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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Social Media Pitfalls for Employers

Social media is a growing marketing tool for businesses, but it has also become a growing headache for employers. How much can an employer restrict the use of social media at work? Does it matter if the restriction is based on concerns of work productivity or negative images of the company? What if an employee discloses the employer's confidential information on social media? These are just a few questions employers are faced in today's day and age of social media.

The National Labor Relations Board or NRLB has made a concerted effort to answer most questions posed above in the negative towards the employer. Do not let the "Labor Relations Board" mislead you to think the NLRB only has jurisdiction over union and traditional labor matters. The NLRB's jurisdiction extends to most private employers as well. In layman's terms, the NLRB has jurisdiction over any efforts by an employer to restrict a group of employees from discussing possible employment violations (i.e., wage and hour violations).

With this backdrop, the NLRB has taken the wide approach that broad restrictions have the potential to "chill" an employee's efforts to discuss employment violations. As such, employers' best practice *(cont'd on Page 3)*

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.

22 States Seek to Block FLSA Updates

Our last newsletter discussed the final revised FLSA Regulations provided by the DOL. Specifically, the Regulations increased the minimum salary requirement for the White Collar exemptions. In May, the DOL announced that all employers must comply with the new Regulations by December 1, 2016. Most private employers have been preparing for changes for the last couple of years when President Obama announced he mandated the DOL examine potential changes. Apparently, state governments were not as prepared.

On September 20, 22 states sued the DOL claiming that the new regulations threaten state budgets and force the states to adopt Federal regulations that can severely and negatively impact states. Texas is one of the states joining in this lawsuit. The lawsuit outlines the financial impact the new regulations will have on state governments due to states being required to increase salaries of exempt workers to meet the new salary requirements.

From a legal standpoint, though, the impact the new regulations have on the states is not that important. The question will come down to whether the federal government has the constitutional authority to enact such laws and require compliance by the states. Similar unsuccessful litigation occurred when states argued that the Affordable Care Act was unconstitutional and an undue burden on states. Even assuming the states are successful with this lawsuit, it only would prevent the Regulations from applying to state government employees. Private employers would still need to abide by the Regulations beginning December 1, 2016.

10,000 Workers Sue Chipotle

A massive lawsuit is currently pending that alleges Chipotle has a nationwide policy of requiring its employees to perform work off the clock. This is a common claim under the FLSA. Employees often claim they performed work before or after clocking in or out. Sometimes the claim is the employer required this or other times it's a claim that the employer knew they were performing work before clocking in and the employer did not prohibit such action. In other situations, the employee claims the employer actually required the employee clock out before hitting 40 hours for the workweek but that the employee was required to finish their work before leaving.

In the case against Chipotle, the employees claim that Chipotle's time clock automatically punches them out at the set closing time, but the employees were required to continue cleaning up the store. The sheer magnitude of a lawsuit of 10,000 plaintiffs claiming a handful of unpaid hours per week could result in a staggering settlement or verdict.

While most employers will never face a lawsuit of this magnitude, there are several takeaways for employers:

1. Require employees to manually clock in and out (whether on a computer system or punch card system). This avoids claims that the time cards are not accurate.
2. Written policy that forbids workers from beginning work before clocking in or continuing to work after clocking out.
3. Pay employees when they violate written policy above, but issue discipline.

Another great Simon | Paschal client

Client Spotlight

Atlas Bail Bonds is a 100% woman owed business with multiple locations in the Metroplex. Atlas assists families through the very stressful times when a family member has been arrested and needs to post bond to remain free while charges are pending. We are proud to have Atlas Bail Bonds as a client and we appreciate the faith they put in us on a daily basis. Check out more about this unique company at www.atlasbail.com.

New DOL Rule

At the end of September, the Department of Labor issued its final rule requiring federal contractors to provide paid sick leave to workers on government contracts. Employees of federal contractors will be able to use the paid sick leave for their own illness as well as to care for family members. Federal contractors must give employees 1 hour of paid sick leave for every 30 hours the employee works on a government contract with a cap of 56 hours of earned sick leave, or 7 days. Unused sick leave can be rolled over but the cap of 7 days per year still remains. The DOL estimates that the new rule will provide or increase sick leave benefits to 1.5 million workers. The final rule will apply to all federal covered contracts that are solicited or awarded after January 1, 2017.

The FLSA's One-Two Punch

Any business with workers must classify those workers either as employees or independent contractors. The "employee" classification includes numerous responsibilities and requirements that the business must meet. These include the employer portion of federal employment taxes, Texas unemployment insurance taxes, the quarterly Form 941 (the Employer's Quarterly Federal Tax Return), the annual Form 940 (Employer's Annual Federal Unemployment Tax Return), the Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report, the USCIS Form I-9 (Employment Eligibility Verification), the Form W-4 (Employee's Withholding Allowance Certificate), the Texas Employer New Hire Reporting Form, and the annual Form W-2 issuance. In addition and depending on the number of employees, various state and federal employment laws apply that govern minimum wage and overtime, medical leave, anti-discrimination and anti-harassment, insurance coverage under the Affordable Care Act, workers' compensation, and workplace safety.

On the other hand, there are minimal responsibilities and requirements in place when a business classifies a worker as an independent contractor. The employer must complete a Form W-9 (Request for Taxpayer Identification Number and Certification) and annually issue a Form 1099 for payments made to the independent contractor. It is for this reason that many businesses seek to classify workers as independent contractors. In turn, this increased desire for the independent contractor classification has resulted in increased state and federal audits regarding worker classification.

According to the IRS, a worker is an independent contractor if the payer (i.e. the business in most cases) has the right to control or direct only the result of the work and not what will be done and how it will be done. To make this determination, the IRS uses the common law control test to examine the relationship between the worker and the business. In doing so, the IRS examines the facts using three broad categories – Behavioral Control, Financial Control and Relationship of the Parties.

**This article is an excerpt from Dustin Paschal's article of the same name scheduled to be published in Today's CPA magazine in 2017.*

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(cont'd from Page 1) should be avoiding broad restrictions against mentioning work related matters. Given the overly broad approach by the NLRB, an employer should consult with an attorney before implementing policies that address what an employee can and cannot say on social media. A majority of states have laws that protect employees' rights to engage in off-duty activities. This includes an employee posting about his or her weekend party habits, political views, etc. However, employers are generally safe in taking disciplinary action, including termination, if an employee uses social media to harass a co-worker or disclose trade secret information.

Simon | Paschal PLLC Happenings

Dustin was recently elected as President-Elect of DallasHR. Dustin will be President of DallasHR starting January 1, 2018. DallasHR is a not-for-profit, professional association formed to foster the development of its membership and be a forum for the exchange of ideas and provide leadership for human resource concerns. DallasHR has more than 2,000 members.

Dustin and Paul will be presenting throughout this year's HRSouthwest Conference in Fort Worth, TX. If you an HR professional and need continuing education credits, you can find out more information about the conference here: http://hrsouthwest.com.

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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