



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

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## Update on Municipal Paid Sick Leave Ordinances

As those of you who read our 2nd Quarter Newsletter know, a lawsuit was filed in April challenging Austin's paid sick leave ordinance that was due to go into effect on October 1 of this year. After the district court ruled against those entities challenging the ordinance, the challenging parties filed an appeal with the Texas Court of Appeals for the Third District in Austin.

On November 16, 2018, the Court of Appeals issued a ruling reversing the district court and finding that Austin's paid sick leave ordinance violated the Texas Constitution because the ordinance is preempted by the Texas Minimum Wage Act.

The Court of Appeals issued a lengthy decision outlining its reasoning, but the end result is that the Court of Appeals directed that a temporary injunction be issued preventing implementation of Austin's paid sick leave ordinance and remanded the case back to the district court for further proceedings. Although the case is not final, this decision all but ends the Austin paid sick leave ordinance.

In response to the Court of Appeals' (*cont'd. on Page 3*)



### Want More Info?

Visit our firm website at [www.SimonPaschal.com](http://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](http://www.youtube.com/SimonPaschalPLLC).

## Many HR Related Bills Filed in Upcoming Legislative Session



The 86th Legislative Session has not even commenced in Texas but lawmakers already have filed hundreds of bills that they wish to be taken up by the legislature. Among these filings are numerous bills related to HR and the workplace.

While it is unlikely that most of them will pass or that many of them will even get out of committee, these bills provide insight into workplace trends and provide an idea of what may be on the horizon (especially in the event that Texas continues its trend of more elected Democrats).

The various topics addressed in the bills include sexual orientation discrimination, TWC unemployment filing retaliation, employee background checks, minimum wage, gender identity discrimination, sexual harassment, arbitration agreements, workers' compensation coverage, compensation discrimination, and more.

We'll monitor these bills and update you as necessary depending on any action related to them.

## Tips About Employee Discipline

Employee discipline is something that all HR professionals have to deal with and it's something that almost none enjoy doing! Over the years that we've been providing advice and counsel to employers and HR, we have seen some things we like and some we wished were done differently. We want to take the opportunity to give you some of our tips on employee discipline.

First and foremost, discipline should be separate and apart from your Performance Improvement Plans (PIP). A PIP is not meant to correct behavior or attitude or laziness or lack of trying. It is meant to correct performance. A PIP should be used to improve the performance of employees that are genuinely trying but are failing to achieve performance standards in some fashion. A PIP should be used as punishment.

Rid your workplace of verbal warnings. They cannot be tracked (especially in the event of turnover in your HR department), they provide little in the way of "fear" factor, and they encourage employers to provide too many warnings. This does not mean you should abandon ongoing verbal counseling/coaching. But when it comes to discipline, get rid of your verbal warnings.

Another mistake we often see is lack of honesty in disciplinary notices, particularly terminations. We are not talking about malicious dishonesty here. Rather, we are talking about false reasons given to spare an employee's feelings (i.e., "You're not the right fit."). The result of this is that the employee will assume the false reason was given to cover up a discriminatory reason. This can result in unnecessary and costly litigation. We often see this (*cont'd. on Page 4*)



Another great Simon | Paschal client

## Client Spotlight

DeVance AV Design, Inc. was founded in 2002 by Matt DeVance. His wife, Dana, later joined him in 2007. They lead a team of professionals who provide turn key audio/visual solutions for homes and businesses. They install, program, and provide top-notch service for audio/video and automation services. We are proud that DeVance AV Design, Inc. has put its faith in us and we are honored to call them a client. Learn more about them and their great team at [www.devance.tv](http://www.devance.tv).



*(cont'd from Page 1)*

ruling, a group of San Antonio area Chambers of Commerce sent a letter to the San Antonio City Council asking that it voluntarily recall its paid sick leave ordinance in light of the Court of Appeals ruling.

San Antonio's Mayor indicated that the City Council had no intention of doing so. As such, pending further litigation or action by the Texas State legislature, San Antonio's paid sick leave ordinance is still set to go into effect on January 1, 2019. It is our belief, therefore, that a lawsuit likely will be filed shortly to halt implementation. Any such lawsuit, if determined by a court of appeals, would be determined by a different court of appeals and, thus, any different ruling from the Court of Appeals for the Third District would result in an appeal to the Texas Supreme Court.

In addition, the Texas State Legislature already appears to be taking action. Multiple bills have already been filed for the upcoming 86th legislative session, which would prohibit any county or municipality from establishing its own minimum wage.

Based on the courts in Texas and the early action already by the Legislature, county and municipal minimum wages likely are a dead issue in Texas. But employers should remain diligent and aware on this issue since at this point, the San Antonio ordinance has not been halted or repealed and is still due to go into effect on January 1, 2019.

Employers should be aware that no matter what, this issue is not going anywhere. With changing demographics and the changing political landscape, you can expect that this issue will continue to be on the forefront of employment issues. We encourage all employers to remain up to date so that they can be compliant with any changes in state or federal law.

## Some Important Reminders About Age Discrimination

The ADA and age discrimination seem pretty straightforward to most HR professionals, but with an ever-aging workforce, it's important to remember to keep some key age discrimination issues in mind.

First, although the ADEA only protects those individuals aged 40 and above, the case law applicable to Texas employers makes it clear that if discrimination occurs before an individual is over the age of 40, such discrimination can still be actionable if the ultimate adverse employment action occurs when the individual is over the age of 40. This is true even if the majority of the discriminatory actions and behavior took place before the individual was 40.

When dealing with employees who are close to retirement age, an employer IS permitted to inquire into the retirement plans IF the employer has a legitimate reason to do so and IF such inquires do not cross over into harassment. A legitimate reason is business succession planning. To avoid crossing over into harassment, cease any inquiries once you have received a negative intent to retire. You should also avoid age-based comments in connection with retirement inquires (i.e., Don't say, "When are you retiring old-timer?").

If you have an employee that expresses an intent to retire at the end of the year, you hire his or her replacement, and the retiring employee changes his or her mind, depending on the specific facts you likely can require the employee to retire (especially if you have taken significant steps to replace the retiring employee and especially if you would proceed the same with a younger employee that announced his or her intention to resign at the end of the year).

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(cont'd. from Page 2) when a termination is made and the departing employee is told that the position is being eliminated (again, in an effort to spare the employee's feelings about his or her poor performance) but the departing employee later learns he or she was replaced.

Failure to discipline the right way can result in a negative work culture, decreased productivity, increased unemployment challenges, and an increased risk of lawsuits.

In addition to avoiding the mistakes outlined above, there are other things you can do. When you issue discipline, do it immediately upon learning about the conduct that warrants the discipline. Outline the facts of the issue that led to the discipline and avoid any emotionally charged words or opinions. **FACTS ONLY!** Identify the specifics, reference any previous discipline, outline what the employee must do or stop doing moving forward (including consequences of failure to do so), and deliver the news in person. Go through the discipline in detail rather than simply providing a written notice.

We also suggest that you follow the three strikes and you're out rule (absent special circumstances). This means that if an employee receives three notices of discipline, the third notice should be a termination notice.

There is no perfect way to discipline but by following these tips, you can improve how you discipline.

## 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 continue with our discussion of FLSA overtime exemptions.

**Professional Exemption** – As we mentioned in our last issue, the professional exemption is split into the learned professional and the creative professional. Last time we outlined the learned professional. To satisfy the job duties test of the creative professional exemption, the worker's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. The examination is done on a case-by-case basis depending on the extent of the invention, imagination, originality or talent exercised by the worker.

Three other exemptions often examined at the same time as the executive, administrative, and professional are the highly compensated exemption, the computer professional exemption, and the outside sales exemption. While these are not technically the three white collar exemptions, they are exemptions that arise more often so we will address them here.

**Highly Compensated Employee** – The worker's primary duty must include office or non-manual work and the worker must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

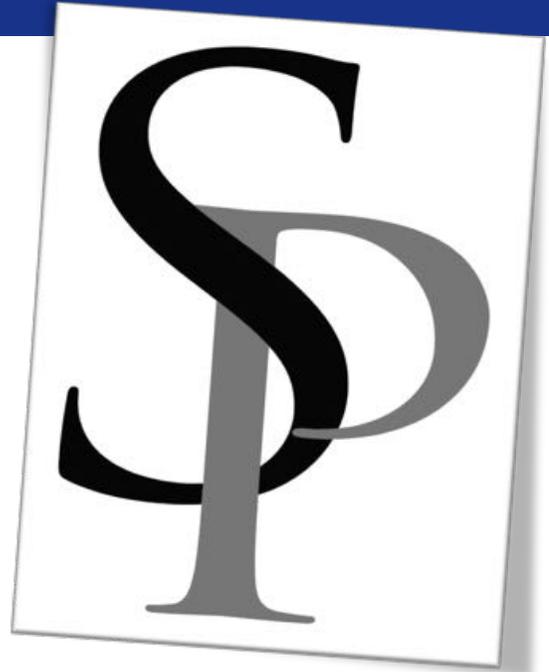
**Computer Employee** – The worker must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled work in the computer field. His or her primary duty must consist of (1) application of systems analysis techniques and procedures, (2) design, development, documentation, analysis, creation, testing or modification of computer systems or programs, (3) design, documentation, testing, creation or modification of computer programs related to machine operating systems, or (4) a combination of the above which requires the same level of skills.

Be sure to check out the next installment of *The Employee Life Span* in our next quarterly newsletter where we will outline the job duties requirements of the outside sales exemptions and go over the definitions of many of the terms used within the various exemptions!

# Simon | Paschal PLLC Happenings

As we close out another calendar year and hit the halfway point of our sixth year of business, we want to take this opportunity to extend an extremely large thank you to all of our clients. Without your support, this firm obviously would not be possible. We also want to extend a huge Happy Holidays to our clients, our friends, and all of your families. May you all experience the joy and happiness of the season and may you experience great success in the coming year. We are looking forward to an excellent 2019!

*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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