

# On Your Radar

## Draw on Our Expertise



September 2016

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!



Passed

### [ILLINOIS] | Illinois Passes Child Bereavement Act

Illinois has passed a law to provide 10 work days of job-protected bereavement leave upon the death of an employee's child. The employee must complete the leave within 60 days of notice of the child's death. [Read more.](#)

### [ILLINOIS] | Illinois Employee Sick Leave Act

Effective January 1, 2017, Employers who provide sick leave benefits are required to allow employees to use their personal sick leave benefits for absences as a result of illness, injury, or medical appointments of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent or stepparent. [Read more.](#)

### [COLORADO] | Colorado Pregnant Workers Fairness Act

On June 1, 2016, Colorado amended its Anti-Discrimination Act to expand protections for pregnant employees. The Colorado Department of Regulatory Affairs issued a proposed Form of Notice employers can use to meet the notice requirements. [Read more.](#)



Pending

### [CALIFORNIA] | Notice of Rights for Possible Victims of Domestic Violence, Sexual Assault, or Stalking

Existing California Labor Code §230.1 provides for victims of domestic violence, sexual assault or stalking to take job-protected leave to, among other things, seek treatment or obtain a restraining order. [Read more.](#)

### [CALIFORNIA] | New Parent Leave Act

Currently pending CA SB 654 would expand the California Family Rights Act to require employers with 20 or more employees to provide up to 6 weeks of parental leave to bond with a new child. [Read more.](#)



Federal &  
State  
Agencies

### [EEOC] | EEOC Class Action Lawsuit Challenging Inflexible Attendance Policy

The EEOC recently filed a class action lawsuit accusing Wayne Farms, a large poultry producer with locations in the Southeast, of violating the ADA in administration of its attendance policy. [Read more.](#)

### [EEOC] | EEOC Lawsuit for Failure to Provide Employee with Light Duty

The EEOC has filed a lawsuit against a Chicago-area bakery on behalf of an employee, accusing it of multiple violations of the ADA. [Read more.](#)



Court  
Opinions

### [11<sup>TH</sup> CIRCUIT] | Overtime as an Essential Function of Position - Auto Assembly Plant Prevails on Summary Judgment

In *Agee v. Mercedes Benz* (11<sup>th</sup> Cir. 2016; NSOP) (available [here](#)), the court upheld summary judgment for the employer on the employee's ADA claim because it established that overtime was an essential function of the employee's position. [Read more.](#)

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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.

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## Passed Legislation

### Illinois

#### Illinois passes Child Bereavement Act

Illinois has passed a law to provide 2 weeks (10 work days) of job-protected bereavement leave upon the death of an employee's child. The employee must complete the leave within 60 days of notice of the child's death. Illinois Child Bereavement Leave may be used to: attend a funeral (or funeral alternative) of the child; make arrangements necessitated by the child's death; or grieve the death of the child. In the event of the death of more than one child in a 12-month leave year, the employee may take up to 6 weeks of bereavement leave.

Time off under the Child Bereavement Act does not count toward an employee's FMLA usage because it is not an FMLA covered leave reason. However, the Act specifies that an employer is not required to provide more unpaid leave per 12 months than is provided by the FMLA. This means that if an employee has already used 12 weeks of FMLA in a leave year, the employee will not thereafter be able to take bereavement leave under the Act. On the other hand, if an employee first takes time off under the Child Bereavement Act, the employee will still have his/her full 12 weeks of FMLA (less any time previously used in the leave year) because the bereavement leave cannot reduce an employee's FMLA leave entitlement. To read more about the Illinois Child Bereavement Act, please visit our blog, [www.matrix-radar.com](http://www.matrix-radar.com), or click [here](#).

### Illinois

#### Illinois Employee Sick Leave Act

Illinois has expanded its Employee Sick Leave Act. Effective January 1, 2017, Illinois employers who provide sick leave benefits to their employees are required to allow employees to use their personal sick leave benefits for absences as a result of illness, injury or medical appointments of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent or stepparent. This act does not create an employer obligation to provide sick leave, paid or unpaid; rather, it applies only to employers' voluntary sick leave policies. The act also does not extend an employee's FMLA leave entitlement of 12 weeks in a leave year; if the employee is eligible and the FMLA is applicable to the leave reason, FMLA will run concurrently with the employee's usage of his/her employer-provided sick leave.

Employers have the option to limit an employee's use of sick leave for a family member to one-half of the employee's annual entitlement. This law also protects employees who exercise, or attempt to exercise, their rights under the Act from retaliation or other adverse employment action and allows any employee alleging a violation or interference to file a claim with the Illinois Department of Labor. You can read Public Act 099-0841 [here](#).

### Colorado

#### Colorado Pregnant Workers Fairness Act

On June 1, 2016, Colorado amended its Anti-Discrimination Act to expanded protections for pregnant employees. The expanded law includes a requirement for employers to provide notice of employee's rights under the Act, but did not include a proposed form of Notice. Recently, the Colorado Department of Regulatory Affairs issued a proposed Form of Notice employers can use to meet the notice requirements. This notice is required to be provided to new employees at the start of their employment and to current employees within 120 days of the law's effective date, August 1, 2016 (i.e. on or before November 28, 2016). The notice can be obtained here: <https://drive.google.com/file/d/0ByJYmAdla2F8UDIQQnhrV2VyR0k/view>

The law requires employers to provide reasonable accommodations to employees who have health conditions related to pregnancy or physical recovery from childbirth. The Act provides list of accommodations for the employer to consider, including more frequent or longer breaks, modified work schedules, or temporary transfer to an available, less strenuous or hazardous position.

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## Pending Legislation

California

### **New Parent Leave Act**

Currently pending CA SB 654 would expand the California Family Rights Act to require employers with 20 or more employees to provide up to 6 weeks of parental leave to bond with a new child. Current law requires employers with 50 or more employees to provide up to 12 weeks of family and/or medical leave. Employee eligibility for the new leave mirrors CFRA and the federal FMLA (1250 hours worked in past 12 months, and 12 months of service). The leave must be taken within one year of the child's birth, adoption, or foster care placement. In addition, the bill would require an employer to maintain and pay for coverage under a group health plan for an employee who takes such leave. As of this writing, the bill has passed both chambers of the California legislature. If signed by the governor, this law will go into effect on January 1, 2018. The bill can be found [here](#).

California

### **Notice of Rights for Possible Victims of Domestic Violence, Sexual Assault, or Stalking**

Existing California Labor Code §230.1 provides for victims of domestic violence, sexual assault, or stalking to take job-protected leave to, among other things, seek treatment or participate in court proceedings to obtain a restraining order. Currently, the law does not require employers to provide notices to employees; however, pending AB2337 would require employers to inform each employee of his or her rights as a possible victim of domestic violence, sexual assault, or stalking, by providing that information in writing to new employees upon hire, and to other employees on request. The bill would also require the Labor Commissioner by July 1, 2017, to provide a notice of rights form for employer use. As of this writing, the bill has passed both chambers of the California legislature and is awaiting the governor's signature. If signed, the law will become effective once the Labor Commissioner posts the form on the commissioner's Internet website. [Here](#) is the proposed bill, including the existing text of Labor Code §230.1.

## Federal and State Agencies



### **EEOC Class Action Lawsuit Challenging Inflexible Attendance Policy**

The EEOC recently filed a class action lawsuit accusing Wayne Farms, a large poultry producer with locations in the Southeast, of violating the ADA in administration of its attendance policy. In its lawsuit, the EEOC claims that employees were discharged for reaching the maximum number of allowable absences under the attendance policy despite providing medical information to support that the employee had an ADA-qualifying condition. In addition to seeking monetary, including punitive, damages, the EEOC seeks an injunction barring the company "from applying its attendance policy to disabled employees who require additional medical leave as a reasonable accommodation."



**Pings for Employers:** Matrix has previously reported on high-dollar consent decrees entered into between the EEOC and companies with inflexible leave or 100% healed policies – both of which can violate the Americans with Disabilities Act because, when strictly applied, they preclude the individualized assessment of a worker and his/her need for accommodation. Consequences can include large damages awards (ask Lowe's about that \$8.6 million), EEOC oversight, employee and manager training, and much more. Check out our Matrix-Radar.com blog posts [here](#) and [here](#).

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## Federal and State Agencies (continued)



### EEOC Lawsuit for Failure to Provide Employee with Light Duty

The EEOC has filed a lawsuit against a Chicago-area bakery on behalf of an employee, accusing it of multiple violations of the ADA. The employee developed a spinal condition as a result of a non-work-related injury, for which she took leave to have surgery. While recovering, she sought to return to work with restrictions, but was told that light duty positions were for employees with work-related injuries only and placed on a leave. The company's maximum leave policy was 180 days; she was released to full duty 30 days thereafter and sought to be re-hired, but was denied re-employment.



**Pings for Employers:** If you provide a work place accommodation such as light duty to some employees, be wary of denying the same accommodation to another disabled employee. The use of the accommodation in some situations will undermine any argument that it is unreasonable or creates an undue hardship when requested by another employee protected by the ADA.

## California Department of Fair Employment and Housing

### New California Resource for Interactive Accommodation Process

The California Department of Fair Employment and Housing (DFEH) have announced its release of a new Request for Reasonable Accommodation form to assist employers in complying with the disability protections of the Fair Employment and Housing Act (FEHA). The Act requires employers of 5 or more employees to provide reasonable accommodation for individuals with a physical or mental disability to apply for jobs and to perform the essential functions of their jobs unless it would cause an undue hardship.

As we well know by now, employers must initiate an "interactive process" when an applicant or employee requests a reasonable accommodation under the ADA or FEHA. The Request for Reasonable Accommodation package was designed to assist employers and employees in engaging in the interactive process in California. According to the DFEH, employers are not required to use these or any other forms to make a request for a reasonable accommodation or to engage in an effective, good faith interactive process. Moreover, the use of the forms does not insulate a user from liability or create a presumption that discrimination did not occur. However, they may be a useful tool for both employers and employees.

[Click here](#) to view the sample Request for Reasonable Accommodation package.

Other resources to help identify whether accommodation is possible include:

Job Accommodation Network: <https://askjan.org>

California Department of Rehabilitation: <http://www.dor.ca.gov/DisabilityAccessInfo/index.html>



### Overtime as an Essential Function of Position - Auto Assembly Plant Prevails on Summary Judgment

In *Agee v. Mercedes Benz* (11<sup>th</sup> Cir. 2016; NSOP) (available [here](#)), the court upheld summary judgment for the employer because it established that overtime was an essential function of the employee's position. Agee worked as a team member in an automobile assembly plant. She brought in a doctor's note stating that due to her medical conditions she could not work more than 40 hours per week. The employer asserted it could not accommodate this restriction on a permanent basis and argued that overtime was an essential function of the position. The court agreed that overtime was an essential function based on the following facts:

- The job description stated the job required (1) flexibility in moving between different job assignments and work schedules, and (2) being assigned different work situations as production or other needs require. [Note that mandatory overtime was not listed specifically in the job description.]
- The job application form completed by Agee stated business needs may require overtime.
- Each team member (Agee's position) worked an average of 3 hours of overtime per week, or 156 hours per year.
- The need to maintain production on various assembly lines, which caused employees to work overtime even if their own line was not experiencing difficulties. [The need for overtime was unpredictable and was needed when a new assembly line started production; a line fell behind or broke down, or simply due to production demands.]

11<sup>th</sup> Circuit



**Pings for Employers:** Whether mandatory overtime is an essential function of a position must be analyzed on a case-by-case basis. The employer's judgment and scheduling practices are important, but can be well-supported by pre-existing job descriptions or information in job ads or applications that identify the overtime or schedule flexibility requirements of the position.

**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](mailto:ping@matrixcos.com).**

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