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Navigational Beacon

NAVIGATING YOU THROUGH THE VARIOUS EMPLOYMENT & HR ISSUES THAT YOU ENCOUNTER AS YOU JOURNEY TO BUSINESS SUCCESS

Dallas & San Antonio Paid Sick Leave Ordinances Go Into Effect August 1st

If you've been monitoring the HR message boards you've likely seen a lot of chatter about the Dallas and San Antonio paid sick leave ordinances set to go into effect August 1, 2019. These ordinances require employers to provide paid sick leave to their employees who work within their respective cities. The City of Austin passed a similar ordinance but as a result of legal action, that ordinance is on hold until the court resolves the legal challenge. While the Texas Legislature attempted in the most recent session to pass a bill or bills pre-empting the city ordinances, the effort failed and no bills were passed.

As a result, unless further legal action is filed in Dallas and San Antonio (or a decision is issued in the Austin litigation that affects Dallas and San Antonio), the Dallas and San Antonio ordinances will go into effect on August 1, 2019. We recently attended the City of Dallas information session and due to the short timeline, we wanted to provide you an outline of the ordinances so that you can be prepared.

When do the Dallas and San Antonio laws go into effect? Barring any legal action, the laws go into effect on August 1, 2019 for employers with more than five employees. The laws go into effect on August 1, 2021 for employers with five or fewer employees. (*continued on next page*)

Resources

Want more information? Visit our website and click on the "Resources" tab to find past issues of the quarterly newsletter as well as our blogs on various issues and our video tips. You can also find our video tips on our YouTube channel at www.youtube.com/SimonPaschalPLLC. In addition, you can find helpful tips and information about our upcoming speaking engagements (as well as just keep up with our shenanigans) on our Facebook page, our Twitter handle, and our LinkedIn page. Connect with us and stay up to date!

(*continued from Page 1*) That said, the City confirmed that civil penalties against employers for violating the ordinances will not begin until April 1, 2020. So, employers have a grace period between August 1, 2019 and March 31, 2020. However, penalties for retaliation begin immediately on August 1, 2019.

To whom do the Dallas and San Antonio laws apply? Both laws apply to private employers (i.e., non-governmental employers).

What employees are covered? Any employee, full-time or part-time, that performs at least 80 hours per year within the respective city is covered by the law. This means that any employee that performs at least 80 hours per year within the City of Dallas is covered by the Dallas law and any employee that performs at least 80 hours per year within the City of San Antonio is covered by the San Antonio law.

What are the grant and accrual rights for any covered employee? A covered employee accrues 1 hour of paid sick leave for every 30 hours worked within the City of Dallas or San Antonio (whichever city is at issue). Accrual begins at the start of the employee's employment or August 1, 2019 for employees already on staff as of August 1, 2019.

For employers with more than 15 employees at any time in the preceding 12 months, a covered employee is permitted to accrue up to 64 hours of paid sick leave per year. For employers with 15 or fewer employees in the preceding 12 months, a covered employee is permitted to accrue up to 48 hours of paid sick leave per year. All available but unused paid sick leave up to the annual cap (i.e., 64 or 48 hours) may be carried over to the following year. However, employers are not provided to provide a covered employee more paid sick leave in any given year beyond the annual cap (i.e., 64 or 48 hours).

What are the usage rules? A covered employee is permitted to use any accrued paid sick leave immediately. However, for any employee that has a guaranteed period of employment of 1 year, an employer may restrict usage of paid sick leave in the first 60 days of employment.

Paid sick leave may be used for (1) the employee's physical or mental illness, physical injury, preventative medical or health care or health condition, (2) the employee's need to care for their family member's (spouse, child, parent, any other individual related by blood, or any other individual whose close association with the employee is the equivalent of a family relationship) physical or mental illness, physical injury, preventative medical or health care or health condition, or (3) the employee's or employee's family member's need to seek medical attention, seek relocation, obtain services from a victim's services organization, participate in a legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking.

For leave of longer than 3 consecutive days, an employer may require reasonable verification of the need for the leave. An employer is not required to allow a covered employee to use earned paid sick leave on more than 8 days in a year. Any employee rehired within 6 months of their separation date can use any earned but unused paid sick leave in existence at the time of the employee's separation.

What if I already provide PTO? Any employer that has paid leave policies that meet or exceed the benefits provided by these laws, is not required to change its policy or provide any additional paid sick leave.

Are there other requirements? Any employer that provides its employees an employee handbook, must include within the handbook a notice of the rights and remedies of these laws.

On at least a monthly basis, an employer must provide either electronically or in writing to each covered employee, a statement showing the amount of the employee's accrued and available paid sick leave.

Any employer that uses a rolling 12-month period (rather than a calendar year) for determining eligibility and accrual of paid sick leave must provide employees a written notice of such policy at the start of their employment or on August 1, 2019 for any employees already on staff on August 1, 2019.

Employers must keep records of the amount of paid sick leave accrued, used, and available by each covered employee.

Employers subject to this law must post conspicuously a sign that outlines the rights and remedies of the respective law. A sign is not required to be posted until such sign is made available on the respective City's website.

Employers may not retaliate against any employee who requests or uses earned paid sick leave, reports or attempts to report a violation, participates or attempts to participate in an investigation regarding the respective law, or otherwise exercises his/her rights under the respective law.

What are the penalties? Violations of the laws may be punished by a fine of up to $500 and each violation (even each violation of each section) constitutes a separate offense. At the information session, however, the City reiterated that its goal is compliance and not fines. As such, when fines begin getting issued starting April 1, 2020, employers will still have 10 days from the date of a violation notice within which to become compliant. If the employer becomes compliant within that 10 days, no fine will be owed.

With any new law or ordinance there is always a degree of uncertainty regarding how the government will enforce the law and how the courts will interpret the laws. We will continue to monitor the status of these ordinances and we are in regular communication with the City of Dallas City Attorney's Office to get clarification to questions from HR professionals such as yourselves. For now, its likely that your current PTO or sick leave policy is substantially compliant with these ordiances and only minor adjustments are needed.

Here We Go Again:
Department of Labor Proposes Change for Calculating the Regular Rate

In our last issue we discussed the DOL's proposal to increase the salary requirement for the white collar overtime exemptions. Well the DOL did not stop there! For the first time in 50 years, the DOL has proposed changing the definition of "regular rate." A common misconception is that overtime is one and one-half times an employee's hourly rate. Overtime is actually calculated at one and one-half times an employee's "regular rate." The regular rate not only includes an employee's hourly rate but also most bonuses, shift differentials, commissions, and other employer paid perks.

Obviously, over the last 50 years there have been a lot of changes in benefits provided to employees - think wellness programs, employee discounts for company products, and employer-provided fitness centers. The DOL appears to have recognized an employer's administrative headache in determing the costs of these items and tracking and calculating them weekly in order to properly calculate the regular rate. Accordingly, the DOL's proposed rule would specifically exclude the following from the regular rate: tuitiion reimbursement, the value of an employee discount, employer-provided gym, cost of wellness programs and onsite specialist treatment, reimbursed travel expenses, and accident, unemployment, and legal services.

This proposed rule has not been finalized yet but we will continue to monitor and let you know if your life gets a bit easier!

The Employee Life Span

Some time ago, 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. 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, general policies, and wage and hour policies. In this issue, we discuss the employee/independent contractor classification.

When it comes to the determination of whether a worker is an independent contractor or an employee, such determination is a matter of law – not merely an agreement between the worker and the company. For Texas employers, there are multiple tests (a TWC test, an IRS test, and the DOL test). At the end of the day, though, they all have as the overall focus whether or not the worker is in business for himself or herself. For this discussion, we'll focus on the DOL test since that is the one that HR professionals will most often encounter and is the most encompassing.

The DOL test for classification (as interpreted and applied by the courts) is known as the economic realities test. It involves 5 factors – (1) the degree of control exercised by the company over the worker, (2) the extent of the relative investments of the worker and the company, (3) the degree to which the worker's opportunity for profit or loss is determined by the company, (4) the skill and initiative required in performing the work, and (5) the permanency of the relationship. Although there are 5 factors to examine, no single factor is determinative and it is a totality of the circumstances review. This means that 4 factors could favor independent contractor status and one could favor employee status, and the worker could still be considered an employee!

As a general matter, though, the less control the company has over the worker's work, the greater the investments in tools and equipment by the worker, the greater the worker's ability to determine his/her profit/loss (i.e., ability to work for others simultaneously), the greater the skill and initiative involved in the work, and the shorter duration of the working relationship…the more likely the worker is an independent contractor.

Keep in mind that just entering into a contract with a worker and calling him/her an independent contractor is not determinative. The true test is an examination of the whole relationship using the factors above.

Be sure to check out the next installment of The Employee Life Span in our next quarterly newsletter where we discuss compensable time.

The SP Opinion: Why You Should Consider Severance

One of the hardest conversations we have with a client is advising them to consider giving a terminated employee a severance payment in exchange for a complete release of any claims the employee may have. The response we receive is often one mixed with frustration that we would even ask them to consider paying a fired employee who violated company policies or somehow harmed the company. Why should an employer pay an employee who was rightfully terminated when the employer has followed the law perfectly? The answer is because it is oftentimes cheaper to pay a severance than it is to pay a lawyer to defend against a lawsuit. This is true even if the lawsuit has no merit. Lawsuits are not just expensive but they also are time consuming on management and other employees who need to assist the lawyers with gathering documents, appearing for depositions, and testifying at trial. Lawsuits are also unpredictible, so even that open and shut case has a glimmer of hope if it reaches the jury. By getting an employee to sign a severance agreement with a release of claims eliminates that potenential cost to defend, loss of employee time, and risk of trial. A severance agreement does not need to be a certain amount of money, or even provide any money. Consideration for a severance could be an agreement to provide a positive review or allow an employee to keep a company laptop (after it is wiped, of course). So the next time you're getting ready to terminate an employee, regardless of the reason, consider the benefits a severance can provide.

> "Severance provides peace of mind, even for meritless lawsuits. #SIMONPASCHALSAYS"

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Affiliated Bank is a "Friendly Community Bank" headquartered in Arlington, Texas. Founded in 1959 as a credit union, the bank has expanded over the years to now being a full-service bank with six locations. Affiliated Bank prides itself on its can do attitude and attentiveness to its customers. You can learn more about them at www.affiliatedbank.com. Thank you, Affiliated Bank, for being a valued Simon | Paschal PLLC client!

Simon | Paschal PLLC Happenings

In September, we'll be presenting to North Texas SHRM (Denton) and Big Country SHRM (Abilene). If you are members of either of these chapters, we'd love to have you attend! We are excited to have been selected to speak again at the HR Southwest Conference in Fort Worth from October 27-30. This year we will be presenting a half-day pre-conference workshop and then three one-hour sessions on various employment law topics. If you're attending the conference, please let us know so we can stop by and say hi!

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