○ 1st QUARTER | ○ 2020

Navigational Beacon

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

Changes Coming in 2020

As we begin 2020 and the start of a new decade, there will be more certainty with some laws and continued unknowns with other laws.

Let's first address the certainties we'll have in 2020. For the first time in 50 years, the Department of Labor (DOL) has updated the FLSA definition of the "regular rate" of pay. This was a long time coming as the benefits employers provide today to employees are drastically different than what were provided when the DOL established the definition. With the changes in benefits, employers have long been left guessing as to whether they were properly calculating the regular rate of pay.

Effective January 15, 2020, the DOL has confirmed that the following employee perks are excluded from the regular rate calculation:

- Unused paid leave.
- Complimentary office coffee and snacks.
- Discretionary bonuses (still need to be mindful whether bonus is actually discretionary or not)
- Gym and fitness classes, wellness programs, parking benefits, employee discounts on retail goods and services, adoption assistance, and certain tuition benefits.
- Business expense reimbursements (i.e., cell phone, organization membership dues)
- Contributions to benefit plans for accidents and legal services.

With this change coming in the new year it's a good opportunity for employers to examine how they are calculating the regular rate for overtime purposes and whether an adjustment can be made.

As for the unknowns, we will head into 2020 still not knowing (*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*) the enforceability and constitutionality of the city sick leave laws in Texas. As we've written in previous articles and client updates, Austin, San Antonio, and Dallas have all passed laws that employees within their city must receive paid sick leave. Austin and San Antonio's laws are both paused as lawsuits were filed and the courts ordered injunctions. The Texas Supreme Court is set to hear the Austin case in 2020. Briefing from the parties should be completed in early 2020, so our best guess is that the Supreme Court issues a decision in mid-to-late 2020. Until a decision is issued by the Supreme Court, neither the Austin or San Antonio law is in effect. If the Supreme Court holds that the sick leave laws are constitutional, the anticipation is that both cities will establish a new date in which employers must come in compliance with the law.

While Dallas' paid sick leave law mirrors Austin and San Antonio, Dallas' paid sick leave law has taken a different course in the court system. No employer filed for an injunction in the state courts so as of today, Dallas' paid sick leave law is still in effect with enforcement of the law beginning April 1, 2020. A lawsuit on the constitutionality of Dallas' paid sick leave was filed in federal court, which does not typically move as quickly on injunctions. That lawsuit was filed at the end of July and the federal court still has not issued a decision regarding the injunction request or other procedural matters. It is uncertain right now when the federal court will issue any decision on the Dallas law and whether that decision will come before the Texas Supreme Court's decision or the April 1, 2020 enforcement date.

With this uncertainty, the question we're left with is what, if anything, should we do now? The easy answer right now is to do nothing. Since Dallas is the only law currently in effect and not under enforcement until April 1, 2020, employers can continue with the status quo and see if the courts provide an answer before April 1. Fortunately, a lot of employers may already have a PTO/sick leave policy that complies with Austin, San Antonio, and Dallas. In that scenario, a court decision will determine whether employers can change their policy in the future or need to keep it as is. If your current policy does not comply with Dallas' sick leave law, then you will likely want to start planning on changes to your sick leave policy in March if the law is not halted before then. Alternatively, if you don't want to wait for a court decision, our previous newsletter provided the requirements for the Dallas sick leave law. As always, we'll continue to monitor the status of these court cases and update you with any changes.

California Changes

While Texas had very few changes to its employment laws, the same cannot be said for California. This should come as no surprise since California is notorious for its heavy regulations and over-protection of employees. Even if you do not operate in California, these new laws can provide some foresight into how your applicable employment laws may change in the future. Here are just some of the new California laws that will take effect in 2020.

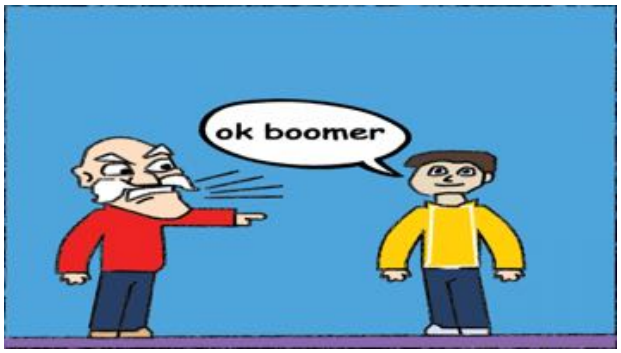
AB 5. On September 18, 2019, California's governor signed AB 5 into law. This law changes the test for independent contractors. The new law changes the previous 11 factor test to a three-part test. The new law *presumes* a worker is an employee unless the company proves that the worker: (A) is free from the control and direction of the company in performing work, both practically and in the contractual agreement between parties; (B) performs work that is outside the usual course of the company's business; and (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the company. The law also added a number of exemptions to the law, including doctors, lawyers, professional services (i.e., marketing, HR), and builders.

The Crown Act. SB 188 went into effect January 1, 2020 and expands the state's definition of race to include traits historically associated with race. This law makes it illegal for employers to discriminate against individuals based on "protective hairstyle," like braids, afros, twists, and locks.

The Fair Pay to Play Act. This law made national news as California enacted a law that allows college athletes to hire sports agents and receive compensation for endorsements. The new law is scheduled to go into effect in 2023, with the thought being that this allows the NCAA to potentially alter its current rules to address concerns about student athletes not receiving fair compensation for their likenesses and contributions to the NCAA and universities.

Reporting Occupational Injuries and Illnesses. AB 1804 will require employers to immediately report injuries, illnesses, or death. The state is developing an online portal for this requirement, but until the portal is operational, employers can make these mandatory reports by telephone or email. Failure to comply with the law carries a $5,000 civil penalty.

Political Correctness, Free Speech, and Discrimination



By now you've likely seen the meme with the phrase "OK boomer." If you're like us, you may have had no clue what this meant and had to Google the phrase. The term has become utilized by millenials to refer to baby boomers, oftentimes in a dismissive or condescending fashion. On one hand, this communication can be seen as friendly banter, especially when an older person comments back with little kid jokes. But when these comments come in to the workplace, they could provide evidence of age discrimination. Will simply permitting employees to go around the office saying "Ok boomer" make a company liable for a hostile working invironmnet? Likely not. But what if the person alleging they are constantly told "Ok boomer" is also one of the oldest employees in a workplace that is skewing younger and the company wants to terminate the older employee because he's just not as ambitious or attentive to detail as the other employees. In that situation, the older employee may be able to paint a picture that the company tolerates or even encourages discriminatory or derogatory comments, and that the true reason for the termination is age based. Employers need to remember that for non-government employers there are no First Amendment rights. Employees do not get the same luxury at work as they do outside of work. The hard part for employers is finding the balance between a workplace people enjoy and in which they are productive, but that doesn't cross the line and create a harassed employee.

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, wage and hour policies, and employee/independent contractor classification. In this issue, we discuss compensation.

We previously discussed the requirements regarding exempt versus non-exempt employees as it relates to salary and overtime. Here we're going to focus more on when and how payment must be made and what is compensable.

When payment must be made. For Texas employers, wages must be delivered to employees at their regular place of work during working hours, mailed by registered mail or by direct deposit to be received by the employee not later than payday, by any reasonable means, or to any person authorized in writing by the employee. For direct deposits you must provide the employee with a payment stub showing his/her compensation for that payperiod. To comply with the Texas Payday Act, if your payday falls on a weekend, you must ensure the employee receives payment on the workday before the weekend.

How often payment must be made. Exempt employees must be paid at least monthly, however, there is an exception for commissioned employees. For non-exempt employees, an employer must pay them at least twice a month. If the employer does not designate the pay days for non-exempt employees the pay period is the 1st and 15th. Pay periods are required to be posted with the employment posters.

Final Paychecks. In Texas, for an involuntary separation (i.e., employer terminates employee with or without cause) payment must be made within 6 days following separation or the next regularly scheduled payday if sooner. Where an employee quits, payment must be made by the next regularly scheduled payday. How and when final pay must be made varies drastically by state. If you have an employee who works in another state, make sure to check that state's payday laws to determine when final payment must be made. In some instances, final payment must be made on the day of termination.

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

The SP Opinion: PIPs are not for discipline

More and more we see performance improvement plans, or PIPs, being used as a form of discipine. The common scenario involves an employee receiving a verbal warning, written warning, a PIP, and then termination. The reason for termination is a failure to complete the PIP. Where this becomes a problem for employers is that the terminated employee usually is able to establish that the PIP appears destined for failure and the real reason for termination must be discriminatory or retaliatory. The reason this occurs is oftentimes because the PIP is being misused and overused. We believe a PIP should only be used to address performance and not for discipline. What that means is that a PIP should not be a step in the discipline process. Verbal and written warnings are for violations of company policy. An easy way to determine if what you're dealing with is a performance issue or discipline is to look at the change you're needing from the employee. If the change is to stop doing something (i.e., stop arrving late or stop being combative), then you're likely dealing with a violation of company policy. In that case, progressive discipline is needed. There is no plan as the employee needs to simply stop violating the policy. For a performance issue, the common theme is the employee is not performing up to the needed standards. It's generally a quantifiable metric (i.e., sales volume or scheduled meetings). In that situation, a PIP will lay out a strategy to help the employee improve and utimately reach those quantifiable numbers. If the employee does not hit the quantifiable numbers, then you can terminate for not completing the PIP. The next time you are considering a PIP, take a second to decide if the issue at hand is actually one that warrants discipline instead.

> "[T]he PIP is being misused. #SIMONPASCHALSAYS"

Enchill Property Management Consulting

Enchill PMC is a nationwide leasing firm specializing in eliminating apartment vacancies on all asset type properties. Enchill PMC's leasing, training, and marketing strategies have contributed over $200 million to its clients' bottom line. You can learn more about them at www.enchillpmc.com. Thank you, Enchill PMC, for being a valued Simon | Paschal PLLC client!

Simon | Paschal PLLC Happenings

On February 11, 2020, Paul will be presenting a legal update at the Cross Timbers SHRM annual HR Conference in Stephenville, TX.

As we begin a new decade, we want to thank all our clients for another year of putting your trust in us. We valued working for you this past year, and hopefully taking a little stress off your plate. We wish you a very propersous 2020!

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