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 **Q3 2017**

What Constitutes a Bona Fide Occupational Qualification?

The Equal Employment Opportunity Commission recently sued a Florida strip club for sex discrimination after it refused to hire men for bartender positions. The EEOC claimed that the refusal constituted gender discrimination in violation of Title VII of the Civil Rights Act of 1964. This raises the question, Is gender a bona fide occupational qualification ("BFOQ") for a strip club bartending position?

A BFOQ is a qualification that although may be discriminatory, relates to an essential job duty and is considered reasonably necessary to the operation of the business at issue. It is important to note that the BFOQ defense cannot be used with respect to race. Examples of a BFOQ are age cutoffs for police officers and pilots, gender requirements for bathroom attendants, and Christian-only requirements for church ministers and pastors.

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Want More Info?

Visit our firm website at 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.

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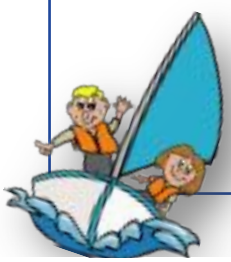

Department of Labor Rules Regarding Paying Interns

We recently recorded a "Simon Paschal Says" YouTube video regarding the Department of Labor requirements for paying interns. Because of the importance of this topic, we thought we would synthesize it here.

Employers often seek to hire interns to give the interns real world experience in a profession or industry in which they have interest. But when must those interns be paid and when are those internships merely learning experiences?

The Department of Labor has a six-factor test to determine when an intern must be paid. An employer must satisfy **ALL** six factors in order for the internship to qualify as an unpaid internship. If all six factors are not met, the intern must be paid. The factors are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The First Amendment and Private Employers

A group of people recently sued President Trump claiming that because he blocked them on Twitter, he violated the Constitution, specifically the First Amendment (i.e., Freedom of Speech). While that is not necessarily the issue here, it raises an often wrongly asserted comment by employees – my employer cannot fire me because this is America and I have freedom of speech.

That assertion is only half right when it comes to private employers. The U.S. Constitution only protects individuals' freedom of speech rights with respect to government suppression of free speech. In Texas, a private employer (with no union presence) absolutely can take action, including termination, against an employee based on what the employee says or talks about.

In recent years, the National Labor Relations Act, more specifically the National Labor Relations Board, has issued guidance purportedly limiting an employer's right to take action against employees based on their speech. However, the speech protected relates to group efforts to improve working conditions (i.e., comments made by a group of employees or by an individual employee made on behalf of a group of employees). The protection does not necessarily extend to comments made by an individual employee made only on behalf of him *(cont'd. on Page 4)*

Client Spotlight

NextLink Internet is a Weatherford, Texas-based Internet Service Provider delivering high-speed Internet and voice services throughout North Texas and Central Texas. NextLink provides these services to residential, business, K-12 education and government customers. NextLink not only provides a great Internet service, but excellent customer service. We are proud that NextLink has been a long-term client and it has been our pleasure to watch them grow over the years! Learn more at www.nextlinkinternet.com.

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So what is not a BFOQ? In a U.S. Supreme Court case from a few years ago, Abercrombie & Fitch refused to hire a Muslim woman because she wore a hijab and the retailer's policy stated no headwear. Abercrombie & Fitch tried to argue a "Look Policy" and that the look was a BFOQ based on the retailer's image and approach to sales. That argument failed. Similarly, past cases have held that employers who restrict women from jobs requiring the lifting of 30 pounds or more are engaging in discrimination because they could not show that all or substantially all women were unable to lift 30 pounds or more. This was essentially discrimination based upon a stereotype.

To establish a BFOQ, an employer must demonstrate that (a) all or substantially all individuals in a protected category would be unable to perform safely and efficiently the job duties at issue, (b) discrimination based on the protected category is absolutely essential to the employer's primary function and that members outside the protected category could not successfully perform the duties that constitute the employer's essence of the business, and (c) that there is no reasonable, less discriminatory alternative.

It is also important to note that an employer cannot rely upon its customers or clients in asserting or crafting a BFOQ. This means that an employer cannot say, "Our clients prefer women perform this job" if the requirements of the BFOQ defense are not otherwise met.

This brings us back to the EEOC lawsuit against the Florida strip club. While the employer likely would be successful in asserting a gender based BFOQ for the performers themselves, it likely will be difficult to assert a gender based BFOQ for the bartender positions based on the three-part BFOQ test.

The takeaway for employers is that the BFOQ defense is an extremely difficult defense and the burden on the employer of establishing the defense is a heavy one. Before you attempt to discriminatorily restrict a job position based on a purported bona fide occupational qualification, you should consult your legal counsel so that you avoid any future legal issues.

Bereavement Leave on the Horizon?

Most everyone is familiar with the Family and Medical Leave Act and its provisions that provide 12 weeks of unpaid leave for a variety of circumstances. One circumstance that is not included within the FMLA protections is bereavement leave. Several members of the U.S. Congress are seeking to change that.

The Parental Bereavement Act of 2017 seeks to amend the FMLA to provide that the "loss of a child up to age 18" is an FMLA qualifying event. Proponents of the bill argue that there is no harm to employers because the leave would be unpaid. They argue that permitting the leave is not only compassionate but would lead to greater productivity and higher workplace morale. They also argue that bereavement leave such as this would not be overly used since the circumstances giving rise to the leave are not incredibly common.

While the U.S. House of Representatives version of the bill has 13 co-sponsors, seven of which are Republicans and six of which are Democrats, the Senate version of the bill has only Democratic support and, thus, has stalled.

Bills such as this have been continually introduced in the U.S. Congress since 2011 but they are beginning to attract more and more supporters. The bipartisan support in the House of Representatives is also another indicator that this bill or one in the very near future will advance.

While it is still too early to tell, this is definitely something on the horizon and employers should be aware. Furthermore, some states have taken action to provide bereavement leave under state law. If you operate in multiple states, it is prudent to check the state laws of the states in which you operate.

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(cont'd. from Page 2) or herself. Furthermore, the speech must be work related.

Another purported limitation on an employer's right to terminate an employee based on speech is whistleblower protection. Absent specific circumstances (i.e., OSHA, Sarbanes-Oxley for publicly-traded companies, etc.), there is no whistleblower protection in Texas for employees employed by private employers. Even in those situations, though, there are many specific requirements to qualify as whistleblower-protected speech.

As a private employer in Texas, therefore, you have significant latitude to restrict your employees' speech in the workplace. We caution you, though, before enacting any such policies. Extreme policies in this area can lead to low employee morale, higher levels of complaints and litigation (even if ultimately unsuccessful) and increased scrutiny from government agencies. If the employee speech at issue is not causing a disruption in the workplace, your best bet is simply to let it go.

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 our first installment last quarter, we discussed the beginning stages of the employee life span – the hiring process and at-will employment. In this installment, we will continue with the early part of the life span as we discuss immigration, and drug testing.

Immigration – First and foremost, an employer cannot inquire into an employee's (or applicant's) immigration status. Employers can only inquire as to whether the employee/applicant is legally authorized to work in the U.S. Remember that within 3 business days of hiring an employee, an employer must complete the I-9 process (using the newly revised I-9). Employers cannot request or require specific identification forms from the I-9 approved list and employers must remember to re-verify any employees that provide temporary work authorizations. Finally, employers must retain the I-9 form until the later of 3 years following the employee's hire date or 1 year following the employee's termination date.

Drug Testing – It is important to note that there is no Texas state law or federal law prohibiting or limiting a private employer's right to have drug and alcohol testing policies. This means that employees can be fired for refusing to sign a drug testing policy, refusing to take a drug test, or refusing a search related to drugs. It's also legal to test some but not all employees and pre-employment testing is okay at any stage since a drug test is not a medical exam under the ADA. Employers merely need to be aware of relevant discrimination and ADA related issues. There also is no federal or Texas state law (absent specific industries, workplace certifications, or workers' compensation subscriber rules) that requires a private employer to have drug testing.

All that said, a drug testing policy is necessary to establish drug or alcohol related "misconduct" with respect to Texas Workforce Commission unemployment compensation claims. To establish misconduct, an employer must show: (a) a written drug testing policy, (b) acknowledged receipt of the policy by the employee at issue, (c) evidence of consent to testing by the employee at issue, (d) chain of custody, and (e) test documentation.

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

Simon | Paschal PLLC Happenings

We will be doing quite a bit of speaking this Fall. In September, we'll be moderating a mock trial presentation for the North Texas SHRM chapter in Denton (September 8th), presenting "1-15-20-50: Why These Numbers Should Matter to Your Organization" to the DFW Association Executives' September Lunch and Learn (September 20th), and presenting "Sensitive Employee Relations Matters" in Corpus Christi at the CB-SHRM HR & Labor Law Conference (September 22nd). In October, we'll be presenting four presentations at The HR Southwest Conference in Fort Worth (October 1-3) and leading a webinar for the Vertical Alliance Group entitled, "Step-by-Step Guide to Workplace Investigations" (October 26th).

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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