

# On Your Radar

Draw on Our Expertise



August, 2016

Welcome to our new format. We hope you find this format easy to use and the information useful. *On Your Radar* is a monthly publication intended to provide 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!

And don't forget, for even more updates – delivered right to your inbox – sign up for our blog at [matrix-radar.com](http://matrix-radar.com).

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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.](#)



Passed

### New Paid Sick Leave Laws

With the dog days of summer upon us and legislatures packing it in until the next legislative session, we thought it was a good time to recap significant leave laws that passed in 2016, starting with paid sick leave.

[Read more.](#)

### New & Expanded Paid Family Leave Laws

Paid Parental leave is the law in NY and San Francisco. [Read more.](#)

### Other Leave Law Developments

Two states recently enacted measures for additional employee protections in their leave laws. Minnesota passed an organ and bone marrow donor law, and Illinois passed a child bereavement leave law.

[Read more.](#)



EEOC &  
DOL

### EEOC Sues *Rooms to Go* For Pregnancy Discrimination

On July 11, 2016, the EEOC filed a lawsuit against the operator and owner of a chain of Rooms to Go furniture stores, alleging violations of the Pregnancy Discrimination Act on behalf of a former employee.

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This is a story of how one employer who had evidence of possible FMLA abuse had the right idea but missed one crucial step. The result? On to a jury trial (or settlement). [Read more.](#)

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## Passed Legislation

### New Paid Sick Leave Laws – 2016 Recap

2016 saw an explosion in paid sick leave laws. Here's a quick recap of laws and city ordinances passed so far in 2016, presented in order of effective date.

#### **Oregon – Statewide Paid Sick Effective January 1, 2016**

The Oregon state-wide sick leave law is in effect as of January 1, 2016. Under provisions of the law, employees earn one hour of sick time for every 30 hours worked, and may accrue up to forty 40 hours per year. Employers with fewer than 10 employees may provide unpaid sick time. As the new law provides limited exceptions and provides special nuances related to the City of Portland, employers operating in Oregon in any capacity would be wise to review the provisions of the new legislation.

Provisions of the new law can be found at: <http://gov.oregonlive.com/bill/2015/SB454/>

#### **Tacoma, Washington – Paid Sick Leave Effective February 1, 2016**

Effective February 1, 2016, all full-time, part-time and temporary employees working in Tacoma must receive 1 hour of paid sick leave for every 40 hours of work. Employees may earn up to 24 hours of sick leave per year, with carry-forward provisions that permit the use of up to 40 hours in a given year. Additional information regarding the Tacoma ordinance can be found at: <http://cms.cityoftacoma.org/finance/paid-leave/tacoma-paid-leave-rules-and-regulations.pdf>

#### **Elizabeth, New Jersey – Paid Sick Leave Effective March 2, 2016**

Elizabeth employers must comply with Paid Sick Leave Ordinance 4617, which will go into effect March 2, 2016. As a result, private sector employers with ten or more employees must provide up to 40 hours of paid sick leave per year, while smaller private-sector employers may provide up to 24 hours of paid sick leave. Employees will earn one hour of paid sick leave for every 30 hours worked. To review the Jersey City Ordinance:

[http://www.cityofjerseycity.com/uploadedFiles/Public\\_Notices/Agenda/City\\_Council\\_Agenda/2015/2015\\_Ordinance\\_2nd\\_Reading/Agenda%20Document\(19\).pdf](http://www.cityofjerseycity.com/uploadedFiles/Public_Notices/Agenda/City_Council_Agenda/2015/2015_Ordinance_2nd_Reading/Agenda%20Document(19).pdf)

#### **Santa Monica California – Paid Sick Leave Effective July 1, 2016**

The Santa Monica City Council has previously adopted a minimum wage and paid sick leave ordinance that is scheduled to go into effect July 1, 2016. Employees will earn one (1) hour of paid sick leave for every thirty (30) hours of work.

Employers with 25 or fewer employees will provide up to 40 hours of paid sick leave, while employers with more than 25 employees may be required to provide up to 72 hours of leave. Employees may begin using accrued leave 90 days after the start of employment. The ordinance can be found at: <http://www.employmentlawworldview.com/files/2016/03/a-law.pdf>

#### **Vermont – Paid Sick Leave Effective January 1, 2017**

Vermont Governor Peter Shumlin has signed the bill requiring paid sick leave, making Vermont the fifth state to pass such legislation. The law will impact all private employers, and cover employees working 18 hours or more per week. The phase-in period of the law for employers with five or more employees in Vermont will begin on January 1, 2017. For Vermont employers with 5 or fewer employees, the phase-in period will begin on January 1, 2018. Employers will initially be required to provide up to 24 hours of paid sick leave per year, but the amount of paid sick leave will increase to 40



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hours beginning January 1, 2019.

The law can be found at <http://legislature.vermont.gov/assets/Documents/2016/Docs/BILLS/H-0187/H-0187%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf>

## Minneapolis – Paid Sick and Safe Time Effective July 1, 2017

Effective July 1, 2017, employees working in Minneapolis will earn one hour of paid sick leave for every thirty hours of work. Employees will accrue up to 48 hours annually, and may carry over a maximum of 80 hours. Minneapolis Paid Sick Leave may be used when the worker or a family member is sick; for physical and mental illnesses or injuries; and for medical appointments. In cases of domestic abuse, sexual assault or stalking, time could be taken for treatment, counseling, relocation or legal proceedings.

The ordinance can be found at: <http://www.govdocs.com/minneapolis-st-paul-paid-sick-leave-ordinances/>.

## Chicago – Paid Sick Leave Effective July 1, 2017

Under the Chicago Paid Sick Leave law effective July 1, 2017, employees will accrue one hour of sick leave for every 40 hours worked, beginning on the later of July 1, 2017, or their first calendar day of employment after July 1, 2017. Employees may earn up to 40 hours in a 12-month accrual period (the accrual period starts with the date the employee starts to earn paid sick leave, i.e. from and after their first 40 hours of work). At the end of the employee's 12-month accrual period, he or she can carry over up any unused, accrued leave, up to 20 hours. For employers subject to the FMLA, their employees may carryover up to 40 hours to the following 12-month period. Chicago employees can begin to use their paid leave after 180 days of employment. The employer can require that leave be taken in a "reasonable minimum increment."

Permissible purposes for Chicago employees to use their paid leave include for their own or a family member's illness, injury, treatment, diagnostic or preventive care; if the employee or a family member is a victim of domestic violence or a sex offense; or if a public official closes the employee's place of business (or the employee's child's school) due to a public health emergency. The term "family member" is very broadly defined by the ordinance. The Chicago Paid Sick Leave ordinance in detail can be found at <http://library.amlegal.com/nxt/gateway.dll/Illinois/chic>.

In addition, **Seattle** and **Puerto Rico** expanded their existing paid sick leave laws in 2016. More information is available at <http://www.seattle.gov/laborstandards/paid-sick-and-safe-time> and <http://www.natlawreview.com/article/governor-puerto-rico-signs-bill-to-expand-paid-sick-leave-use>.

Matrix keeps up with state or municipal paid sick leave laws so that we are in the know about all things leave related, but we do not administer these programs.

## Paid Family and Parental Leaves – 2016 Recap

Paid family leave laws were passed in 2016 in New York state and San Francisco, and expanded in California. Summaries are provided below. For more information on each of these laws, please read our blog post available [here](#).

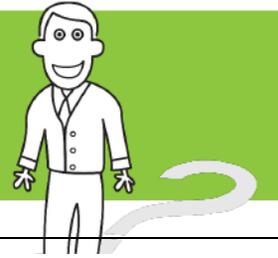
**New York.** Effective January 1, 2018, the New York paid family leave can be taken for bonding with a new child and to care for an ailing family member. This law was passed as part of the state's 2016 budget and is another benefit available in addition to the state's worker's compensation and employee disability pay benefits.

The New York paid family leave law is one of the most progressive proposed or passed, providing up to 12 weeks of job-protected paid family leave after a phase-in period. The law dovetails to a large extent with leave rights under the federal Family and Medical Leave Act but in some regards will provide more leave rights, which might result in greater leave time



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in a 12-month period than the 12 weeks provided separately by each law.

**Example:** NY PFL will be available to care for a domestic partner, grandchild, or grandparent, which are not covered relationships for leave under the FMLA. A New York employee who takes leave to care for one of these family members would still have his or her full entitlement to 12 weeks of unpaid, job-protected leave for a different family member or for another leave reason under the FMLA.

**California.** On April 11 California Governor Jerry Brown signed a law increasing the pay benefit available to California employees for family leave from 55% to 60%, and as high as 70% for a new classification of low-income workers. Effective January 1, 2018, the law also eliminates the current 7-day waiting period currently imposed prior to an employee's eligibility to receive benefits. California's PFL program is funded by worker contributions and is administered by the state's Employment Development Department, which also administers the state's short term disability benefits. Reports indicate that EDD has enough in savings from workers' contributions to cover the additional benefits that will commence in 2018.

Other material aspects of the existing CA PFL remain unchanged at this point.

**San Francisco.** San Francisco recently took paid family leave benefits to a new level, providing an increase in salary replacement benefits to eligible San Francisco employees who take leave for a newborn or newly adopted or foster child (San Francisco Paid Parental Leave – SF PPL). Unlike the state programs in California, New York, and Rhode Island, the new San Francisco ordinance does not cover leave taken to care for an ill or injured family member.

As summarized above, California already has paid family leave benefits (CA PFL), under which employees can receive up to 55% of their wages for six weeks for this bonding time. This amount will increase to 60-70% as of January 1, 2018. The San Francisco ordinance will enable eligible employees to receive full 100% salary replacement during such leave. The new ordinance goes into effect on January 1, 2017.

The San Francisco ordinance has some provisions that provide additional rights to California employees. For example, the leave is job protected under the San Francisco ordinance, but not under the CA PFL leave program.

Matrix will be ready on January 1, 2017, to administer this new law for affected employers. Contact your Account Manager or ping us at [ping@matrixcos.com](mailto:ping@matrixcos.com) for more information.

## Other Leave Law Developments

In addition to the spate of paid sick leave and paid family leave laws, two state legislatures enacted measures for additional employee leave of absence protections. Here's a summary of these significant developments:

- **Wisconsin Donor Leave.** Wisconsin passed a Bone Marrow and Organ Donor Leave Law, joining 10 other states which have protections and leave provisions for donors. To read more about these donor laws, please read our blog post by clicking [here](#).
- **Illinois Child Bereavement Leave.** Illinois passed a law providing leave for employees in the event of the death of a child. Details are available on our blog post [here](#).



WI & IL

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## EEOC & DOL

### EEOC Sues *Rooms to Go* For Pregnancy Discrimination



On July 11, 2016, the EEOC filed a lawsuit against the operator and owner of a chain of Rooms to Go furniture stores, alleging violations of the Pregnancy Discrimination Act on behalf of a former employee. The employee claimed that, 2 days after she was hired as an apprentice in its furniture repair shop, she informed a supervisor that she was pregnant and subsequent to doing so, was confronted by that supervisor and two other high-level managers to confirm her pregnancy. After she did so, she claims that she was told that she could no longer work there because she would be exposed to certain chemicals, the label of which had a warning about risk of harm to an unborn child.

**Notes for employers:** EEOC lawsuits carry the possibility of consequences greater than a suit filed by the individual employee. Potential remedies for the employee are the same – possible reinstatement, monetary damages that can easily equal 3 years of the employee’s salary and benefits, and punitive damages. But when the EEOC is involved, terms of a settlement can also include the agency’s oversight of the company for 2-5 years, reporting requirements, employee and manager training obligations, and more.

### EEOC Sues McDonald’s Franchise For Disability Discrimination



On July 5<sup>th</sup>, the EEOC filed a lawsuit against a McDonald’s franchise in Arkansas, alleging that the company fired an employee after learning that he was HIV-positive. The lawsuit also claims McDonald’s violated the ADA’s limitations on the scope of permissible medical inquiries by requiring employees to report use of prescription medication.

### Light Summer Reading From The Department Of Labor



Back in April the U.S. Department of Labor unveiled its new *Employer’s Guide to the Family and Medical Leave Act*. (Our report is [here](#).) The *Guide* was released to coincide with the annual FMLA/ADA Employer Compliance Conference hosted by Disability Management Employer Coalition in Pittsburgh. Helen Applewhaite, FMLA Branch Chief for the DOL, announced the *Guide* to attendees in opening remarks. Then Ms. Applewhaite and I co-presented on some tough FMLA issues (2<sup>nd</sup>/3<sup>rd</sup> opinions, anyone?), and presented parts of the *Guide* as a resource for employers.



Now the DOL has released a blog post, “[What Employers Need to Know About the Family and Medical Leave Act](#),” more formally introducing the *Employer’s Guide* to the rest of the employer community. The post has a short introductory video and a link to download or order copies of the *Guide*. It also has links to the Matrix blog post and my friend Jeff Nowak’s blog announcing the introduction of the *Employer’s Guide* at the DMEC conference. Thanks to the DOL for the nod!

If you haven’t yet reviewed the *Employer’s Guide*, you should. It doesn’t answer all the difficult FMLA questions we encounter, but it does provide an easy-to-read, non-legal resource for employers.

While you’re at it, also take a look at the [Family and Medical Leave Act Employee Guide](#). This concise booklet can serve as a great training and reference tool for your employees. What do I like about it? The *Employee Guide* doesn’t just explain employee leave rights under the FMLA; it also advises employees of their obligations if they want to benefit from FMLA leave. FMLA is a two-way street, with both parties – employer and employee – having rights *and* obligations. Happy beach reading!

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## Court Opinions

### FMLA Abuse – Honest Belief Defense: How To Do It Right

This is a story of how one employer who had evidence of possible FMLA abuse had the right idea but missed one crucial step. The result? On to a jury trial (or settlement).

Tammy Poitras was employed by Connecticare, Inc., in customer service. She suffered from a degenerative disc disease and spinal stenosis, chronic conditions that her physician indicated would limit her ability to sit or stand for long periods of time during painful flare-ups. She periodically requested, and was granted, intermittent FMLA leave. In April 2014, she requested continuous FMLA leave until May 6, 2014, supported by a certification from her physician that she was “unable to stay in a sitting position or stand” and that the frequency of her pain had increased from three to six episodes per week. This leave was granted and, she also applied for and received STD benefits paid for by her employer. On May 2, 2014, Ms. Poitras attended an event at a steakhouse and saloon and posted pictures of herself on Facebook dancing, raising her arms, clapping and drinking at least 2 beers. Colleagues at Connecticare saw these postings and shared them with supervisors. These postings caused many managers and employees to express concern and outrage that Ms. Poitras claimed to need leave, yet was able to dance, particularly because her absence required them to work additional hours. As a result, Connecticare launched an investigation into these activities and of the claim that, while on leave, Ms. Poitras had driven to the office to deliver Avon products she had sold to Connecticare employees.

On May 7, 2014, Ms. Poitras was suspended and, two days later, was asked to come to Connecticare to meet with her manager and HR. At that meeting, which Ms. Poitras recorded, she was confronted with the Facebook video postings of her dancing and drinking beer while she was out on leave, and asked to explain. She immediately voiced her disagreement with the apparent conclusion the company drew that, if she could drink beer and dance, she could work. Nevertheless, concluding that she had fraudulently obtained FMLA leave, her employment was terminated.

In this decision, the court denied summary judgment for the employer on Ms. Poitras’ claims of FMLA interference (for failing to reinstate her upon her return from leave) and for FMLA retaliation. In doing so, the court focused on whether the employer had a “good faith belief defense,” which justifies an employer’s employment actions taken due to an honest or good faith belief that an employee fraudulently used FMLA leave. To do so, the employer must conduct some inquiry into the employee’s medical condition and specifically, whether the employee’s activities are truly inconsistent with her condition and limitations. In this instance, Connecticare hadn’t adequately conducted such an inquiry. Although they talked with Ms. Poitras – usually the best first step – they drew their own conclusions from the Facebook postings, despite Ms. Poitras’s denial that one evening out was inconsistent with her condition, without further inquiry or investigation. So now, Connecticare is headed for a potentially costly jury trial or settlement on these FMLA claims.

The case is *Poitras v. Connecticare, Inc.*, 2016 WL 3643713 (D. Conn. June 30, 2016).

#### **Pings for Employers:**

**Talk to the employee.** A critical first step when FMLA abuse is suspected is to discuss the situation with the employee. There could be a reasonable explanation for the questionable activity during leave. Courts and the



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DOL will expect the employer to give the employee a fair chance to explain. Often this will resolve the situation one way or another, with a good explanation or an admission by the employee.

**Ask for recertification.** An important next step in a situation like the one faced by Connecticare is further inquiry or investigation. The FMLA allows an employer to request recertification in the event that “[t]he employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification.” 29 CFR §825.308(c)(3). In the recertification request, tell the health care provider the information you have and ask whether the employee’s activities are medically consistent with the employee’s condition and the limitations posed by the condition. In this case, the employer could even send the dancing and beer-drinking video to the provider. If the medical information from the provider does not support the employee’s activities, you are in position to take action based on your honest belief that the employee abused her FMLA leave.

**Reminder.** The recertification process is handled basically the same way as a request for an initial certification: provide the cert form to the employee with instructions to have it completed by a health care provider and give the employee at least 15 days to return the completed form. But, for recertification, you can also include information you want the provider to consider, such as a pattern of absences or, as in the *Poitras* case, the employee’s activities during leave that you are questioning.

**MATRIX CAN HELP!** Questions about how legislative changes could impact your business or 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 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).

### Disclaimer

*This communication is intended as general information only and does not carry the force of legal opinion.*

*The **Federal Register** and the **Code of Federal Regulations** remain the official sources for regulatory information published by the Department of Labor.*

*This communication does not constitute legal advice. Every situation is different. Please consult your attorney for advice based on the particular facts of a case or claim.*