



Navigating you through the various legal employment and business issues that your Company encounters as you journey to business success!

# Navigational Beacon

A Simon | Paschal PLLC Publication

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## Potential Changes For Employers Under President Trump

As President Trump has passed his first 100 days in office, it is worthwhile to look at what changes employers have seen under President Trump and what changes employers may see in the near future. The government agencies over which President Trump has oversight that most directly impact employers are the EEOC, OFCCP, DOL, and NLRB. President Trump has not filled the key positions for these agencies so until he does so, we likely will not see significant policy change because the agencies still are operated primarily by President Obama's appointees. That said, there are still some changes we already have seen or that are being proposed.

In the most recent budget proposal from the White House, President Trump calls for the merger of the EEOC and Office of Federal Contract Compliance Programs (OFCCP) by the end of the 2018 fiscal year. *(cont. page 3)*



### Want More Info?

Visit our firm website at [www.SimonPaschal.com](http://www.SimonPaschal.com) and click the "Resources" tab to find past issues of the quarterly newsletter as well as our blogs on various issues. You can also find info on our YouTube channel at [www.youtube.com/SimonPaschalPLLC](http://www.youtube.com/SimonPaschalPLLC).

YouTube



## Are Employers Required to Pay an Employee Who is on Jury Duty?

In a recent [YouTube video](#), we answered the question whether an employer is required to pay an employee who is on jury duty. In Texas, the answer is no. An employer is not required to pay an employee, even a salary-exempt employee, who misses work as a result of jury duty. That does not mean an employer is prohibited from having a policy that does still pay employees while they serve on a jury. If an employer pays an employee while they are on jury duty, the employer can require the employee provide the employer any payment the employee received for serving. For anyone who has served on a jury, you know that this payment is often meniscal (\$30-\$50 per day).

The general restriction on employers when it comes to jury duty is an employer cannot retaliate or discriminate against an employee who is serving on a jury. While there is a burden on the employer when an employee misses work for jury duty, the general consensus seems to be employees would much rather work than receive that jury summons in the mail.

So if an employer is not legally required to pay an employee on jury duty, the next question is should the employer pay them anyways? A majority of the comments on our YouTube video indicated that employers should still pay their employees. Since the employee has not choice but to show up for jury duty, an employer's refusal to pay the employee is seen as a double whammy. This is especially true for a lower wage earner living check to check as the jury pay is generally significantly lower than their wages. For employers with financial concerns about paying an employer who is on jury duty while perhaps paying overtime or a temp to handle the missed worked, an employer can consider allowing the employee to use PTO or even pay a lower wage to the employee while on jury duty.

## Managing Sensitive Employee Relations Matters

As employers and HR professionals, you are often called upon to address sensitive issues involving your employees. These issues are never easy and we are often asked for legal implications and best practices.

Sensitive employee matters can include personal hygiene, workplace relationships, and mental health disabilities.

Personal Hygiene – While there are no laws governing personal hygiene per se, employers should be aware that sometimes a body odor or other personal hygiene matter may be health related or related to religious or ethnic rituals/practices. Accordingly, be aware that a reasonable accommodation may be necessary. Employers should also be mindful of gender-based disparate treatment (i.e., rules against females wearing perfume that are not equally applied to men and cologne) and potential issues involving the “recipient” (i.e., accommodations for employees with an allergy to smells/perfume/cologne). If you are faced with a personal hygiene issue, you should address it immediately and privately, present the issue as something you’ve noticed rather than as a complaint you’ve received, and approach the issue as an inquiry into how you can help rather than as a disciplinary moment.

Workplace Relationships – As with hygiene, there are no laws governing *(cont'd. on Page 4)*



Another great Simon | Paschal client

## Client Spotlight

Nannies On The Go was founded in 2006 by an over worked, stressed mother of three who left her corporate executive position to start a nanny agency that makes hiring a nanny safe, efficient and transparent with a focus on quality and training of the caregivers. Nannies On The Go has a registry exceeding 600 active, professional nannies and sitters in the DFW area and Nannies On The Go has served more than 3,000 clients! Nannies On The Go provides 24/7 customer support, online payment, psychological testing and a complimentary backup service. Learn more at <http://www.nanniesonthego.net>.



*(cont'd from Page 1)*

The thought process behind the merger of these two agencies is that both agencies are tasked with investigating compliance with employment laws and regulations. Opponents of the proposal, however, argue that the EEOC and OFCCP have vastly different purposes. The proposed budget calls for the OFCCP to have its budget cut by \$17 million and the number of employees reduced by 181 to 440 full time employees. These cuts are in anticipation of the merger with the EEOC.

For most employers that do not have government contracts, this potential merger may have little noticeable impact on the EEOC's enforcement and investigation of employee claims. That said, the combining of the agencies may cause further delay and hamper the EEOC's ability to adequately investigate claims as it deals with the issues that come with merging two agencies.

The NLRB is also facing the realistic possibility of downsizing. President Trump's current proposed budget calls for cutting the NLRB by almost \$30 million and reducing the number of employees from 1,596 to 1,320. Under the Obama Administration, the NLRB was an extremely active agency that greatly expanded its reach into the private, non-union sector. The growing consensus is that these budget cuts, along with President Trump's appointments to the Board, would curb the NLRB's broad interpretations of its rules and policies on private, non-union employers. Currently the five-seat board has two vacancies and is still controlled by a two-to-one Obama-appointee majority.

As for the DOL, there are no proposed changes to its budget so the likely change will come from policy. As you likely recall, the DOL's proposed increase to the salary requirement of the White Collar exemptions was blocked by a Federal Court at the end of 2016. That matter was appealed prior to President Obama leaving office. Under President Trump, the DOL has yet to file a brief on the appeal. There is a good possibility that the DOL simply dismisses its appeal.

We will continue to monitor any new appointments to these agencies as well as the final approved budget. Until then, it is safe to assume that these agencies will continue to operate as they have in the recent past.

## Are Austin's Ban-the-Box Days Numbered?

On March 24, 2016, the city of Austin passed an ordinance that prohibited employers from inquiring on their applications about an applicant's criminal history. This has been commonly referred to as banning the box. Austin is not the first city to institute such a measure. The idea behind the prohibition is that a higher percentage of minorities have criminal convictions so the checking of the box acknowledging a criminal conviction had a chilling effect on minorities applying as well as being summarily denied an opportunity for further interviews because of the checked box.

In the 2017 Texas legislative session, HB 577 was introduced in the House, which would prohibit municipalities from adopting their own ban-the-box ordinances. While this bill did not get out of the House before the legislative session ended, it could be a sign for greater push to create a uniform ban-the-box throughout Texas. More likely with a Republican-controlled legislature, this bill would have the effect of eliminating any prohibition on an employer inquiring into the criminal history of its applicants.

In a somewhat related, but unrelated bill, the Texas legislature passed a bill that reversed Austin's ban on Uber. Austin did not in fact ban Uber, but it implemented fingerprinting requirements and other measures that Uber did not require its drivers perform so in effect, Uber was prohibited from operating in Austin. The legislature's curbing of an individual municipality's rights may be foreshadowing the realistic possibility that a bill similar to HB 577 does pass and eliminates Austin's and other municipalities' ban-the-box ordinances.



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(cont'd. from Page 2) workplace relationships per se but many things can be implicated, including sexual harassment claims, defamation, retaliation, hostile work environment, favoritism, and many more. As a result, no matter what your position is, you should have written policies about workplace relationship. If you permit relationships, the policies should include procedures for identifying and notifying as well as implications and consequences (i.e., transfers, etc.) so you can avoid claims of gender discrimination.

Mental Health Disabilities – Employers should be aware that the Americans with Disabilities Act covers mental disabilities as well and these disabilities are often less-discussed by employees. Employers, therefore, should be broad in their interpretation of accommodation requests (i.e., a request for time off because an employee is “stressed and depressed” is likely enough). Employers should also be careful with regarded-as claims...focus on performance rather than the cause. For example, rather than saying “you seem to have a drinking problem,” you should say, “you’ve been late to work 6 times in the last 3 weeks.”

## The Employee Life Span

We recently gave a speech entitled *HR In an Hour: The Employee Life Span*, which covered employment law based on an employee’s life span – application/interview through termination. Over the next several issues of our newsletter, we’re going to recreate that presentation and address the multitude of employment law issues facing employers and HR professionals. These laws include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Occupational Safety & Health Act, the Immigration & Nationality Act, the Employee Retirement Income Security Act, the National Labor Relations Act, and many, many more! And that is just the federal laws!

In this first installment, we will address the beginning stages of the employee life span – the hiring process and at-will employment.

Applications – Employers should be aware that the EEOC looks unfavorably on “relatives employed” questions due to its tendency to reveal gender and marital status. Employers should also note that any

background check authorizations must be in a separate standalone document rather than simply at the end of an application. Employers must retain job applications for one year.

Interviews – Employers are permitted to inquire about “relatives employed” and inquire into ban-the-box-type inquiries but should avoid discriminatory questions.

Background Checks – The Fair Credit Reporting Act applies if you get background information through a company engaged in the background check business (i.e., something other than just doing your personal Google search). In addition to the standalone written consent document referenced above, employers must follow the FCRA with respect to any potential adverse action based on the report. Specifically, before making the adverse decision, employers must give a copy of the report to the individual at issue as well as a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.” After taking the adverse action, employers must (1) inform the individual that the adverse action is based on the report, (2) give the name/address/phone number of the company that provided the report, (3) inform the individual that the company didn’t make the negative report, and (4) inform the individual of his/her right to dispute the report.

At-Will Employment – While the default employment relationship in Texas is at-will (absent a contract), there are many lesser-known at-will restrictions. These include but are not limited to: (1) inability to terminate an employee in retaliation for filing a workers’ compensation claim, (2) inability to terminate based on union participation, (3) whistleblower protection for employees of publicly traded companies, (4) inability to terminate based on debtor/bankruptcy status, (5) inability to terminate based on jury service, (6) inability to terminate based on how an employee voted or for refusal to disclose how he/she voted, and (7) many more.

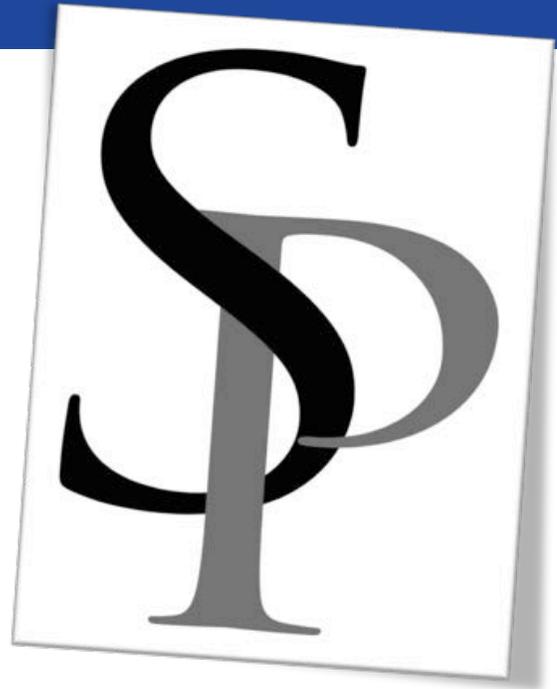
Be sure to check out the next installment of *The Employee Life Span* in our next quarterly newsletter!

# Simon | Paschal PLLC Happenings

6 years and counting....Dustin was once again selected as a Texas Super Lawyers Rising Star (2012 – 2017). Paul was selected as a Texas Super Lawyer for the fourth straight year (2014-2017).

Expertise.com also recently recognized Simon | Paschal PLLC as one of the Best Employment Lawyers in Dallas for 2017 and ranked Simon | Paschal PLLC in the Top 20 of 309 employment lawyers it reviewed in Dallas, Texas.

*The small print: The contents of this newsletter are not intended to provide specific legal advice and you should not take any action based on the content of this newsletter without seeking legal counsel. If you have specific questions, please contact a lawyer, preferably us!*



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