ATTORNEY WALSH TO PRESENT AT UPCOMING SFSP MILWAUKEE CHAPTER MEMBERSHIP MEETING AND NETWORKING EVENT

Attorney Peter J. Walsh will be presenting at the SFSP Milwaukee Chapter Membership Meeting and Networking event on Tuesday, March 24, 2015.

Mr. Walsh is a member of the Tax and Succession Planning Practice Group and will be presenting on how insurance products, such as life insurance and long term care insurance, can be used in asset protection planning for long term care. He first presented this topic to the Elder Law Section of the Wisconsin Bar in September 2013 and his upcoming presentation will be updated to reflect recent changes in the law.

ATTORNEY LAING SPEAKS AT MARQUETTE UNIVERSITY LAW SCHOOL SEMINAR

On March 6, 2015, Dean Laing spoke at the 2015 Marquette University Law School Civil Litigation and Evidence Conference for attorneys. The topic of his presentation was "Deposition Practice," and included discussion on errata sheets, sequestration, videotape depositions, telephonic depositions and behavior at depositions. The presenters at the Conference included some of the top trial attorneys in Wisconsin.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ASSEMBLY PASSES RIGHT-TO-WORK BILL — GOVERNOR WALKER EXPECTED TO SIGN BILL ON MONDAY

Today, Friday, March 6, 2015, the Wisconsin State Assembly after a marathon session passed right-to-work legislation by a vote of 62 to 35. The State Senate had previously approved the right-to-work legislation by a vote of 17 to 15 the previous week. The votes were cast according to party lines. The fast-tracked bill will be sent to Governor Scott Walker for

signature, which could occur as early as Monday. The bill is aimed at making Wisconsin more attractive to businesses by prohibiting as a condition of employment membership in a labor organization, and, accordingly, provides employees the freedom to choose as to whether they want to pay union dues. Union supporters strongly opposed the bill arguing that the bill harms unions and slows job growth. However, Republican Assembly Speaker Robin Vos said that in Indiana, which passed a similar bill in 2012, unions have not shrunk and jobs have grown.

Once Governor Walker signs the bill, Wisconsin will become the 25th right-to-work state in the country following recent right-to-work legislation passed in Indiana and Michigan. The right-to-work legislation will affect only private-sector workers. The Wisconsin bill would make it a crime punishable by up to nine months in jail to require a worker who is not in a union to pay dues.

Right-to-work is an often misinterpreted concept, as it does not guarantee any right to employment. Under federal labor law, a union that is elected to represent a bargaining unit must represent all workers, even those who have voted against the union. In states that do not have right-to-work laws, all employees in the bargaining unit are required to pay their fair share of union dues for that representation, even if they voted against the union and do not wish to pay union dues. In right-to-work states, however, which Wisconsin will soon be, employees cannot be compelled to pay any union dues or fees in a workplace where an union represents employees through a collective bargaining agreement even though such employees will be covered by the collective bargaining agreement. Wisconsin's right-to-work legislation also makes it unlawful to require any individual to become or remain a member of an union.

Once Governor Walker signs the bill, the new right-to-work law will apply upon the renewal, modification, or extension of any private sector collective bargaining agreement. This means that for collective bargaining agreements currently in place as of the time of enactment of the law, employees would still be required to pay their fair share of union dues and remain members of the union for the remaining term of the agreement. However, for any collective bargaining agreement entered into, renewed or modified after enactment of the legislation, any union security clause requiring employees to be members of the union or any requirement for employees to pay union dues would no longer be enforceable.

EMPLOYMENT LAWSCENE ALERT: THE FMLA,

WFMLA, AND SAME-SEX SPOUSES

On February 25, 2015, the Department of Labor (DOL) issued a Final Rule revising the definition of "spouse" under the FMLA. Currently, a "spouse" is defined as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The Final Rule amends the FMLA definition of "spouse" to include eligible employees in same-sex marriages, even in states that do not recognize same-sex marriages. Importantly, same-sex marriages will be deemed valid based on the place in which the marriage was entered into, instead of the state in which the employee lives or works. Marriages will be valid if they are performed in any state or country that deems the marriage legal. Wisconsin, through a series of recent federal court decisions, recognizes same-sex marriages. Therefore, if an employee in a same-sex marriage was married in a place that legally recognizes same-sex marriages, an employer in any state, even those that do not currently recognize same-sex marriages, must grant that employee FMLA leave for the care of a same-sex spouse if the employee is otherwise eligible for that leave.

The amendment to the meaning of "spouse" under the federal FMLA does not affect the Wisconsin Family Medical Leave Act (WFMLA). The WFMLA is broader in scope than the federal FMLA as it not only recognizes the right of an employee to take a leave of absence for the serious health condition of a "spouse," defined as "an employee's legal husband or wife" (including a same-sex spouse), but also provides leave rights to employees engaged in domestic partnerships. The WFMLA defines "domestic partner" in one of two ways. First, domestic partner can mean two individuals who: (i) are 18 years or older and competent to enter into a contract; (ii) are not married to or in a domestic partnership with anyone else; (iii) are not related by blood in a way that would prohibit marriage; (iv) consider themselves each other's immediate family; (v) agree to be responsible for each other's basic living expenses; and (vi) share a common residence. Second, domestic partners can be those who have signed and filed a declaration of domestic partnership in the office of the registrar of deeds of the county in which they reside. In Wisconsin, domestic partnerships can apply to same-sex couples who are not married as well as to opposite-sex couples who are not married. Therefore, even employees who are not legally married can be eligible for up to two weeks of WFMLA leave if they are part of a domestic partnership recognized under state law.

The new FMLA regulation goes into effect on March 27, 2015 and the WFMLA is already in effect for Wisconsin employers, so employers should review their policies and educate supervisors, managers, and human resources personnel on the Final Rule as well as Wisconsin law so that they can be applied properly.

EMPLOYMENT LAWSCENE ALERT: HOW FMLA LEAVE SHOULD—AND SHOULD NOT—AFFECT YOUR EMPLOYEES' PERFORMANCE EVALUATIONS

Under the Family Medical Leave Act, employers are not permitted to take an employee's FMLA-protected absences into consideration when making employment decisions such as discipline and termination. However, if performance deficiencies are discovered while an employee is on FMLA leave and would have resulted in termination or discipline had the employee not been on leave, the employer is permitted to follow through with the same discipline or termination. Determining which category an employee's performance issues fall into can be very challenging.

For example, in a recent decision out of the United States District Court for the Eastern District of Michigan, the period in which the employee was on FMLA leave factored into the employer's calculation of her achievement of performance goals, which eventually led to her termination. As an Account Executive, the employee was assessed based on her revenue-to-budget figure, which was calculated on a three-month rolling average. Because the employee was on leave for five weeks, the court found that her numbers were affected for not only those specific weeks but also the following five months in which the revenue that could have been generated in those weeks would have shown up as part of her assessment. Because of this, the Court granted summary judgment to the employee finding that "no reasonable juror could conclude that [the employer] did not use [the employee's] FMLA leave as a negative factor in its decision to discipline and then terminate [the employee]."

However, employees who take FMLA are not entitled to greater rights than they would have been if they had been continuously working. "Therefore, if, while the employee is on leave, an employer happens to discover a performance issue or other offense for which the employee would have been disciplined or terminated had he or she been working at the time, the employer is still entitled to terminate or discipline that employee." As the Seventh Circuit Court of Appeals has said "the fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee."

Employers need to be very careful in handling how they discipline and terminate employees who are either taking or have recently taken FMLA leave. If the employee's FMLA leave could affect an objective performance criterion in a negative way, employers need to be cautious of using that criterion to terminate an employee. However, if the employer can show that they would have taken the action independent of the leave and merely discovered the issue while

the employee was on leave, it will have a solid defense to an FMLA claim.

EMPLOYMENT LAWSCENE ALERT: SEVERANCE AGREEMENTS REMAIN IN EEOC'S CROSSHAIRS

In February 2014, the EEOC filed suit in Illinois federal court against CVS Pharmacy, Inc. alleging that the company's separation agreements constituted a pattern or practice of unlawfully discouraging employees from exercising their rights under Title VII of the Civil Rights of 1964 to communicate with the EEOC or to file discrimination claims. The EEOC's complaint stated that CVS had used a five-page, single-spaced separation agreement that included, among other things, a requirement that employees notify CVS if they became part of an administrative investigation, a promise to not disparage the company or its officers, directors, or other employees, a non-disclosure agreement, a release of claims, and a covenant not to sue. Although the agreements contained express language stating that nothing in the agreement was meant to interfere with the employee's right to participate in any legal proceedings or cooperate with an agency's investigation, the EEOC claimed that that language was not sufficient because the non-disparagement and nondisclosure provisions made cooperation impossible.

In April 2014, CVS filed a Motion to Dismiss the EEOC's complaint calling their severance agreements "run-of-the-mill" and stating that they did not violate the law. CVS further argued that the agreements, even if they restricted employees unlawfully, were not a pattern or practice of interfering with employees' rights but merely constitute unenforceable contracts. CVS' Motion to Dismiss was given support by an *amicus* brief filed by the Retail Litigation Center, Inc., which said that the language used by CVS was substantially similar to agreements used by employers nationwide and a ruling for the EEOC could result in the invalidation of agreements far beyond CVS and result in a flood of litigation.

The federal district court judge dismissed the EEOC's suit, however, not on its merit. The EEOC's case was dismissed because the EEOC failed to meet its pre-suit conciliation efforts before bringing the lawsuit. The federal district court found that the EEOC did not engage in any conciliation procedure and, as a result, was not legally authorized to commence suit. The EEOC, in response, acknowledged that it had not engaged in any pre-suit conciliation efforts but argued that it was proceeding under a portion of Title VII that did not require the agency to conciliate.

The EEOC has appealed the district court's decision to the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin. Given that the federal district

court dismissed the case on procedural grounds, it is very unlikely that the Seventh Circuit, on appeal, will address the merits of the EEOC's claim regarding the legality of CVS's severance agreements. If the EEOC is successful with its appeal at the Seventh Circuit, then it would be most likely that the case will be remanded back to the district court for further proceedings.

This leaves the question open of whether the EEOC will stay the course and continue to press its case against CVS or whether it will select another employer as its target in pursuing its claim that "run-of-the-mill" severance agreements violate Title VII in preventing individuals the full enjoyment of rights afforded by Title VII.

Until a decision on the merits is reached on this issue, it is recommended that employers include explicit and express provisions in their severance agreements that make clear (i) that employees are allowed to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws.

ATTORNEY MAGER PRESENTS DURING "UTILIZATION OF MENTAL HEALTH, COUNSELING, AND MEDICAL RECORDS IN FAMILY LAW CASES: A VIEW FROM THE BENCH, THE BAR AND HEALTHCARE PROFESSIONALS"

On February 5, 2015, Gregory S. Mager spoke during Utilization of Mental Health, Counseling, and Medical Records in Family Law Cases: A View from the Bench, the Bar and Healthcare Professionals presented by The Society of Family Lawyers, The Leander Foley Matrimonial Inns of Court, and The Association of Family and Conciliation Courts Wisconsin Chapter. This continuing education program addressed the technical, legal aspect of requests for production of health care records and of complying with records requests, factors in determining admissibility of these records, limitations on use, pros and cons of using these records, standards for mental health professionals regarding records, the effect of litigation on record keeping, the effects of record production/admission on therapeutic relationships,

and alternatives to using these records.

Attorney Mager is a shareholder at O'Neil Cannon who focuses his practice on family law. Contact him at gregory.mager@wilaw.com or 414.291.4726 for your family law needs.

EMPLOYMENT LAWSCENE ALERT: ACCOMMODATING EMPLOYEES UNDER THE ADA — THE EFFORT DOESN'T HAVE TO BE PERFECT, IT JUST HAS TO BE MADE

The Americans with Disabilities Act requires employers to make reasonable accommodations for employees with disabilities. This process requires that employers and employees engage in an interactive process to discuss potential reasonable accommodations. The interactive process requires an informal dialogue between the employer and the employee in which the parties discuss reasonable accommodations for an employee's disabilities. A recent case out of the First Circuit shows that the process does not have to be perfect to be adequate and that both the employee and the employer have to engage in the interactive process in good faith.

In *EEOC v. Kohl's Department Stores, Inc.*, No. 14-1268, the employee suffered from Type I diabetes and claimed that her unpredictable work schedule as a sales associate was aggravating her condition and endangering her health. When the employee supported her request for accommodation with a doctor's note, her supervisor spoke with human resources. When the employee and the supervisor met, the employee requested a consistent schedule, which the supervisor said she could not give her. This was a valid decision by the employer as the accommodation given does not have to be the accommodation the employee specifically requests. Instead of proposing another accommodation or discussing the options, the employee got upset and quit. While the employee was leaving, the supervisor asked that she reconsider her resignation and asked to discuss other potential accommodations. The employee refused and left the premises. A week later, the supervisor again called the employee and requested that she come back to work and they could discuss accommodations. The employee did not accept this offer.

The interactive process requires bilateral cooperation and communication and, because the employee did not cooperate in the process and was responsible for the breakdown of communication, the court found that the employer could not be held liable for failure to provide a reasonable accommodation. The lesson for employers is that their efforts do not

need to be perfect to fulfill their requirements under the Americans with Disabilities Act; employers simply need to engage in the interactive process in good faith, be willing to discuss potential accommodations with the employee, and, if appropriate, provide the employee with a reasonable accommodation, not necessarily the employee's preferred accommodation, that permits the employee to perform his or her job.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS VAN DE KAMP AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Timothy Van de Kamp was recently elected a shareholder of the firm. Mr. Van de Kamp has been with the firm since 2012 and is a member of the Corporate Practice Group. He focuses his practice in Real Estate and Construction Law and Banking and Creditors' Rights.

Mr. Van de Kamp is an active member of the community. He is a member of the Board of Directors for the Iota Court Preservation Association, the Real Estate Alliance for Charity, and NAIOP Commercial Real Estate Development Association.

Learn more about Mr. Van de Kamp by visiting his full profile.

EMPLOYMENT LAWSCENE ALERT: SUCCESSFUL EMPLOYERS RECOGNIZE THE IMPORTANCE OF HAVING WELL-TRAINED SUPERVISORS

Employers in today's society are faced with a variety of workplace challenges, from complying with complex and often confusing employment laws to effectively managing a diverse workforce comprised of individuals from a broad spectrum of society. Let's face it: managing your workforce, making the right employment decisions with regard to hiring, promotions, and terminations; and complying with the numerous, complicated, and sometimes overlapping federal, state, and local employment laws is no easy task. It is even more difficult in these uncertain economic times as employers struggle to maintain their workforce amidst declining revenue and increased costs. The numerous recent changes in employment laws, like the NLRB decisions on union organizing and elections, and proposed changes, such as updates to the FLSA Overtime Exemption, that are certain to take place, will not make things any easier for employers. Successful employers realize that the success of their business to comply

with these numerous and complex challenges is dependent upon well-trained supervisors.

A supervisor has several key roles that are essential to the success of the workplace. One of the most critical roles of the supervisor is to carry forward the mission and the vision of the company. This requires the supervisor to embrace and foster the values of the company and to instill those values in the workforce. A supervisor must also possess the technical skills to support the organization, the management skills to achieve the objectives and goals of the company, and the people skills to effectively lead and communicate with employees to enable them to achieve the goals of their job. Supervisors must also direct employees, instruct them, and ensure that they follow organizational policies and procedures. Moreover, supervisors must make important decisions with regard to hiring, job assignments, job performance and evaluation, promotions, pay increases, accommodations, discipline, and termination, all while complying with a myriad of state and federal laws.

Given these very large and demanding responsibilities, individuals placed in a supervisory position soon begin to realize that they have not been given the skills and tools necessary to handle all the dynamic challenges of the job. Successful employers, however, recognize this shortfall and provide their supervisors either inside or outside training to help these individuals become good and successful supervisors.

What defines a good and successful supervisor? A good supervisor is a leader and a motivator who promotes teamwork, teaches safe and efficient work practices, and consistently communicates and enforces work rules and policies. A good supervisor understands his or her role within your organization and the importance of communicating the vision and mission of the company to employees. A good supervisor also demonstrates a loyalty to the values of your company and values the people that contribute to the success of your organization – your employees! Many employers rightly recognize that it is their employees who represent their most important asset and who, in most cases, make the difference between a successful company and an unsuccessful company. Employers also recognize that the best way to achieve value from their employees is to have good and well-trained supervisors who are committed to maximizing the productivity from each and every employee. Well-motivated employees are more productive than less-motivated employees. This is a simple truism but one that is often neglected by employers. Employees who are not motivated in their jobs have lower morale, lower productivity, and diminished loyalty to the organization. Consequently, employees who are not motivated in their jobs usually become disinterested and unsatisfied in their jobs, which, in turn, leads to increased employee turnover and higher operating costs and lower profit margins for the employer. Supervisors are the individuals who have the most influence and effect upon an employee's motivation.

Well-trained supervisors have the ability to enhance an employee's motivation and the overall morale of your workforce. Well-trained supervisors understand that by (i) treating employees fairly; (ii) valuing and appreciating employees' efforts and contributions to the company; (iii) recognizing their work; and (iv) assigning job tasks that match an employee's skills with the employee's interest in the job will increase employees' motivation and interest in their jobs. A good and productive employee is often times determined by a well-trained supervisor who understands that he or she must be a leader, a communicator, a teacher, and a motivator; sometimes all at the same time. These functions are what define a good supervisor.

Many readers, after reading this article, may think that they don't need to actively train their supervisors as their business is successful or profitable. However, being profitable or successful does not mean that you have good supervisors committed to the values of your company or that your employees are motivated or satisfied in their jobs. Also, giving an individual a "supervisor" job title does not make them automatically equipped to handle the various and demanding responsibilities of the job. To determine the level of your supervisors' understanding of their own role in your company, you should ask each of your supervisors the following three questions:

(1) How do you define your role as a supervisor in our company?

(2) What characteristics or traits do you believe you possess that makes you an effective supervisor?

(3) What is the most important skill you possess as a supervisor?

Depending on their answers, you may want to consider whether providing your supervisors training on the fundamentals of good supervision makes good business sense.