

On Your Radar

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December, 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!



Legislative
Updates

New York | Paid Family Leave “Notice to Employees” Available

New York has released form PFL-120. This form is required of all employers and must be displayed or posted in plain view where all employees can see it [Read more.](#)

DOL | 90-Day Delay of ERISA Disability Claims Rules Change

The US Department of Labor has announced a 90-day delay (from 1/1/18 to 4/1/18) of the applicability date for ERISA plans to comply with the 2016 “Final Rule” amending the claims procedures for disability claims. We’re ready! [Read more.](#)

EEOC | Another Employer with a “100% Healed” Policy Brought to Heel

A significant judgment against American Airlines and Envoy Air settles a nationwide class disability discrimination lawsuit. [Read more.](#)

EEOC | Consent Decrees

A few ADA Consent decrees and by the way; Don’t mess with a pregnant employees’ rights. [Read more.](#)

EEOC | Strategic Enforcement Plan for FY 2018-2022 Announced

The EEOC is seeking comment on its Strategic Enforcement Plan for the next 5 years. [Read more.](#)



Federal &
State
Agencies

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GET TO KNOW



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READ OUR BLOG

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



New York - Paid Family Leave “Notice to Employees” Now Available

Section 380-7.2.e. of the New York Paid Family Leave law requires employers to post a notice to employees of their rights under the law:

Every covered employer must display or post, and keep posted, a typewritten or printed notice concerning PFL in a form prescribed by the Chair. The notice must be displayed in plain view where all employees and/or applicants can readily see it.

The state has now issued form PFL-120 for employers to use for this purpose. It can be obtained from your designated Account Management representative at our sister company, Reliance Standard Life Insurance Co., or from an employer’s own PFL insurance carrier.



New York

For more information about New York Paid Family Leave, check out our Matrix-Radar blog posts: [October 2017](#), [October 2017](#), [August 2017](#), [July 2017](#), [May 2017](#), [March 2017](#), and [April 2016](#).

Tired of reports on ERISA, NY Paid Family Leave, and all things California? Check out our recent blog posts on other topics:

[The Headless Horseman – An ADA Halloween Tale](#)

[Lucky Employer Skates on ADA Liability](#)

[Pushing Back on the “Inadvertent Leave Law” – Court Rules that a Multi-Month Leave of Absence is not a Reasonable ADA Accommodation](#)

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Federal and State Agencies

DOL – Announces 90-Day Delay of ERISA Disability Claims Rules Change

In late November the U.S. Department of Labor announced a 90-day delay – from January 1 to April 1, 2018 – of the applicability date for ERISA plans to comply with the December 16, 2016, “Final Rule” amending the claims procedure requirements applicable to disability benefits. As explained below, further delay of the applicability date beyond April 1 is not out of the question. The DOL action was published in the Federal Register on November 29, 2017, and can be reviewed [here](#).

According to a [press release](#) issued by the DOL:

. . . [T]he delay of the applicability date announced is intended to give interested stakeholders the opportunity to submit, and for the Department to consider, data and information related to concerns by some insurance industry and employer groups, and some members of Congress, that the claims procedure amendments will drive up disability benefit plan costs, cause an increase in litigation and, in so doing, impair workers’ access to disability insurance benefits.

The delay ruling is the result of a notice published by the DOL in the Federal Register on Oct. 12, 2017, seeking comments on the proposed 90-day delay of the applicability date of the Final Rule. That comment period ended on October 27, and on November 24 the DOL announced its adoption of the delay. Also on October 12 the DOL also asked for comments that “provide data and information germane to a re-examination of the merits of repealing, replacing, modifying, or retaining the rule.” That comment period ended on Dec. 11, 2017.

The 108 public comments in support of and in opposition to the 90-day delay can be reviewed [here](#). Some of the commenter’s expressed concern that a 90-day delay was not sufficient to allow the DOL to review and consider all data and comments submitted regarding whether any changes (other than the delay) should be made to the Final Rule. According to the DOL, however:

. . . [V]arious stakeholders made a commitment to provide such data and information to the Department. . . If the Department receives such supporting data and information, the Department will provide interested stakeholders with a reasonable opportunity for notice and comment on that data and



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information. Only at that point would the Department be in a position to seriously consider any further delay of some or all of the requirements of the Final Rule beyond April 1, 2018.

We will continue to watch for developments regarding this subject. However, it took the DOL over four weeks to determine whether to extend the applicability date for 90 days. Given the more substantive issues now pending regarding the Final Rule and the comment closure date of December 11, it is unlikely that the DOL will make any significant announcements no sooner than late January 2018 at best.

What is Matrix Doing? At Matrix we have been working diligently to prepare for the new rules. Regardless of the outcome of the DOL review, Matrix will be ready to administer our clients' disability plans in compliance with the new regulations by April 1, 2018, or other new effective date. To this end, we have assembled a task force of experts in disability plans, claims handling procedures, ERISA, and customer service. Our practice leaders and account managers will keep clients, producers, and others apprised of our work during the lead-up to the effective date – whatever it is! If you have questions in the meantime, contact your account manager or sales representative, or send us an email at ping@matrixcos.com.

EEOC – Another Employer with a “100% Healed” Policy, Brought to Heel by the EEOC - \$14 Million in Stock Value

American Airlines and Envoy Air will pay \$9.8 million in stock, which is worth over \$14 million if cashed in today, and provide other significant relief to settle a nationwide class disability discrimination lawsuit filed by the EEOC. The EEOC alleges that American and Envoy violated federal law by requiring their employees to have no restrictions before they could return to work following a medical leave – known as a “100% healed” policy. If an employee had restrictions, American and Envoy refused to allow them to return to work and failed to determine if there were reasonable accommodations that would allow the employee to return to work with restrictions.

We have blogged about this type of policy in the past, together with the perils of a policy that sets a maximum amount of leave time an employee can take regardless of circumstances or consideration of an ADA accommodation. In this article, [Lowe's to pay \\$8.6 million in yet another EEOC case involving inflexible leave policies](#), we explained that home improvement retailer Lowe's agreed to pay \$8.6 million to settle a case brought by the EEOC for setting a limit to how long an employee could be out on medical leave. The following chart shows other employers who have entered into pricey consent decrees due to maximum leave or 100% healed policies. American and Envoy now top that list.



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Company	Date	Amount	Policy /Practice in Violation of ADA
American Airlines / Envoy Air	November 2017	\$14 million (stock value)	Requiring employees to be 100% healed before returning to work following medical leave
Lowe's	2016	\$8.6 million	Terminating employees whose need for medical leaves of absence exceeded Lowe's maximum leave policy (180 days, subsequently 240 days)
Pactiv LLC	2015	\$1.7 million	Assessing attendance points for medically-related absences; not allowing use of intermittent leave or extension of a leave of absence as an ADA reasonable accommodation
Princeton HealthCare System	2014	\$1.35 million	Limiting medical leave of absence to maximum of 12 weeks: <ul style="list-style-type: none"> • employees FMLA-eligible terminated after 12 weeks\ • employees not FMLA-eligible terminated after short absence Requiring certification of 100% recovery upon return to work rather than considering return to work with a reasonable ADA accommodation
Dillard's	2012	\$2.0 million	<ul style="list-style-type: none"> • Maximum-leave policy limiting the amount of medical leave an employee could take • Policy requiring all employees to disclose personal and confidential medical information in order to be approved for sick leave
Interstate Distributor Co.	2012	\$4.85 million	<ul style="list-style-type: none"> • Limiting medical leave of absence to maximum of 12 weeks • Requiring certification of 100% recovery upon return to work rather than considering return to work with a reasonable ADA accommodation
Verizon	2011	\$20	Failing to make exceptions to "no fault"



Communications		million	attendance plans for individuals with disabilities as an ADA accommodation
Supervalu, Inc., Jewel Food Stores, Inc. etc.	2011	\$3.2 million	Terminating employees with disabilities who were not 100% recovered at the end of medical leaves of absence rather than considering return to work with a reasonable ADA accommodation
Sears, Roebuck and Co.	2009	\$6.2 million	Terminating employees following exhaustion of workers' compensation leave without engaging in the interactive accommodation process to consider workplace accommodations or leave extension as an accommodation

In addition to the \$9.8 million in stock American and Envoy agreed to pay (\$14 million value if cashed in today), the two-year consent decree, which applies to all American and Envoy employees throughout the country:

-  Includes injunctions against engaging in any future discrimination or retaliation based on disability;
-  Requires the companies to adopt policies that ensure reasonable accommodations are provided to persons with disabilities; and
-  Requires the companies to provide mandatory periodic training on the ADA to employees.

[EEOC Press Release 11-20-2017.](#)

Other EEOC / ADA Consent Decrees

Employee's termination one day after disclosing disability results in \$25,000 liability.

AccentCare, Inc., a home healthcare company headquartered in Dallas, has agreed to pay \$25,000 and provide other significant relief to settle a disability discrimination lawsuit brought by EEOC. The EEOC charged in its suit that AccentCare discriminated against an employee with bipolar disorder. According to the EEOC's suit, an AccentCare IT analyst informed the company that she had bipolar disorder and requested leave in order to see her health care provider. The EEOC further said that upon learning of the employee's disability and receiving her request for leave, AccentCare fired her within one day, without giving proper consideration to her request. In addition to paying \$25,000, AccentCare also agreed



to post a notice about the settlement, and to provide ADA training for employees and training for managers and supervisors of the potential consequences for violations of the ADA. Additionally, AccentCare has agreed to document complaints of disability discrimination and report them to the EEOC.

[EEOC Press Release 12-1-17](#)

Employer's disclosure of employee's EEOC disability charge could constitute adverse employment action and retaliation. Price tag: \$45,000 and more.

Day & Zimmermann NPS, a Philadelphia-headquartered provider of staffing services to the power industry, will pay \$45,000 and furnish extensive injunctive relief to settle a lawsuit alleging retaliation and interference with rights filed by the EEOC. According to the EEOC's suit, an electrician hired by Day & Zimmermann to work during the shutdown of a Waterford, Conn. power plant filed a disability discrimination charge with EEOC under the Americans with Disabilities Act (ADA). After that, the company publicized details of the charge, including the employee's name, union affiliation, and information about the medical restrictions on his ability to work, in a letter to 146 members of his union local. The EEOC's lawsuit was scheduled to go to trial in January 2018 after the court ruled in August that dissemination of the employee's charge could constitute an adverse employment action, and that a jury, could find that "a retaliatory motive played a part" in the company's decision to publicize the employee's charge. The court further held that a reasonable jury could find that the company's letter "could have the effect of interfering with or intimidating the letter's recipients with respect to communicating with the EEOC about possible disability discrimination by DZNPS." The employer has agreed to a consent decree which prohibits future retaliation or interference with ADA-protected rights and prohibits publicizing the identity of individuals who file charges of disability discrimination in the future. In addition, the consent decree provides for revision of company policies, an extended statute of limitations for certain individuals to file ADA claims with the EEOC, and \$45,000 in compensatory damages to the employee who filed the original discrimination charge.

[EEOC Press Release 11-30-2017.](#)

Learn this lesson: Don't mess with pregnant employees' rights. Two more employers have learned the hard way that pregnant employees have greater protections than they realized – or wanted to acknowledge. Apparel company R. Siskind & Company, Inc., will pay \$50,000 and implement revised anti-discrimination policies and procedures to settle a pregnancy



discrimination lawsuit. The EEOC alleged in the action that Siskind Group fired a customer service employee because of her pregnancy, childbirth, and related medical conditions that included the effects of an emergency caesarean section. Although Siskind Group purported to grant the employee maternity leave, when she tried to return to work, she was informed that she no longer had a position for reasons that the EEOC said were pretexts for discrimination.

[EEOC Press Release 11-29-2017.](#)

Similarly, Peninsula Packaging will pay \$45,000 and provide other relief to settle a charge of pregnancy discrimination filed with the EEOC. The employee alleged that a packer required a modification to her job due to her pregnancy, which Peninsula Packaging refused to do. Instead, the company placed the employee on an involuntary leave of absence. Peninsula Packaging agreed to enter into a three-year conciliation agreement with the EEOC and the alleged victim. In addition to the monetary relief, the company agreed to hire an outside equal employment opportunity consultant to develop and conduct effective training for all employees on discrimination with an emphasis on pregnancy discrimination, develop reporting procedures, and assist the company with revising and modifying its current discrimination policies. The EEOC will monitor compliance with this agreement.

[EEOC Press Release 10-31-2017.](#)

EEOC – Announcement of Proposed Strategic Enforcement Plan for FY 2018-2022

On December 8, 2017, the EEOC published a notice eliciting comments on its Strategic Enforcement Plan (“SEP”) for Fiscal Years 2018-2022. In prior SEPs, the EEOC announces its priorities for enforcement- such as systemic practices, pre-employment and religious discrimination. This SEP is significant because it certainly is a different take on the EEOC as an agency.

While the SEP indicates that systemic practices and lawsuits will remain a priority, this SEP sets measurable targets for the EEOC to demonstrate. Namely, that the EEOC needs to focus on negotiating resolutions after a reasonable cause finding and the proposed SEP targets that 80-82% of EEOC resolutions identify “targeted, equitable relief.” This means “customized training for supervisors and employees, development of policies and practices to deter future discrimination and external monitoring of employer actions.” The other measurable targets include for the EEOC to “favorably resolve at least 90% of the agency’s enforcement lawsuits.” Could this mean that the EEOC will be more circumspect in its use

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of litigation to meet this very high rate of “success?”

The SEP also requires the EEOC to “maintain data and report annually on the overall number of systemic cases filed in the FY, the percentage of cases filed in the FY that are systemic cases on the agency’s overall docket, the number of ongoing systemic investigations by bases; and the percentage of all pending investigations that are systemic investigations.” The other priority of the SEP that will be of interest to employers is that the agency will spend 2018 prioritizing the EEOC guidance and training that needs to be updated, with the goal of updating at least 2 guidance or resource materials annually starting in 2019.

The other priorities identified in the SEP are focused on the EEOC targeting federal agencies for compliance, cleaning its own house by establishing its own internal quality measures, and use of technology and social media to improve its outreach and education to underserved communities (new immigrants and youth) and small and new businesses.

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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