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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Is Sexual Orientation Protection on the Horizon?

As HR professionals, you certainly know that the law is always changing and you have to be aware of these changes. One area that could be on the horizon for a change is sexual orientation/gender identity protection.

An ongoing national debate in the world of employment law is whether or not sexual orientation and gender identity are protected under Title VII. The EEOC interprets the Title VII "gender" protected category to include sexual orientation and gender identity. EEOC interpretation/guidance is not binding law, though. Thus, we look to relevant case law. In the 5th Circuit (the federal circuit governing Texas), sexual orientation is NOT a protected category and the courts do not include it within Title VII's "gender" protected category. However, gender identity and transgender individuals are protected in the context of gender

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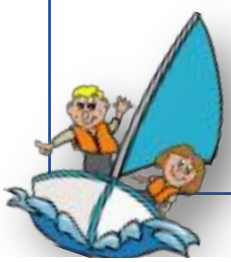

Want More Info?

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.

YouTube

What Should Employers Know About EEO-1 Report Filing

Let's start with the immediate task first – employers with more than 100 employees must file the EEO-1 Report no later than March 31, 2018. The race, ethnicity, gender and EEO-1 category of all employees must be reported. The report is based on a workforce snapshot for any payroll period between October and December 2017.

Employers should note that the EEO-1 Report that should be filed is the same as in previous years. The Obama Administration previously had revised the EEO-1 Report such that employers were required to report W-2 wages data and hours worked data broken down by race, ethnicity and gender.

In August 2017, however, the Office of Management and Budget halted implementation of the pay data reporting. The OMB and EEOC will review the previous Administration's rule revisions to determine the appropriateness of them and will issue further guidance as to whether or not the EEO-1 Report will be altered moving forward.

Austin City Council Passes Paid Leave Ordinance

On February 15, the Austin City Council passed Ord. No. 20180215-049, "An ordinance establishing earned sick time standards in the city…"

The ordinance defined "employer" and "employee" such that among other things, the ordinance applies to all private employers (regardless of size) and applies to any employee who performs at least 80 hours of work within the City of Austin in a calendar year.

Here is what you need to know:

- An employer must provide 1 hour of earned sick time for every 30 hours worked in the City of Austin; the earned sick time shall be granted in one-hour increments
- Earned sick time starts at the commencement of employment
- An employer can restrict usage of the earned sick time during the first 60 days of employment ONLY IF the employer establishes that the employee's term of employment is at least one year
- Earned sick time can be used for (1) the employee's physical or mental illness or injury, preventative care, or health condition; (2) the employee's need to care for a family member's physical or mental illness, preventative care, or health condition; or (3) the employee's need to seek medical attention, relocation, obtain services from a victim services organization, or participate in legal action related to domestic abuse, sexual assault, or stalking involving the employee OR the employee's family member *(cont'd. on Page 4)*

Client Spotlight

QJumpers started more than 10 years ago with the goal of bringing flexibility to the recruitment process. QJumpers developed recruitment software for recruiters BY recruiters. QJumpers has a phenomenal team to take care of your recruitment needs. We are proud that QJumpers is a client and it has been our pleasure to help them with their legal needs! Learn more about them and their great team at www.qjumpers.co.nz.

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stereotyping. Specifically, a plaintiff can satisfy Title VII's "because of sex" requirement with evidence of the plaintiff's perceived failure to conform to traditional gender stereotypes.

As we said, though, there is a national debate. The 7th Circuit Court of Appeals and the 2nd Circuit Court of Appeals have both held that sexual orientation IS protected under Title VII. While the losing party in the 2nd Circuit case has indicated it will not appeal and thus, no U.S. Supreme Court review is imminent, with all the decisions in lower courts and the growing movement surrounding this area of the law, we expect Supreme Court review sooner rather than later.

For now, it is important for employers in Texas to know that there are some protections for employees in the area of sexual orientation and gender identity. We previously addressed the gender-stereotyping concept. In addition to that, several municipalities prohibit sexual orientation discrimination by employers operating within their cities, including Austin, Dallas, Fort Worth and Plano.

In addition to all the foregoing, sexual orientation is protected under the Family and Medical Leave Act. Specifically, pursuant to the Supreme Court decision regarding gay marriage and pursuant to Department of Labor regulations, FMLA leave must be extended to otherwise eligible employees who are in legal same-sex marriages. The protection does not extend, however, to individuals solely in domestic partnerships.

So what should employers do? Keep an eye on this ever-evolving area of law. Make sure you have detailed anti-discrimination and anti-harassment policies that include language that sexual harassment/discrimination need not be motivated by sexual desire and that slurs, epithets and negative actions based on sexual orientation are prohibited since they are often based on gender stereotypes. Make sure you have a well-designed and well-explained complaint/grievance process. Train your employees AND your managers in this area of the law and on your policies and procedures.

We'll keep you updated on any changes that may arise!

News and Notes

On February 26, 2018, the NLRB reversed course again with respect to the joint employer standard. Back in December, the NLRB overturned a 2015 decision, *Browning-Ferris Industries*. In the *Browning-Ferris Industries* decision, the Obama-era NLRB decided that indirect control of an employee could constitute a joint-employer relationship. As a result of the December 2017 decision, however, a company was deemed a joint employer only if there was proof that the employer exercised direct control over employment terms of the employee at issue. After an Inspector General report found that one of the NLRB members improperly participated in the *Browning-Ferris Industries* case as a result of his law firm's involvement in the case, the NLRB vacated the December 2017 decision. As such, the NLRB returned to the previous Obama-era NLRB ruling regarding the joint employer relationship. We expect the NLRB will revisit this issue again but for now, employers should be mindful of the current standard.

After the most recent Texas legislative session, a new law was added to the Texas Labor Code that requires employers to provide leave for the care of sick foster children IF those employers provide leave to care for a sick biological or adopted child. There is no requirement to provide leave to care for a sick foster child if the employer does not provide such leave to parents of non-foster children.

Keep an eye out for potential changes in the area of state marijuana laws. A Connecticut federal court recently held that federal law did not pre-empt the state's medical marijuana statute that prohibited employers from firing or refusing to hire qualified medical marijuana patients. While not a Texas issue, we expect this issue to continue to develop over time.

news & notes

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- Earned sick time is capped annually at 64 hours per employee per year for employers with more than 15 employees and capped at 48 hours per employee per year for employers with 15 or fewer employees
- Employees must be allowed to carry over to the following year all earned sick time up to the cap unless the yearly cap of earned sick time is made available to the employees at the beginning of the year
- Employers can cap usage of earned sick time to 8 days in a calendar year
- Employers must provide at least monthly to each employee a statement showing the amount of the employee's available earned sick time
- If an employer has an employee handbook, the rights and remedies under this ordinance must be outlined therein
- An employee rehired within 6 months following separation may use any earned sick time that the employee had available at separation
- If an employer's paid leave policies meets the requirements of the ordinance, no additional paid leave must be given
- Employers must display a sign describing the requirements of the ordinance
- An employer cannot discriminate or retaliate against an employee for requesting or using earned sick time or reporting a violation

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 continue with some general policies and considerations relevant to most every workplace.

Driving at Work – Absent specialized industries, there are no federal or Texas laws requiring driving policies, although your insurer may require them. Employers are highly encouraged to have driving policies, though, and should address cell phone usage while driving, accident reporting, and safe operation of vehicles. Employers also should require proof of insurance if employees are using their own vehicles for work.

Workers' Compensation – Texas law requires employers to notify employees as to whether the employer is a subscriber or non-subscriber to workers' compensation. At a minimum, all employers should have a policy and procedure regarding the reporting of workplace accidents, including to whom they should be reported.

Weapons in the Workplace – It is important to keep in mind that the open carry and concealed carry regulations that require certain signage to prohibit such carrying ARE NOT applicable to the employer-employee relationship. As such, you do not need a 30.06 or 30.07 compliant sign to prohibit concealed/open carry of weapons by your employees. That said, an employer may not prohibit employees with a lawful license to carry from keeping their handguns in their personal vehicles (whether or not on company property). Employers should, however, have policies that include a right to search personal belongings and vehicles of employees.

Work Week & Time Clock Policies – If the workweek is not defined in your policies, it is presumed to be Sunday to Saturday. However, an employer can define the workweek however it chooses. Employers should keep accurate records of hours worked (because it is the law) but also because without records, an employee in an FLSA overtime lawsuit is permitted to estimate overtime hours worked and the employer then has the burden to overcome the evidence with evidence rebutting the employee's allegation of overtime hours worked.

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

Simon | Paschal PLLC Happenings

D Magazine recently recognized Paul Simon and Dustin Paschal in its Best Lawyers Under 40 list. You can see the full list in the January issue of D Magazine. In addition, Simon | Paschal PLLC was a finalist for Small Business of the Year by the Frisco Chamber of Commerce. If you'd like to see us present, you have a great opportunity on Wednesday, March 21st. We'll be presenting at the Frisco Chamber of Commerce HR Summit at Collin College Preston Ridge Campus. And mark your calendars for Saturday, April 14th for the Texas Big Star Half Marathon & 5K in Frisco! Simon | Paschal is a proud sponsor!

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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