



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

Navigational Beacon

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Sexual Harassment Steps Out of the Shadows

As long as there has been a workplace, there has been sexual harassment. For the longest time, however, the focus has been on rank and file employees and lower level supervisors and managers. Recent news has changed that. Recently, numerous women have come out to say that they were sexually harassed and/or assaulted by Harvey Weinstein, former Co-Chairman of The Weinstein Company. As more and more accounts came out, we learned that the harassment was not only rampant but that the company likely knew of Weinstein's actions.

News followed of significant sexual harassment complaints against former Fox News personality, Bill O'Reilly and Fox News' awareness and lack of action regarding O'Reilly and former Fox News Chairman and CEO, Roger Ailes.

The revelations did not stop there. News broke that famed New Orleans celebrity chef, John Besh,
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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.



Out of State Update: No More Salary History Questions

While we generally focus on federal and Texas laws affecting employers, we occasionally like to bring attention to other states' laws that you might encounter if you have employees outside Texas.

We have previously discussed the increasing number of states and municipalities passing "ban the box" laws that prohibit employers from asking applicants about criminal conviction histories on job applications.

The newest change in job applications are laws that prohibit employers from asking about an applicant's salary history, either on a job application or in a job interview. New York City, California, Oregon, Delaware, Philadelphia, Pittsburgh, Massachusetts, New Orleans, and Puerto Rico have all enacted a version of the law. Philadelphia's law is currently temporarily on hold pending active litigation against the ban filed by a local business group. The law in New Orleans and Pittsburgh only applies to public employees.

The stated purpose of the laws is to narrow the gender pay gap. While it is too early to say how far and how fast this law will expand to other states and municipalities, it is wise for employers to be aware.

The California law even goes so far as to state that if an employer already has a candidate's salary history or the candidate volunteers it, the employer cannot base the new hire's pay on past earnings. The California law also requires employers to give applicants pay scale information if they request it.

Top 5 Mistakes HR Makes

Based on some rough research, there are approximately 40,000 employment related lawsuits filed each year just in the state of Texas. One can only imagine how many are filed each year nationwide! With this in mind, we decided to look into what we believe are the Top 5 Mistakes HR Makes That Cause Lawsuits. Certainly, we are not claiming that HR is the cause of all these lawsuits. BUT...there are things HR does that might seem fine but ultimately may lead to a lawsuit.

In our experience, these mistakes are – (1) failure to act, (2) overreaction, (3) kindness, (4) lack of training, and (5) political correctness. Obviously, these mistakes are not mutually exclusive and they sit on a sliding scale. This means that a little of one of these mistakes might be fine but a lot of any one of them could lead to a lawsuit.

Failure to Act – Do you have employees with high quantities of disciplinary notices? Do you have employees with numerous complaints against them? Do you have long-term stagnant employees with a history of promotion requests? You might have a "Failure to Act" problem.

Overreaction – Do you have extremely high employee turnover? Do you have a lot of terminations with no previous disciplinary history? Do you have very strict no-call/no-show policies? Do your terminations generally contain a multitude of reasons (i.e., kitchen sink terminations)? *(cont'd. on Page 4)*



Another great Simon | Paschal client

Client Spotlight

The Behavior Exchange is a Plano, Texas-based company focused on helping children with autism spectrum disorders, behavioral issues, developmental delays, and other special needs reach their full potential. Their therapists not only work with children, but also with parents and teachers to ensure they are using proper techniques to improve behavior. We are proud that The Behavior Exchange is a client and it has been our pleasure to help them with their legal needs! Learn more about them at www.behaviorexchange.com.



(cont'd from Page 1)

stepped down from the company he founded after numerous sexual harassment allegations against him were revealed. The allegations included a description of Besh Restaurant Group as a hostile corporate culture where sexual harassment flourished and where women who complained were berated, ostracized or ignored. In another revelation, several former ABC News employees came forward alleging that journalist Mark Halperin sexually harassed women while he was in a powerful position at ABC News. While ABC News claims it received no complaints regarding Halperin, several individuals involved have stated that Halperin's conduct was "well known" within ABC News.

The common denominator among all these claims is that the perpetrator is either a C-Suite executive or otherwise high level and well known within the company at issue. What does this mean? This is something we here at Simon | Paschal PLLC have stated for years – sexual harassment policies and training often are not extended to, applied to, and enforced against C-Suite executives. Most employers are diligent about including sexual harassment and discrimination policies in their employee handbooks, providing those employee handbooks to the rank and file employees, and providing regular and ongoing harassment and discrimination training to rank and file employees. But far too often, employers do not follow these same procedures with the CEO, COO, CFO, CIO, CHRO, and other high level executives. The belief and understanding is that these individuals already are aware of these policies or need not be bothered with them. Furthermore, while employers often investigate harassment and discrimination complaints against rank and file employees, they rarely investigate complaints against executives either due to a fear of reprisal, a lack of authority to do so, or a belief that any investigation would be a waste of time.

As these recent news stories suggest, though, it is imperative that executives be treated the same as rank and file employees. They should receive employee handbooks. They should participate in training. They should be thoroughly investigated (and disciplined if necessary) when complaints arise against them. It is only through this diligence that employers can be truly protected in the event of any potential legal issues.

The Never-Ending FLSA White Collar Exemptions Debate

Although the changes to the FLSA's white collar overtime exemptions that were made during the Obama Administration are officially dead and gone, the Trump Administration is continuing work on the exemptions. It appears that this issue isn't going away anytime soon.

On July 26, 2017, the Wage and Hour Division of the U.S. Department of Labor issued a Request for Information regarding the Regulations, "...which define and delimit exemptions from the [Fair Labor Standards Act]'s minimum wage and overtime requirements for certain executive, administrative, professional, outside sales and computer employees.

Included in the Request for Information are requests for whether or not the salary levels should be increased to reflect inflation, whether there should be multiple salary levels, whether the job duties tests should be adjusted, and more. The public comment period closed on September 25, 2017.

We are unlikely to see any changes for a while but it is possible that we may see an increase (albeit slight) in the salary level for these exemptions. We may also see a change in the job duties, something we haven't seen in a long time.

For now, employers should just continue on as they have been doing but keep an eye out for potential FLSA changes on the horizon. And as always, monitor your job descriptions and the actual work your employees are performing to ensure that your classifications are up to date and correct.



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(cont'd. from Page 2) Do you aggressively challenge unemployment claims? You might have an "Overreaction" problem.

Kindness – Do you provide untruthful but nice reasons for terminations to avoid upsetting employees? Do you minimize faults and exaggerate the positives in performance reviews? Do you skip performance reviews if an employee hasn't fully improved but is getting better? You might have a "Kindness" problem.

Lack of Training – Do you have a high volume of policy questions? Do you have poor exit interviews but no previous complaints? You might have a "Lack of Training" problem.

Political Correctness – Do you have a "check the box" approach to employment decisions? Do you have a "split the baby" approach to workplace disputes? You might have a "Political Correctness" problem.

Recognizing the mistakes is important so that you can correct them. Train your employees. Follow the three strikes and you're out rule. Regularly conduct performance reviews and evaluate the reason for long-term stagnant employees. Remember that honesty is the best policy with employees. Contact us if you want to know more and we'll provide you with a copy of our presentation on this topic.

The Employee Life Span

We 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 last several issues of our newsletter, we've been recreating that presentation and addressing 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! We continue that discussion here.

So far, we have discussed the beginning stages of the employee life span – the hiring process, at-will employment, immigration, and drug testing. In this issue, we are going to move on to some general policies and considerations relevant to most every workplace.

Dress Codes – While there are no federal or Texas laws governing dress codes per se, employers should ensure that dress codes are applied and enforced evenly and should be aware that reasonable accommodations may be necessary based on religious beliefs and other protected categories (i.e., blanket prohibitions against facial hair can negatively impact black males in light of the condition pseudofolliculitis barbae).

Internet & E-mail Usage – Employers should be sure to make employees aware (through policies and/or otherwise) that they have no expectation of privacy in the use of the Internet and e-mail at work (including personal e-mail accessed on employer-owned equipment). Employers also must be aware of NLRB rules that govern online discussions and social media. Blanket employer policies such as, "don't pick fights online" or "do not send unwanted, offensive or inappropriate e-mails" should be avoided as they can be construed to be a violation of employees' protected concerted activity rights. Employers should put the focus on professionalism and respect toward clients or customers and address specific situations such as, "Do not make racial slurs, derogatory comments or insults" and "Do not share confidential information regarding business partners, vendors or customers."

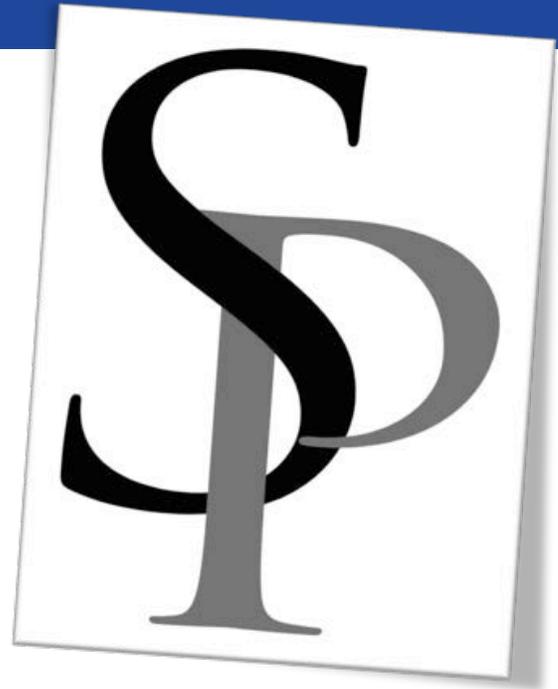
Breaks – Absent specific industries and child labor, there are no federal or Texas laws requiring that breaks be given. That said, if an employer gives breaks, the employer should be aware that a break of 20 minutes or less must be paid and meal breaks can only be unpaid if they are at least 30 minutes long and the employee is completely relieved of duty. One federal law regarding breaks that applies to all employers is the provision of the 2010 Health Care Reform law that amended the FLSA to require employers to provide reasonable break times for nursing mothers to express breast milk during the first year following birth. The breaks can be unpaid and employers with less than 50 employees need not follow the law if they can establish doing so would be an undue hardship.

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

Simon | Paschal PLLC Happenings

We were recently honored with a 2017 Best of Business Award by Frisco Style Magazine in the category of "Giving Back to the Community." Here's a link to the article: <http://friscostyle.com/stories/2017-best-business/>. At Simon | Paschal PLLC, we take community service seriously and consider it an integral part of our business and who we are. We dedicate our time and resources to many projects and causes and believe that all businesses have a duty to give back. We thank Frisco Style Magazine for this great honor and we will continue to do our best to meet this standard.

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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