



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

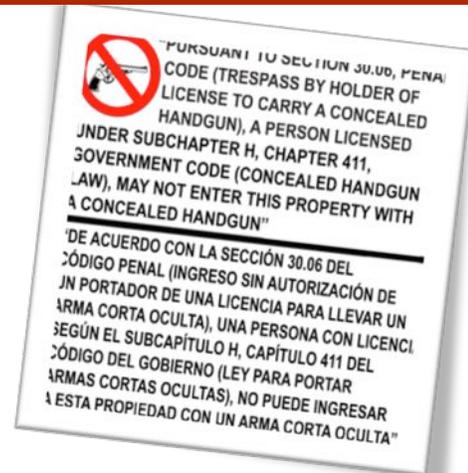
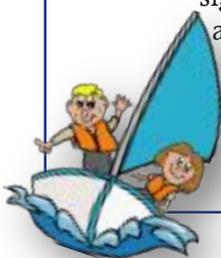
Q1 2016

The Effects of Texas' New Open Carry Law

As you are probably aware, the Texas Legislature passed laws last year regarding the open carry of handguns for those individuals already licensed or who later become licensed to carry a handgun. These laws went into effect January 1, 2016. Most employers already have policies and procedures regarding weapons in the workplace but such policies and procedures should be revisited based on these new laws.

There are two aspects that need to be considered by employers. While they are most often thought of as non-employee considerations (i.e. vendors, visitors, customers, clients, etc.) and employee considerations, both affect employees. First, if you wish to prohibit the carrying of firearms into your place of business (concealed and/or open), you must post signage that is in compliance with Texas Penal Code Section 30.06 (addressing concealed) and/or Texas Penal Code Section 30.07 (addressing open carry). If you wish to

prohibit open carry only, you must post 30.07 signage but if you wish to prohibit open carry and concealed carry, you must post 30.06 AND 30.07 signage. The statutes have requirements regarding size, language (i.e. English and Spanish) and color. There are a number of websites at (cont'd on Page 4)



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.

You can also listen to our weekly radio show, *The Jury Is Out*, each Wednesday at 10am on www.KVGIradio.com or by downloading the KVGI Radio app on Apple or Android devices.

Must An Employer Initiate a Reasonable Accommodation Discussion Under the ADA

Most, if not all, employers are aware that once a disabled employee has requested a reasonable accommodation, an employer has a duty to engage in the interactive process to determine if a reasonable accommodation is available to the employee without undue hardship on the employer. What if the employee does not request a reasonable accommodation? Does an employer have a duty to initiate the interactive process?

The general rule is that it is the duty of the employee to first request a reasonable accommodation. However, both the courts and the EEOC have held that if a disability is open, obvious and apparent to the employer, the employer may have the burden to initiate the reasonable accommodation discussion. Specifically, the Fifth Circuit Court of Appeals (the federal circuit governing Texas) contemplates this when a disability and the resulting limitations and necessary reasonable accommodations are open, obvious and apparent. The EEOC contemplates the situation when the employer knows the employee has a disability, knows or should know that the employee is experiencing workplace problems because of a disability, or knows or should know that the disability prevents the employee from requesting a reasonable accommodation.

These situations arise most often in the context of mental illness and mental disabilities when the employer may not be aware of his or her illness/disability and/or the employee may not be capable of requesting a reasonable accommodation. As an employer, therefore, simply remaining silent in the face of a known disability could result in liability.



Checklist for Employee Background Checks

Most employers conduct a background check on applicants as part of the hiring process. But are you doing it right? It is important to know that background checks prepared by third parties whom the employer pays, are governed by the Fair Credit Reporting Act and employers must follow certain guidelines. Here is a checklist of things to keep in mind.

- The background check must be for a “permissible purpose,” which includes employment purposes. Employment purposes involve evaluations of the individual for employment, promotion, reassignment or retention. Investigations into misconduct or compliance with rules are not included.
- An employer must make the appropriate disclosures and obtain authorization in a standalone document. It cannot simply be at the end of an application. Furthermore, the language must track the regulations and should not include a release and waiver of claims.
- If information is discovered that would result in an adverse employment decision, the employer must provide a notice (with specific required language and included items) **BEFORE** a decision is made. Do not do it simultaneously with the decision.

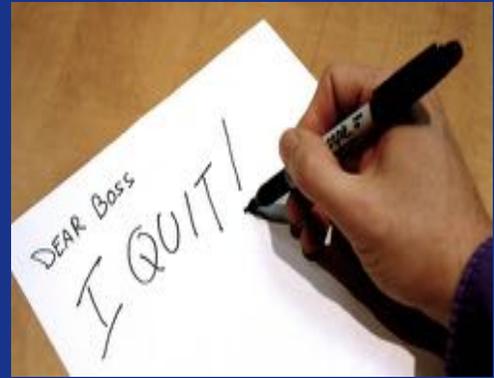


Another great Simon | Paschal client

Client Spotlight

Superclean Service Company, Inc. is a professional cleaning services company located in Dallas, Texas. Superclean has been in business for over 20 years and offers a comprehensive range of facility cleaning services for the retail and restaurant industries including floors, windows, high dusting, pressure washing, carpets and awnings. Superclean is fully-licensed, bonded and insured, and is a member in good standing by the Institute of Inspection Cleaning and Restoration Certification. We are proud to have Superclean as a client and we appreciate the faith they put in us on a daily basis. Check out more about this great company at www.gosuperclean.com.

A resignation is not always the end of the story. The Fifth Circuit Court of Appeals recently held that refusal to accept rescission of a resignation letter could be considered a materially adverse action and, therefore, grounds for a retaliation claim. The court was careful to say that the factual circumstances of that particular case supported such a decision because a reasonable employee in that workplace might have expected to be able to rescind a resignation. So while there is no per se rule, keep in mind that if the circumstances of your workplace (i.e. requests to reconsider a resignation, a previous history of allowing employees to rescind resignation letters, etc.) might lead a reasonable employee to believe he or she would have the chance to rescind a resignation, then refusal to accept such a rescission could be considered retaliation (if the other elements of a retaliation claim are present).



Workplace Investigations

In our last newsletter, we gave five very quick tips about what to consider when conducting a workplace investigation. In this issue, we want to go a little more in depth. There are a lot of things to consider and review before deciding to begin an investigation, but we want to focus on what to do once you are ready to begin. Below is our step-by-step guideline for conducting any workplace investigation:

1. Notify the interested parties and select an investigator
2. Separate the complainant and the alleged wrongdoer
 - a. Including paid leave for the alleged wrongdoer, if necessary (do not put the complainant on leave)
3. Obtain a written complaint from the complainant
 - a. Interview the complainant if unable to obtain a written statement
4. Create an investigation plan and prepare the investigation file
 - a. Determine what parties should be interviewed, where interviews should take place, order of interviews, whether a witness should be present and if so, who that witness should be, what documents and other evidence should be reviewed/obtained, what other parties should be involved in the investigation (i.e. IT, security, etc.)
 - b. Investigation file should be kept separately from personnel files and should include the following sections: (1) investigation plan, (2) complaint, (3) response, (4) witness statements, (5) investigator's notes, (6) documentary evidence, and (7) investigator's report & findings
5. Obtain a written statement from the alleged wrongdoer
6. Interview complainant (unless that occurred at Step 3)
7. Interview alleged wrongdoer
8. Interview witnesses
9. Review documentary evidence
10. Conduct any follow-up interviews
11. Draft a report summarizing findings (no recommendations)
12. Discuss findings with decision-maker(s), make decisions, and implement
13. Communicate findings to complainant and alleged wrongdoer
14. Evaluate the need for additional training



cont.

(cont'd from Page 1) which you can purchase signage that complies with the statutes. That said, you must ensure that the following language is in the signage verbatim:

- 30.06: Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.
- 30.07: Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.

Last year, we wrote about some things to keep in mind when it comes to classifying workers as independent contractors or employees. This quarter, we want to add to that discussion based on a recent Department of Labor Administrator's Interpretation Memorandum (Memorandum 2015-1). In that Memorandum, the DOL Administrator made the startling comment that, "...applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA." As a result, employers should be extremely careful with classification.

Although no one factor is determinative, here are the six factors that make up the economic realities test referred to in the Administrator's statement:

1. The extent to which the work performed is an integral part of the employer's business. The more integral the work, the more likely an employee.
2. The worker's opportunity for profit or loss depending on his/her managerial skill.
3. The extent of the relative investments of the worker and the employer. The more significant (in both nature and magnitude) of the worker's investment, the more likely an independent contractor.
4. Whether the work performed requires special skills and initiative. To be more likely an independent contractor, the skills should involve business, judgment and initiative to establish economic independence.
5. The permanency of the relationship. The more permanent, the more likely an employee.
6. The degree of control exercised or retained by the employer. Actual control over meaningful aspects is more likely an independent contractor.

If you are a tenant at a building and the building owner has placed compliant signage at the building entrance, you do not need additional signage on your company door. If the building owner's signage is not compliant, though, or the building owner does not place signage, you will need to place the signage on your company door if you wish to prohibit concealed and/or open carried handguns in your place of business.

Although employers traditionally view this signage as something directed to non-employees, keep in mind that it is notice to employees as well. While you should have internal policies and procedures in place directed to employees (discussed below), those policies and procedures only make a violation by an employee a workplace offense. They do not make the employee's actions illegal. The required signage does that.

With respect to your employees, you also should have policies and procedures in place, presumably in your handbook, that prohibit the carrying of weapons in the workplace. We suggest duplicating the above sign language in your policies as well. Such policies should outline what is included in the definition of weapons, what is included in the definition of workplace, and the discipline that will result in the event of a violation. Keep in mind also that while you can prohibit the keeping of handguns and other weapons in company-provided vehicles, you cannot prohibit employees from keeping handguns in their personal vehicles, even on company property, if the employees are lawfully licensed to carry such handguns.

Simon | Paschal PLLC Happenings

We like to take just a little space to highlight the attorneys of the firm and their accomplishments and activities. Dustin recently was selected as a Texas Super Lawyers Rising Star for the 5th year in a row (2012 – 2016). In addition to this accomplishment, DallasHR recently recognized Dustin as the Volunteer Leader of the Year for 2015.

Paul and Dustin also will be lending their time and energy to multiple organizations in 2016. At the end of 2015, Paul was elected as the 2016 Dallas Association of Young Lawyers President-Elect, which means he will serve as the President of the 3,000 member organization in 2017. Dustin was appointed to a second term on the DallasHR Board of Directors for 2016, where he will serve as the Director of the Employment Law & HR Compliance Committee.

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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