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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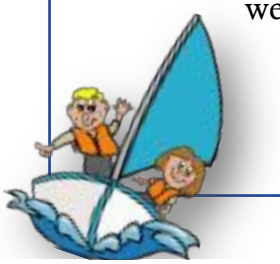
Lesser Known FMLA Rules

Like many employment laws affecting HR and employers today, the FMLA can be complicated and the intricacies and details of the law can be easy to miss. We all know that eligible employees of covered employers are able to take 12 weeks of unpaid leave for various circumstances. But what about those lesser-known rules that we do not see all that often.

We recently received some questions related to a few of these lesser-known rules, so we thought we would share that information here.

The first question we received was whether or not an employer was required to designate FMLA-qualifying leave as FMLA leave when the employee did not want it designated as such. For instance, an employee might come to you and indicate that he or she wants to take a week of vacation to stay at home with his or her newborn child but does not want to utilize FMLA leave because the employee has major back surgery (*cont'd. on Page 3*)



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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

Supreme Court Bans Mandatory Union Fees for Public Sector Workers

On June 27, the Supreme Court held that states and public-sector unions may no longer require workers to pay agency fees. Now, an employee must affirmatively consent to pay.

This decision overturns the 1977 case, *Abood v. Detroit Board of Education*, which held public sector unions could require government employees to pay agency fees. The decision was based on the theory that all employees benefited from the union and the mandatory payment prevented employees from "free riding."

In the June decision, the Supreme Court disagreed with this theory and decided the mandatory payments were a form of "compelled speech" which violated the 1st Amendment. Justice Samuel A. Alito, Jr. rejected the idea that employees who do not support the union are "free riders." Instead, he considered them "captives."

The Court's decision prompted mixed reactions. Republican legislators felt the decision "[was] a victory for free speech and a victory for the American workforce," while Democratic leaders felt it "[was] nothing more than blatant and disgraceful union busting."

Whatever your opinion, if you work for a public sector employer that has a unionized workforce, be aware that your union may no longer require workers to pay union fees.

New FCRA Summary of Consumer Rights Form

As most employers know, pursuant to the Fair Credit Reporting Act (FCRA), any time an employer conducts a third-party background check on any potential employee or current employee, the employer has certain obligations. One such obligation relates to when an employer denies employment based on the results of a background check. In that instance and before the employer takes action, the employer must provide the potential employee or current employee a pre-adverse letter (indicating the background check was conducted and negative results were reported), a copy of the background check report, and "A Summary of Consumer Rights Under the FCRA." The "Summary of Consumer Rights Under the FCRA" must also be included with the adverse action notification letter.

While that information is important, the purpose of this piece is to advise employers of a recent change in this area. As a result of the Economic Growth, Regulatory Relief, and Consumer Protection Act passed by Congress in May 2018, the Consumer Financial Protection Bureau issued an interim final rule that updated the "Summary of Consumer Rights Under the FCRA." The interim final rule was issued on September 12, 2018.

The new "Summary of Consumer Rights Under the FCRA" includes language regarding the new national *(cont'd. on Page 4)*

Client Spotlight

Boss Fight Entertainment is an independent game development studio based in Allen, Texas. Their team has produced some of the industry's best-selling and most critically acclaimed games for mobile, social, PC, and consoles. In addition, their CPO/HR Director, Pamela Daniel, recently was announced as a finalist for DallasHR's HR Executive of the Year (Medium Size Business). We are proud that Boss Fight Entertainment is a client and it has been our pleasure to help them with their legal needs! Learn more about them and their great team at www.bossfightentertainment.com.

(cont'd from Page 1) later in the year and would like to use the full 12 weeks of FMLA leave at that time. Obviously, staying home with a newborn child is FMLA-qualifying leave. So are you as the employer required to designate the week as FMLA leave or can you allow the employee to forgo FMLA leave and save it for later in the year?

The law says that this becomes a matter of company policy. An employer is permitted to have a policy that requires the use of FMLA leave when the employer knows the leave is FMLA-qualifying and the employee complies with the notice and paperwork requirements (whether or not the employee wants it designated as such). The notice and paperwork requirements would arise in the instance of leave to care for a serious medical condition. In the example above, the employer would have all that it needs to apply a policy of mandated FMLA leave. In this instance, however, the employer should be careful about the intersection of the FMLA and ADA. Specifically, if the employer requires the employee to utilize FMLA to care for his or her newborn and, thus, indicates only 11 weeks of FMLA leave remain for the back surgery and recovery, the employer may need to consider an ADA reasonable accommodation if the employee's back surgery and recovery must extend beyond 11 weeks (based on medical need).

In addition to the permitted policy outlined above, an employer also can have a policy that allows an employee to utilize some designated amount of PTO or some other unpaid leave before FMLA leave is designated. The employer can outline in the policy how much or how little PTO or other unpaid leave can be used before FMLA leave is designated. An important note here, however, is that even if the leave is not designated as FMLA leave, the job and benefit protections provided by the FMLA still apply to the employee when he or she is on the FMLA-qualifying leave. In essence, therefore, if an employer chooses this option, it is essentially providing its employees FMLA leave in excess of the 12 weeks mandated by law.

As you see from what is outlined above, it is extremely important that employers have a policy to address this situation. While an employer could still choose either option above without a written policy, the lack of a written policy could result in allegations of inconsistent treatment (i.e., discrimination based on disparate treatment) or FMLA interference.

The next question we received involved the issue of FMLA leave for spouses that work for the same employer. First and foremost, it is important to note that the rules discussed below only apply to "spouses." This includes individuals in legal common law marriages and same-sex individuals who are legally married. It does not apply to domestic partnerships.

Pursuant to FMLA rules and regulations, when spouses work for the same employer, there are limits on the combined amount of leave they can take for some, but not all, FMLA-qualifying leave reasons. The combined limitation applies to (1) the birth of a son or daughter and bonding with the newborn child, (2) the placement of a son or daughter with the employee for adoption or foster care and bonding with the newly-placed child, and (3) the care of a parent with a serious health condition. So this means that for spouses working for the same employer, any leave for the above conditions is limited to 12 weeks combined for both employees. The limitation does not apply to leave for the employee's own serious health condition, the care of a spouse or child with a serious health condition, or any qualifying exigency arising out of the fact that the employee's spouse, child or parent is a military member on covered active duty. Furthermore, the combined limitation does not apply if only one of the employees is FMLA eligible (i.e., the only eligible spouse is entitled to the full 12 weeks of leave no mater the FMLA qualifying condition).

The tricky part can be when an employee has leave that falls into the combined limitation and leave that does not. As an example (taken from the Department of Labor), suppose that two employees are FMLA eligible and are married. After the wife gives birth to their daughter, she uses 6 weeks of FMLA for her own serious health condition and 2 weeks of FMLA leave to bond with her child. If the husband also wishes to utilize FMLA leave to bond with the child, he is limited to 10 weeks of FMLA leave since his wife already utilized 2 weeks of the combined allowable leave.

As you can see, the FMLA can be tricky. It's important to be up to speed and look into every situation that arises to ensure that you are in compliance.

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(cont'd. from Page 2) security freeze. Basically, nationwide consumer reporting agencies must now provide national security freezes free of charge to consumers. The national security freeze restricts prospective lenders from obtaining access to a consumer's credit report, which makes it harder for identity thieves to open accounts in the consumer's name.

While the "Summary of Consumer Rights Under the FCRA" is only a model form and employers are free to create their own, any form created by an employer must be "substantially similar" to the model form. Since the model forms are available online, it is much easier and less risky for employers simply to use the model form.

The new "Summary of Consumer Rights Under the FCRA" form is available at https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09.docx.

If you are using a third party to conduct background checks of your potential and current employees, you should immediately go to the link above, download the new form, and replace your old form. This new form should be used moving forward anytime you deny employment based upon the results of the third-party background check.

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. 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, general policies, and the start of workplace wage and hour issues and policies. In this issue, we continue with our discussion of the exemptions to overtime under the FLSA. As we stated in our last newsletter, the administrative, executive, and professional exemptions have both a salary test and a job-duties test. We previously discussed the salary test so we'll now move into the job-duties test.

Executive Exemption

To satisfy the job-duties test of this exemption, the employee's *primary duty* must be *managing* the enterprise, or managing a customarily recognized department or subdivision of the enterprise, the employee must *customarily and regularly* direct the work of at least two full-time employees (or their equivalent), and the employee must have the authority to hire/fire (or the employee's suggestions regarding hiring/firing are given *particular weight*).

Administrative Exemption

To satisfy the job-duties test of this exemption, the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and the employee's primary duty must include the exercise of discretion and independent judgment with respect to *matters of significance*.

Professional Exemption

This exemption is split into the learned professional and the creative professional. We will focus on the learned professional first. To satisfy the job-duties test of this exemption, the employee's primary duty must be the performance of work requiring advanced knowledge (defined as work that is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment), the employee's advanced knowledge must be in a field of science or learning, and the employee's advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In our next issue, we'll discuss the creative professional exemption and dive deeper into the meanings of the italicized words outlined above. Be sure to check out the next installment of The Employee Life Span in our next quarterly newsletter!

Simon | Paschal PLLC Happenings

We are proud to once again be presenting at the HR Southwest Conference in Fort Worth! HR Southwest is the official State of Texas SHRM conference and it is powered by DallasHR. We will be presenting a total of five times throughout the conference from October 14th through October 17th. If you work in HR, we highly encourage you to register for this conference! If you register, come see one of our presentations or catch us in the conference Marketplace or our hangout during conference, Whiskey & Rye at the Omni Hotel Fort Worth!

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