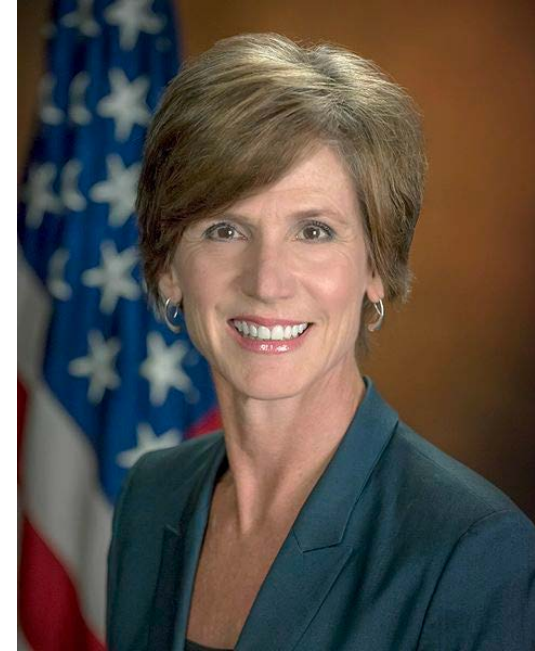
Free Speech

The Law: 1st Amendment (US) and Art. I, § 8 (Tex.)

Plaintiff must show:

- not speaking pursuant to official job duties;
- speaking as a citizen on a matter of public concern;
- interest in speaking outweighed the employer's interest in promoting workplace efficiency;
- adverse employment action; and
- it was substantially motivated by the protected speech.

Burnside v. Kaelin, 773 F.3d 624, 626 (5th Cir. 2014)



Union Membership/Activity and Free Association

The Law: *Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 262 (5th Cir. 1984):

- 1A protects right of public employees to join unions & of their unions to advocate and petition gov't
- State action meant to intimidate EEs from joining or being active or to retaliate violates 1A
- Rights flow to unions, members & organizers



Union Membership/Activity and Free Association

The Test:

Plaintiff NEED NOT show:

- activity was on a matter of public concern

Boddie v. City of Columbus, Miss., 989 F.2d 745 (5th Cir. 1993)

And, speech in context of union activity is almost always a matter of public concern.

Almost never pursuant to official duties.



Political Patronage and Free Association Rights

The Law: 1st Amendment protects most public employees from discipline based on political affiliation (Elrod-Branti doctrine)

- Patronage dismissal violates 1st Amendment unless job is a “policymaker” or “confidential” position (Elrod v. Burns – 1976)
- The test refined: is political affiliation an appropriate requirement for effective performance of the job? (Branti v. Finkel – 1980)
- Rule extended to hiring, promotion, and transfer decisions (Rutan v. Repub. Party Ill. – 1990)
- The “Plum Book”

<https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>

Procedural Due Process

The Test: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)

- Plaintiff must have a constitutionally recognized interest in “life, liberty or property.”
 - Interest defined by other source of law, e.g., state statute
- State must grant Plaintiff adequate notice and opportunity for hearing appropriate to the nature of the case
 - Property interest at issue? Risk of erroneous deprivation? Value of other procedural safeguards? Government’s interest?
- *Banks v. Federal Aviation Admin.*, 687 F.2d 92 (5th Cir. 1982)
- *Houston Fed. of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 251 F. Supp. 3d 1168 (S.D. Tex. 2017)

FLSA – Special Rules for Public Sector

- **Comp Time** – an agreed alternative to overtime pay
- **Volunteers** – work for free for the government!
- **Shift swapping** – if voluntary, doesn't affect timekeeping and OT pay obligations
- **Special work week definition** – for police and fire employees
- **Immunity** – State agencies immune from private FLSA suits

Whistleblower Act (Tex. Gov't Code Ch. 554)

“A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.” Tex. Gov't Code §554.002(a)

Watch out for “appropriate law enforcement authority”!

Good faith

Exhaustion & deadlines

Civil Service Laws

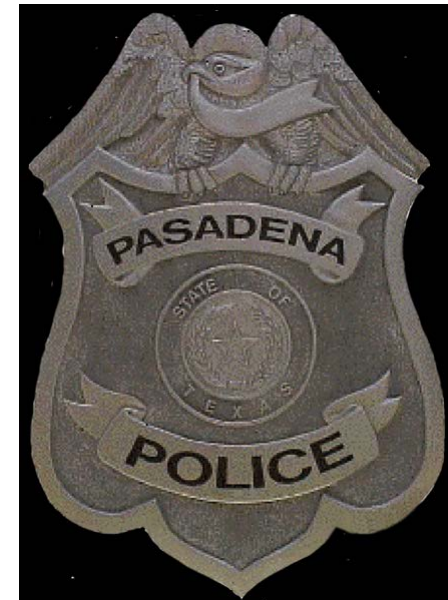
- Statutory personnel administration systems
- Covers hiring, promotions / transfers, disciplinary actions, some pay issues
- Establish “cause” standard for discipline
- Reaction to 19th century “spoils system”
- Complex rules, different law for different employee groups:

Federal Gov't: 5 U.S.C. §2101 <i>et seq.</i>	School Dists.: Education Code Chap. 21
Travis Co.: Local Gov't Code Chap. 158	City of Austin: LGC Chap. 143 + Charter

Fire, Police (and EMS) Civil Service

Tex. Loc. Gov't Code Ch. 143 – Fire and Police

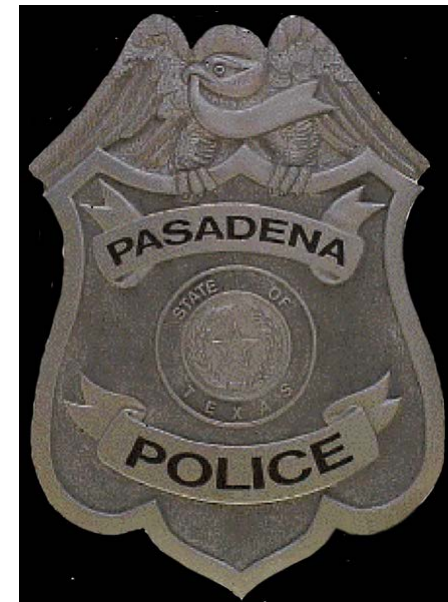
- 10,000 or more residents
- Paid police/fire department
- Subchapter K: EMS (460,000 population)
- Opt in by election
- Covers hiring, exams, promotions, types of pay, benefits
- Reasons for discipline, range of discipline, notice and procedural requirements
- Certain actions appealable to Commission or Independent Hearing Examiner
- No right to strike



Public Sector Unions / Collective Bargaining

Ch. 174 (“Fire and Police Employee Relations”)

- Adopt by election
- Municipality must recognize association selected by majority
- Parties must bargain in good faith about compensation, hours and conditions of employment
- To replace civil service provisions, CBA must do so explicitly
- Impasse procedures (optional mediation, arbitration)



Public Sector Unions / Collective Bargaining

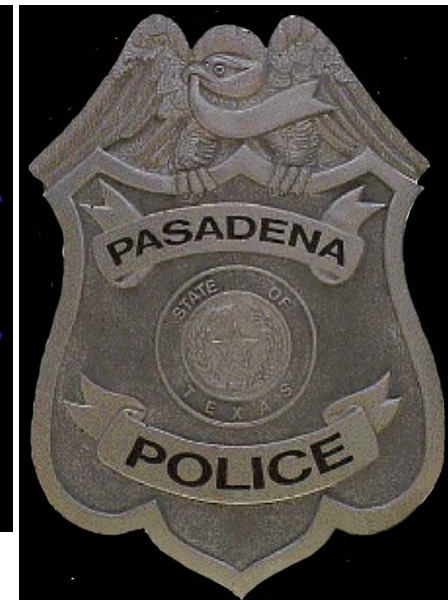
Other Chapters to keep in mind:

- Chapter 142
- Chapter 147

“Meet and Confer”

Applicability:

- Population
- Coverage under another chapter
- Petition and recognition or election



Public School Teachers

Texas Education Code Chapter 21:

- Probationary, term and continuing contracts
- Look out for:
 - timing of action (during or end of contract)
 - reasons
- Will determine:
 - adjudicator
 - discovery and procedure
- Strict deadlines!
- No collective bargaining
- No right to strike



Public Employment - Litigation Topics

- Special immunity defenses (plea to jurisdiction)
- TX Public Information Act
- Federal EEO claims
- Labor Code Chap. 451 claims
- Contract claims based on local ordinances
- Settlements