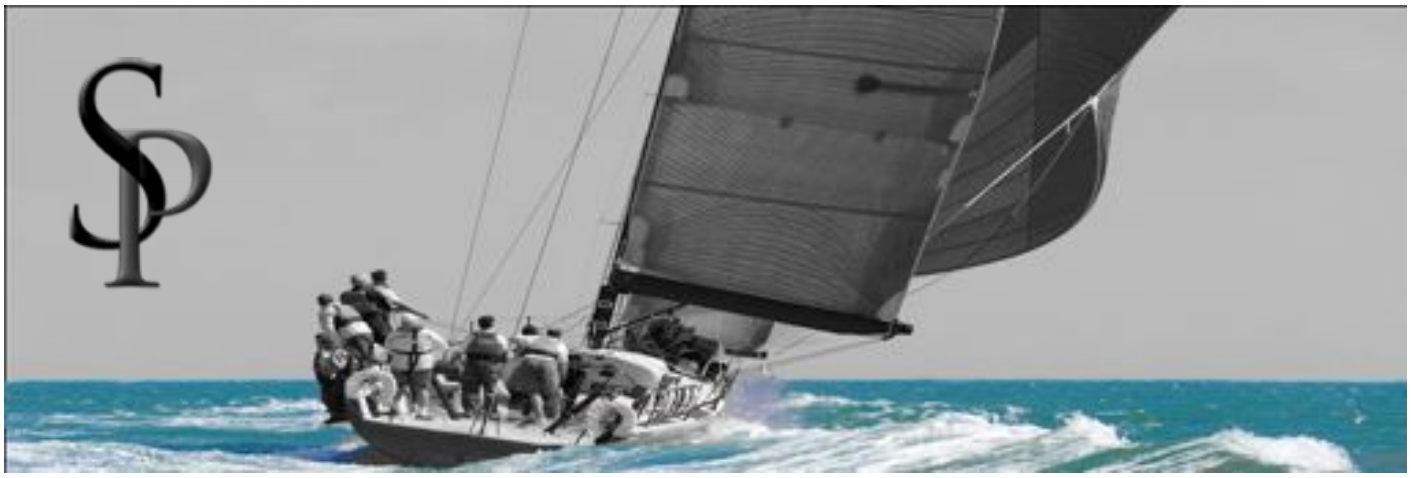


Navigating you through the various legal employment and business issues that your Company encounters as you journey to business success!

# Navigational Beacon

A Simon | Paschal PLLC Publication. Q2 2015

## FMLA Changes…Kind of…Maybe

On March 27, 2015, new FMLA regulations went into effect that changed the definition of "spouse." The new definition includes individuals in lawful/valid same-sex marriages whether or not the state in which they currently reside or work recognizes same-sex marriage. As long as the individuals were married in a state where same-sex marriage is legal, then the individuals are covered under the FMLA's definition of "spouse." The change, however, did not happen in Texas, Arkansas, Louisiana and Nebraska. On March 26, 2015, the U.S. District Court for the Northern District of Texas preliminarily enjoined application of this rule in these four states. The four states sought the injunction based on a portion of the Defense of Marriage Act that survived the U.S. Supreme Court's decision in *United States v. Windsor*. In the *Windsor* decision, the Supreme Court held as unconstitutional, a federal law defining marriage between one man and one woman. The Supreme Court, however, let Section 2 of the Act remain, which allowed individual states to refuse to recognize same-sex marriages performed under the laws of other states. This provision survived based on the Full Faith and Credit Statute.

(*cont'd on Page 3*)


### Rethink Performance Reviews:

Did you know that according to the Corporate Executive Board, 90% of HR professionals don't believe their companies' performance reviews provide accurate information? 66% of employees say the review process interferes with their productivity and 65% say the reviews are not relevant to their jobs. Time for something new?

## Confusion About Termination Decision and Failure to Follow Progressive Discipline Problematic

A recent case out of the U.S. District Court for the Southern District of Texas should be cautionary to employers. The City of Corpus Christi terminated a 55-year old man from his position and he subsequently sued the city for age discrimination under the ADEA. During the case, supervisors gave conflicting testimony regarding who decided to terminate the former employee. There also was testimony that the city failed to follow its own progressive discipline procedure. Specifically, prior to his termination, the former employee had never been reprimanded or disciplined.

Under the law governing discrimination claims, a plaintiff must first establish a prima facie (or initial) case of discrimination. The Court held that the former employee did so here because he demonstrated that the city hired people in their mid-thirties to perform his job duties after his termination. The next step in these cases is that the employer must show a non-discriminatory reason for the termination. The court held the city did that here because it stated it terminated the former employee for poor performance.

The final step is that the plaintiff must demonstrate that the city's reason was pretext and he was really terminated because of his age. The court held that was satisfied because of the conflicting testimony regarding who terminated the former employee and because the city failed to follow its progressive discipline policy. The court allowed the case to proceed to trial. This is another reason employers should follow their disciplinary procedures and be clear and direct when terminating an employee.

ADA 25 AMERICANS WITH DISABILITIES ACT 1990-2015

### ADA's Association Provision

As the Americans with Disabilities Act turns 25 this year, employers should be aware about the lesser-known association provision. The ADA prohibits discrimination against an employee or applicant because of a known relationship or association between the employee or applicant and a person with a known disability.

The employee or applicant does not have to have a disability or be perceived as disabled – association by itself provides protection. Furthermore, the association does not have to be a family relationship. The determining factor is solely whether or not the employer is motivated by the employee's or applicant's relationship or association with a person who has a disability.

Examples include terminating an employee for excessive tardiness because of the employee's need to care for a child with a disability or rejecting an applicant because you believe there will be increased health insurance costs because of the spouse's disability.

The association provision, however, does not require employers to provide reasonable accommodations to those protected by the association provision. This provision is often over looked but employers should always keep it in mind.

Another great Simon | Paschal client

## Client Spotlight

Macatax Income Tax Services specializes in income tax preparation and small business bookkeeping. Macatax is based in Irving, Texas and prepares both personal and business tax filings. Macatax can assist with ITIN applications and help your business with day-to-day bookkeeping. We are proud to have Macatax as a client and we appreciate the faith they put in us on a daily basis. Check out more about this great company at www.facebook.com/macatax.


We expect that a proposed rule to revise the FLSA white collar exemption regulations will be released this summer, with final regulations to take effect in 2016 before President Obama's administration ends. Insiders believe the salary threshold level will go from $23,660 annually to somewhere between $42,000 and $50,000 annually. In addition, it is expected that the job duties test will be revised such that more than 50% of an employee's time must be spent on exempt duties each week for the position to be classified as exempt.

In addition, there are various bills pending before Congress regarding the EEOC. Specifically, the House Subcommittee on Workforce Protections recently discussed four bills. The most discussed bill, the "Certainty in Enforcement Act," would offer a safe harbor to employers if they comply with federal or state laws that mandate businesses perform criminal background checks before hiring. The bill would clarify EEOC guidance issued in April 2012 regarding how employers should conduct criminal background checks. That guidance was aimed at the perceived negative impact of background checks on minorities and the EEOC's efforts to minimize that impact.

On March 26, 2015, the U.S. Senate approved a budget plan that included some HR-related items. The budget included funds for legislation to allow all U.S. workers to earn paid sick leave, funds to repeal the ACA, reserve funds for providing reasonable accommodations to pregnant workers, and funds for promoting equal pay initiatives. The House and Senate will now work toward a comprehensive budget plan.

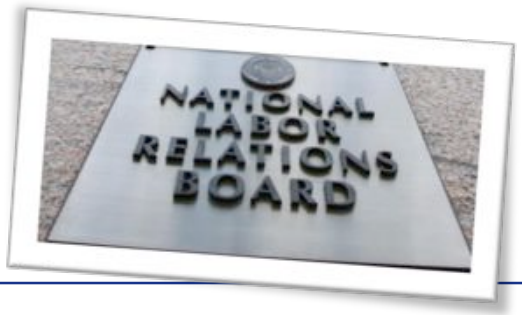
cont.

*(cont'd from Page 1)* In granting the injunction, the U.S. District Court for the Northern District of Texas held that the FMLA's changed regulation would require the states that sued to either violate the Full Faith and Credit Statute and/or violate their own state laws prohibiting the recognition of same-sex marriages from other states. The Court further held that the new definition contradicted the FMLA's original meaning of "spouse" when the act was enacted. For the time being, the original meaning of "spouse" applies in Texas, Louisiana, Arkansas and Nebraska. In every other state, the new definition of "spouse" applies. This all may be moot, though, depending on the U.S. Supreme Court's pending decision regarding same-sex marriage. If the Supreme Court holds that the 14th Amendment requires states to license a marriage between same-sex couples, the preliminary injunction entered by the Northern District of Texas may be rendered moot. Stay tuned…

## NLRB Issues Expansive Memo on Employment Handbooks

The NLRB's General Counsel recently issued a 30-page memorandum in an effort to provide employers guidance regarding various handbook policies that could be prohibiting or restricting employee concerted activity. The information in the memo could fill an entire newsletter all by itself so we won't attempt to summarize here. Furthermore, while the NLRB purported to provide guidance in this memo, employer obligations are still unclear.

We suggest you read the memo in full and consult your attorney with any questions or ask your attorney to update your employee handbook pursuant to the NLRB memo guidelines. We created a client alert that provides more information that we will provide you if you request. The NLRB is cracking down and attempted compliance is always best. The memo is GC 15-04 and can be found at www.nlrb.gov/reports/guidance/general-counsel-memos.



# Simon | Paschal PLLC Happenings

On Wednesday, May 20, 2015, we will be partnering with Staff One, a client of ours, to begin a free year-long educational series for small to mid-size businesses. Joining us will be a commercial banker and a CPA. The year-long series will take place once a quarter for four quarters. Each session will focus on a different topic, including legal compliance, HR compliance, banking/lending issues, and tax/accounting issues. We are very excited about this series and think it will be a huge benefit to businesses. More details will be announced but we hope you mark your calendars for the first part of the series on May 20th!



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