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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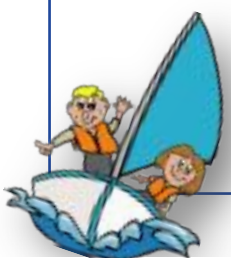
Lawsuit Filed Over City of Austin Paid Leave Ordinance

On February 15, the City of Austin passed an ordinance requiring private employers to provide paid sick leave for their employees. The ordinance is set to take effect October 1. In response, the Texas Public Policy Foundation & Texas Association of Business filed a lawsuit on April 24 against the City of Austin challenging its sick leave ordinance. Texas Attorney General Paxton, the Society for Human Resource Management (SHRM), and Texas SHRM later joined the lawsuit as plaintiffs.

For those that are not aware, the Ordinance (at a basic level): (1) Applies to all employees working within the Austin city limits, regardless of whether the employer has an office in Austin; (2) Provides 1 Hour Of Sick Leave for every 30 hours worked; and (3) Caps the paid time off at 8 days off if the employer at issue has 15 or more workers or 6 days if the employer at issue has less than 15 workers. (*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.

YouTube

Beware of Blanket Prohibitions Prohibiting the Hiring of Felons

A Federal District Court recently ruled in favor of the EEOC in a lawsuit filed against that agency by the State of Texas. In the suit, the State of Texas sought a ruling that Texas had a right to bar convicted felons from serving in employment with the State as the State saw fit. The EEOC has guidance stating that blanket prohibitions against hiring convicted felons is a violation of Title VII.

While the court held that EEOC guidance is essentially rule-making and, thus, should follow the appropriate notice and comment period (which it did not in this case), the court also held that a blanket prohibition against hiring convicted felons painted with "too broad a brush." Thus, the court essentially sanctioned the content of the EEOC guidance.

What this truly means for employers is that the courts likely will continue to give deference to the EEOC with respect to its rule making and guidance. It also means that employers with blanket prohibitions against hiring convicted felons likely could face EEOC charges or court-action and, thus, should revisit those policies.

Supreme Court Approves Class Action Waivers in Arbitration

On Monday, May 21, 2018, the United States Supreme Court issued a 5-4 ruling delivered by new Justice Neil Gorsuch in which the Court ruled that class action waivers in employment arbitration agreements are enforceable. The case is *Epic Systems Corp. v. Lewis*.

The case involved differing interpretations by two different laws. Proponents of class action waivers in arbitration agreements argued that the Federal Arbitration Act permitted employers to contract with employees that all disputes would be handled via private arbitration and that employees would be permitted to bring individual claims only and could not proceed as a class or collective action. Opponents of class action waivers argued that the National Labor Relations Act prohibited them on the grounds that proceeding as a class constituted protected concerted activity.

In ruling class action waivers enforceable, the majority held that Congress previously instructed that arbitration agreements should be enforced as written.

What does this mean for employers? It means that if you choose to have an arbitration agreement with your employees, you are permitted to prohibit any class or collective actions and, thus, require your employees to pursue their claims individually through arbitration.

Admittedly, this can be a benefit to the employer and prevent the add-on of employees who otherwise might not have brought a claim absent the class action or collective action opt-out or opt-in process. *(cont'd. on Page 4)*

Client Spotlight

Sirius Plumbing and Air Conditioning was founded by Brent & Jeni Garrett with one goal in mind – to treat their customers like family and, thus, expect the best of each other. At Sirius, they treat their customers and their homes with respect and solve the issue right and fast. We are proud that Sirius is a client and it has been our pleasure to help them with their legal needs! We even use them for our own plumbing and A/C needs. Learn more about them and their great team at www.siriuspac.com.

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You can refer back to last quarter's newsletter to learn more about the ordinance itself.

Austin City Council Member Greg Casar, a supporter of the ordinance, stated the ordinance is a "common-sense approach to address our serious health and safety needs." He also noted that the United States remains the only advanced economy in the world that doesn't require paid leave as a workplace standard.

Research shows the benefits of time off and many businesses understand the positive affects it has on its employees and their businesses. The Harvard Business Review did a comparison between workers in the U.S. and workers in other countries and found more time off correlated with greater productivity. The study concluded workers with more time off focused better at work and wasted less time. Many businesses in Austin, including Waterloo Records and Videos, acknowledge the benefits of time off and already have programs in place for paid time off.

Pushback against the ordinance, therefore, is not in opposition to paid time off in general, but stems from the City Council's overreaching. The opposition intends to fight this ordinance because of the limitations it puts on business owners' rights. The organizations that brought the suit are troubled by the intrusive role the government would have in the business decisions of a small company.

Many across Texas are watching this lawsuit due to similar ordinances being considered by the Dallas and San Antonio City Councils. This lawsuit could very well determine the future of municipal ordinances as they apply to private workplaces. We will continue to watch for future developments and update you as warranted.

*** Thank you to our Intern, Jacob Tucker, for the preparation and drafting of this article. Learn more about Jacob on the last page of this newsletter.*

Buyer Beware: FLSA Unveils PAID Program

On March 6, the Department of Labor revealed its Payroll Audit Independent Determination ("PAID") program, which allows companies to voluntarily identify and self-correct FLSA wage and hour violations. Under the PAID program, employers can correct the violations simply by paying the back wages to the employee and, thus, avoid paying liquidated damages or civil monetary penalties.

At a glance, the PAID program seems to provide protection to the employer; however, there are some concerns with the program:

1. The Employee is Not Required to Accept

When an employer uses the PAID program and makes the offer of back pay to an employee, the employee does not have to accept the offer. Further, the employee can use the employer's participation in the program as evidence of admission to an FLSA violation. The employer potentially could bring a lawsuit upon itself and establish all the evidence the employee needs to bring a successful FLSA claim.

2. Target for Future Investigations

Even if the employee accepts the employer's offer and the PAID program relieves the employer of any FLSA claim from that employee, participation in the program may make the employer a target for future investigation.

** DOL Thinking—If they messed up once, I wonder if they did it again. **

These concerns beg the question whether or not the PAID program truly provides any protection at all. Before participating in the PAID program, you should consult your legal counsel since participation could have serious consequences.

*** Thank you to our Intern, Jacob Tucker, for the preparation and drafting of this article. Learn more about Jacob on the last page of this newsletter.*

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(cont'd. from Page 2) An employer's inquiry and examination should not stop there, though. Arbitration is not right for every employer and despite the drumbeat of support for arbitration by many lawyers, it can have significant downsides – especially if class action waivers are used.

Arbitrations can be extremely costly. Unlike a court (where the Judge is paid by taxpayers and, thus, free to employers), an arbitrator is in private practice and charges an hourly rate. In employment arbitrations, that hourly rate must be paid by the employer. So in an arbitration, an employer is paying for its lawyer *AND* the arbitrator.

In addition, arbitrators want repeat business. Since both sides in an arbitration have a say in selecting the arbitrator, arbitrators have an incentive to keep both employers and employees happy. The result is that arbitrators many times will "split the baby" in lawsuits and try to give each side something so that each side feels like it/he/she won something.

With the new ability to enforce class action waivers, arbitration can now be more costly. Instead of defending a single arbitration against a class of employees, an employer now might potentially have to defend multiple different arbitrations.

This does not necessarily mean that you should abandon arbitration agreements. You should just have a thorough discussion internally and with your lawyer.

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, drug testing, and general policies. In this issue, we move into workplace wage and hour issues and policies.

We'll start with the basic wage and hour requirements under the FLSA and Texas law. The minimum wage is $7.25 per hour for every hour worked up to 40 hours in a workweek. For any employee eligible for overtime, overtime must be paid at a rate of time and one-half an employee's regular rate of pay for any hours worked over 40 in a workweek.

The examination then looks at whether or not an employee is eligible for overtime. Employees are segmented into two groups with respect to overtime – exempt employees and non-exempt employees. Exempt employees are not eligible for overtime compensation while non-exempt employees must be paid overtime compensation.

While there are many industry and job specific exemptions, the general exemptions applicable to most employers are the so-called white-collar exemptions – the executive, administrative, professional, computer, and outside sales exemptions.

With respect to the administrative, executive, and professional exemptions, an employee must meet both a salary test and a job-duties test in order to qualify as exempt. The salary test is as follows: the employee must be paid at least $455 per week in the form of a salary ($26,660 annually). While an employer can deduct from an exempt employee's salary for absences of one or more full days for personal reasons other than sickness or disability or for one or more full days due to illness if the employer has a PTO plan or for penalties related to violation of workplace conduct rules or major safety violations (along with other specific allowable deductions), employers are not permitted to deduct from an exempt employee's salary due to variations in the quantity or quality of the employee's work.

Unlike the administrative, professional, and executive exemptions, the computer exemption also allows an employer to pay an hourly rate – so long as that hourly rate is $27.63 per hour or higher.

Be sure to check out the next installment of The Employee Life Span in our next quarterly newsletter as we continue our discussion of exemptions and other wage and hour issues and policies!

Simon | Paschal PLLC Happenings

D Magazine recently recognized Paul Simon and Dustin Paschal in its Best Lawyers in Dallas list. You can see the full list in the May issue of D Magazine. Simon | Paschal is also proud to welcome Jacob Tucker to the team as our Summer 2018 Intern. Jacob, a Coppell native, is a graduate of Texas A&M University and currently is a student at Texas A&M School of Law in Fort Worth. Jacob is already off and running and you can read two of his articles in this newsletter! Finally, on July 1st, Simon | Paschal PLLC will celebrate its 5th Anniversary! We are so thankful for our friends, family, and clients for their support! Be on the lookout for details about our anniversary celebration in early July!

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