

On Your Radar

Draw on Our Expertise



April / May, 2017

This monthly publication provides a snapshot of what you need to know about developments relating to employee absence management, workplace accommodations, and benefits. Watch for an issue to arrive in your inbox each month!

March and April were quiet-ish months, with not many significant developments of note from the legislatures, EEOC, DOL (nada!) or the courts. But we do have some nuggets of information to share with you.



Legislation

State Legislative Update

In our March 2017 On Your Radar we summarized state legislative activity in the leave and paid benefits arenas. Now, two months later, a total of 22 states have hopped on the bandwagon and have introduced PFL bills as of the end of April. [Read more.](#)

The Power of the EEOC – Looking for Lowe’s Claimants for Settlement!

In May 2016 home improvement giant Lowe’s agreed to pay \$8.6M to affected employees as part of a consent decree entered into with the EEOC in California. The EEOC claims that Lowe’s violated the ADA by terminating employees with a disability after failing to provide them reasonable accommodations. [Read more.](#)

Operator of nursing homes settles EEOC lawsuit alleging pre-employment ADA violations

This case reminds employers that the EEOC is very focused on pre-employment practices. The EEOC sued Magnolia Health Corporation (“MHC”), an operator of nursing homes and assisted living facilities, accusing MHC and its affiliates of violating the ADA. [Read more.](#)

Disability services Company settles EEOC lawsuit for \$100,000

Every employer can make ADA mistakes, even if it is in the disability services business. Unfortunately, ValleyLife, an Arizona corporation which provides services to disabled individuals, failed to live up to its aspirations. [Read More.](#)

Assorted other EEOC Quick-Hits!

Three important EEOC press releases. [Read More.](#)

Walking the Walk – Service Dogs in the Workplace

Ford Motor Company applies sound ADA practices to maneuver through unfamiliar territory. See how they dealt with an employee’s request for a service animal in the workplace – the right way. [Read more.](#)

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Learn about our insights in absence management and workplace accommodations, and how they affect you and your business.



EEOC &
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Court
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Passed Legislation

State Legislative Updates

In our [March 2017 On Your Radar](#) we summarized state legislative activity in the leave and paid benefits arenas. At that time, we reported that in just the first two months of 2017, 11 states had introduced bills for some sort of paid family leave (many of which include proposals for paid disability leave for the employee's own health condition). Now, two months later, a total of 22 states have hopped on the bandwagon and have introduced PFL bills as of the end of April. So here is the list of states that have pending PFL legislation:

Arkansas	New Hampshire
Colorado	Oklahoma
Connecticut	Oregon
Georgia	Rhode Island (expansion)
Hawaii	South Dakota
Illinois	Tennessee
Indiana	Texas
Maine	Vermont
Massachusetts	Washington (funding proposals for law passed in 2007)
Minnesota	Wisconsin
Missouri	
Nevada	

Montana and Virginia also proposed paid family leave bills in 2017 but both have died in their respective state legislatures.

In addition, the District of Columbia Universal Paid Leave passed by the D.C. council earlier this year has passed its congressional review period without changes. That law will phase in starting with payroll contributions in 2019 and benefits in 2020.

And for those waiting with baited breath for developments in New York, the public comment period for the proposed regulations to support the state's paid family leave law has expired. No word on when the state will issue final regulations for the law that is effective January 1, 2018. Matrix and our sister company First Reliance Standard are proactively preparing for this new leave and pay benefit and will be ready to offer insurance and administer the law on its effective date.

Remember, Matrix will keep you posted on all updates via our blog, www.Matrix-Radar.com.

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 EEOC & DOL

The Power of the EEOC – Looking for Lowe’s Claimants for Settlement

In May 2016 home improvement giant Lowe’s agreed to pay \$8,600,000 to affected employees as part of a consent decree entered into with the EEOC in a federal district court in California. The EEOC claims that Lowe’s violated the ADA by terminating employees with a disability after failing to provide them reasonable accommodations when their medical leaves of absence exceeded Lowe’s 180-day (and, subsequently, 240-day) maximum leave policy. You can read details about the case and settlement on our blog post [here](#).

Now the EEOC is reaching out to locate former Lowe’s employees who were terminated as part of the unlawful practice to share in the settlement. This is a good thing. Lowe’s has agreed to the amount of their liability. It is right that the EEOC should use its national reach to help locate worthy participants in the settlement. But of course, it does remind us of the underlying principles at issue:

-  Employers: Do NOT have a policy that sets a fixed limit on how long an employee can be on disability leave before being terminated. Every situation is different and you must always engage in the interactive process with the employee to determine if there is any reasonable accommodation – in the workplace or a bit more leave – that will enable the employee to return to work.
-  And the corollary is, no “100% healed” policies. Again, engage in the interactive process to determine whether the employee can return to work with a workplace accommodation even if the employee still have an impairment or will never recover fully.

https://www.eeoc.gov/eeoc/litigation/lowes_settlement.cfm



Operator of nursing homes settles EEOC lawsuit alleging pre-employment ADA violations

This case reminds employers that the EEOC is very focused on pre-employment practices. The EEOC sued Magnolia Health Corporation (“MHC”), an operator of nursing homes and assisted living facilities, accusing MHC and its affiliates of violating the ADA. The EEOC alleges that, among other things, MHC revoked offers of employment to employees who were subjected to post-offer medical examinations and discharged employees following post-employment examinations (when the employee was already in the job) when the examinations revealed potential restrictions or prior medical conditions. The EEOC further charged that Magnolia required employees be completely free of medical restrictions to work – a big no-no in ADA world.

Employers are cautioned about how they use the information obtained in medical examinations. If those exams reveal conditions potentially requiring accommodation the employer must start the



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interactive process to identify any reasonable accommodation(s) the employee needs to perform the essential functions of the job.

MHC settled the lawsuit and, in addition to paying \$325,000, entered into a two-year consent decree with the EEOC, under which it will be required to maintain a system to track ADA requests and complaints and to hire a consultant to revise MHC's policies on discrimination and provide training.

[EEOC Press Release 3-8-17](#)

Disability services company settles EEOC lawsuit for \$100,000

Every employer can make ADA mistakes, even if it is in the disability services business. Unfortunately, ValleyLife, an Arizona corporation which provides services to disabled individuals, failed to live up to its aspirations: to enable "people with disabilities . . . to live a life with choices, independence and dignity." <http://valleylifeaz.org/>

In a lawsuit filed by the EEOC, the agency accused ValleyLife of violating the ADA by simply terminating people who had exhausted their paid time off and/or any unpaid leave for which they were eligible under the Family Medical Leave Act (FMLA). ValleyLife did not engage in any kind of "back-and-forth dialogue" (a/k/a the interactive process) with the employees to explore whether reasonable accommodations were possible. For example, the EEOC said ValleyLife could have reassigned the employees to other positions, provided additional leave, or provided other kinds of accommodations such as a shift change or assistance with lifting. The EEOC also accused ValleyLife of violating the confidentiality provision of the ADA by commingling medical records with employee personnel files.

In addition to paying a total of \$100,000 to four individuals, ValleyLife entered into a consent decree which requires it to provide companywide ADA training, post notice of ADA rights, revise its policies regarding reasonable accommodation for applicants and employees, and ensure that medical records are properly separated from personnel files.

[EEOC Press Release 3-28-17](#)

Assorted other EEOC Quick-Hits

Zales to pay \$30,000 for failure to allow standing 15 minutes per hour as an accommodation. The EEOC's lawsuit charged that Zales affiliate Piercing Pagoda violated federal law by firing Rose Gravel because of her disability. Gravel has degenerative disc disease and fibromyalgia, which cause chronic pain. According to the EEOC's lawsuit, Gravel told Piercing Pagoda she needed to sit for 15 minutes of each hour as an accommodation for her disability. Piercing Pagoda refused Gravel's request and insisted that she stand her entire work shift. Piercing Pagoda then fired Gravel instead of allowing her the requested accommodation.



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[EEOC Press Release 04-04-2017](#)

Again – remember the interactive process and accommodations during hiring. Flying Star Transport settled an ADA charge by agreeing to pay \$65,000 to a rejected job applicant and consenting to other measures such as training its supervisors. The EEOC alleges that the trucking company refused to hire truck driver Robert Kallgren because he had had his arm amputated during his teenage years. Kallgren had more than 20 years of experience driving trucks when he applied to work for Flying Star. The company made an assessment, without evidence or proof, that there was no accommodation that would allow Kallgren to do the job safely, and failed to engage in an interactive process of exploring that with him.

[EEOC Press Release 04-26-2017](#)

“A shocking reminder of why the Americans With Disabilities Act is such a critical law.” So says the EEOC about a recently settled case against IDEX Corporation, a manufacturer and supplier of fluidics systems. An IDEX regional manager based in Miami who had successfully performed his job was diagnosed with cancer in 2010. The manager continued to perform his job well, even while undergoing treatment, the EEOC said. During the period of his treatment, however, supervisors repeatedly asked the manager invasive questions about his illness and questioned his ability to perform job tasks. Ultimately, IDEX fired the regional manager because of his disability, alleges the EEOC. IDEX agreed to pay \$380,000 in monetary relief to the terminated employee and, among other terms, to create a disability discrimination policy and train all human resources and operations managers on the ADA's prohibition against disability discrimination.

[EEOC Press Release 04-19-2017](#)

Court Opinions – Case Summary

Walking the Walk – Service Dogs in the Workplace

Bradley Arndt v. Ford Motor Company, 2017 WL 1196442 (E.D. Michigan March 29, 2017)



If you've been in a shopping center or an airport lately then you know that the prevalence of service dogs is on the increase (I love those vests!). For employers, however, there are still many challenges in addressing an employee's request for a service dog (or other animal) as an accommodation in the workplace. In the case of *Bradley Arndt v. Ford Motor Company*, Ford applied sound ADA practices to maneuver through unfamiliar territory.

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Bradley Arndt was a Supervisor at Ford's Van Dyke Transmission Plant. He suffers from PTSD following his extensive military service, which included several combat deployments. In February 2013, after about six months of tenure, he approached his then-direct supervisor indicating he was having issues with his PTSD at work, and mentioned bringing his service dog, Cadence, to work (I love that name!). While his supervisor initially expressed enthusiasm for the idea, he became concerned about potential safety and quality issues. Shortly after Bradley mentioned bringing Cadence to work, he emailed an HR representative for Ford and reported that he had missed work due to his PTSD and asked if could bring his service dog to work. The HR rep thanked him for his email and told him she would look into his request.

HR provided Bradley with a Disability Reasonable Accommodation Request form to complete, and he did so, also providing a letter of the functions his service dog could provide to him in the workplace, which he described as sensing when he is having an anxiety attack, calming him down, and keeping people away from him. Bradley indicated that just having the dog nearby "provide[d] a great deal of comfort and security... thus giving me the utmost confidence to perform my job."

Shortly after submitting his request form, Bradley met with the physician at the plant regarding his request. The doctor asked Bradley to provide a release to facilitate communication with the VA personnel treating his PTSD and told Bradley that the doctor would be working with HR to determine whether accommodation could be made, but also noted health and safety concerns with a dog in the manufacturing facility. The very next day, Bradley withdrew his request. Apparently, the doctor mentioned the possibility of a transfer to the Dearborn location. Bradley informed the HR rep that he did not want to go to Dearborn because he understood that the city had a large population of Arabs and that seeing women "walking around in burkas" might trigger his PTSD. He also told HR that he was withdrawing his request because he "didn't want to be a bother." HR told him it wasn't a bother and that they needed to engage in the interactive process. After he insisted on withdrawing the request for accommodation to bring Cadence to work, HR told him to put the withdrawal of his request in writing, which he did on March 15, 2013.

Bradley took medical leaves for his PTSD. Upon his return from a second such leave, on February 21, 2014, he submitted a return to work note from his treating physician indicating he could return to work as of February 20, 2014 "with the presence of a service dog, Cadence." That same day, he completed another Disability Accommodation Request Form asking for a "service dog at work." The form invited him to specify the job functions he was having difficulty performing, as well as limitations his condition posed which interfered with his ability to perform his job. Bradley's answers did not, however, provide that information.

Because the plant had not previously dealt with a request to bring a service dog to work, HR placed Bradley on a "no work available" or "unfit to work" status so that he could continue to receive his fully salary and benefits while Ford looked into his request. On March 4, 2014, HR and Bradley's supervisor met with him to discuss his request. They asked Bradley to identify the aspects of his job he could not perform without his service dog. In this meeting, Bradley insisted that he could perform all of the aspects of his job and that he just needed to have his dog to "alleviate environmental

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factors.” After the meeting, HR wrote a letter to Bradley’s doctor asking clarifying questions, provided the doctor with a job description, and posed very specific questions: which job functions were rendered difficult for Bradley to perform due to his condition, how the requested accommodation helped him perform his job, and whether there were other accommodations that might be offered. On April 4, 2014, Bradley returned the completed information from his physician. The doctor opined that she was unaware of any job functions he couldn’t perform, though she believed that having his service dog under his desk at work might calm him so he could complete his job duties.

HR arranged a second meeting with Bradley to discuss his request to bring his service dog to work. That meeting took place on May 13, 2014. Bradley brought his dog to the meeting. Humes asked him what job functions he felt he could not perform without accommodations. Bradley insisted he had already answered the question several times, placed his Ford badge on the desk and said that if Humes could not give him an answer by the following Monday morning, he was quitting. Bradley filed a lawsuit, accusing Ford of failing to reasonably accommodate his PTSD.

Ford won this lawsuit on summary judgment. In its decision, the court emphasized that Bradley failed to show that having his service dog with him at all times in the manufacturing facility would enable him to perform his job. In addition, the court rejected Bradley’s contention that a three-month interactive process demonstrated that Ford failed to participate in good faith. In doing so, the court acknowledged that Ford had legitimate concerns about Bradley bringing his dog to work and whether doing so would enable him to perform his job and effectively calm him if his PTSD were triggered at work. Ford was able to show that, during that three-month timeframe, they were actively engaged in investigating the possibility of accommodating Bradley’s request, including asking other facilities whether and how they had successfully allowed a service animal accommodation at their plants and walking the plant floor with the safety manager to have her identify any safety or health concerns. Ford also put Bradley on a fully paid leave (which is itself a reasonable accommodation) while they were doing that important research. Ultimately, the court concluded, by quitting instead of continuing the interactive discussion, it was Bradley who was responsible for the breakdown in the interactive process. Because of this, Bradley could not show that Ford failed to engage in the interactive process nor that Ford had violated the Americans with Disabilities Act by not providing his requested accommodation to bring Cadence to work with him.

PINGS FOR EMPLOYERS:

The Arndt case provides a great outline for what employers should do when an employee requests to bring a service animal to work as an ADA accommodation:

- 🐾 **Get information.** When an employee asks for an ADA accommodation, the employer has the right to certain information, including how the employee’s condition limits his ability to perform his essential job functions and how the requested accommodation(s) is going to help him do so.

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- 🐜 Follow the usual ADA process. A service dog is like any other accommodation in this regard – if your employee says he needs to bring his dog to work, you can and should start the interactive process to understand what job functions are impacted by his condition and how the dog will help him perform his job.
- 🐜 Conduct an individualized assessment. It is understandable that an employer’s first reaction to a request for a service dog as an accommodation would be to balk – but it is imperative to conduct an individualized analysis and keep an open mind in the process.
- 🐜 Accommodation must be effective. Like any accommodation, granting the employee the right to bring a service dog to work requires not only that it be reasonable, but that it is effective. This is where Bradley failed in communicating with Ford.
- 🐜 A caveat. Ford and the court seemed to focus on whether the service dog Cadence enabled Bradley to perform any specific essential functions of his position. This was a tall order. Perhaps Bradley could have made an argument that by keeping him calm, Cadence enabled him to perform his job overall by being present and functional. Another court, another time, might have found Bradley’s evidence in this regard sufficient to support a claim of failure to accommodate. Of course, Bradley still had the problem of walking out before the interactive process was complete.
- 🐜 Give it a try. One of the best things an employer can do in the accommodation process is to give the employee’s request a trial. In the case of a service animal, if the presence of the animal causes problems or the accommodation isn’t effective to enable the employee to perform the essential functions of the position, you have tried and you have solid evidence – not just speculation – that the accommodation isn’t effective. Then restart the interactive process to determine whether an alternate accommodation might be reasonable and effective.
- 🐜 Other concerns. Sometimes a service animal in the workplace can create additional problems, such as complaints from other employees with animal allergies, fear of dogs, etc. If the co-worker’s issue is also a disability, you may need to seek a compromise, such as designating restricted areas where the service animal cannot go or providing air purifiers. Also, the employer can establish ground rules – like keeping the dog on a leash, and having the employee be responsible at all times for its care and behavior.

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- 🐞 Count your blessings. Not only that you are able and not in need of a service dog, but that your employee has not requested to bring a service horse to work. Go ahead, Google it!
- 🐞 Ask JAN! For more assistance always remember to work with the Job Accommodation Network at <http://askjan.org/>. JAN is a free, not-for-profit organization that focuses on assisting employees and employers with navigating the ADA – and you can talk with a live person if you call the number on the website.

Matrix's ADA Advantage leave management system and our dedicated ADA accommodation team helps employers maneuver through the accommodation process. We will initiate an ADA claim for your employee, conduct the medical intake if needed, assist in identifying reasonable accommodations, document the process, and more. Contact Matrix at 1-800-866-2301 to learn more about these services.

MATRIX CAN HELP! Questions about how legislative changes or court opinions could impact your business? Want to learn more about our benefits and absence management solutions? Matrix provides leave, disability, and accommodation management services to employers seeking a comprehensive and compliant solution to these complex employer obligations. We monitor the many leave laws being passed around the country, watch the courts and governmental agencies, and specialize in understanding how they work together.

For leave management and accommodation assistance, contact your Account Manager or local Reliance Standard Sales Representative or contact us at ping@matrixcos.com.

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