

# On Your Radar

Draw on Our Expertise



November, 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!

## Election 2016 – What Happens With Paid Family and Medical Leave?

*The party's over*

*It's time to call it a day . . .*

Whew! Whether you're nursing an electoral hangover or still on an adrenaline high, it is a relief to have the election over with and return to normal life – but what is "normal" now? What are we likely to see in the next few months or years of a Donald Trump presidency, with respect to family and medical leave and related issues? Who or what will SNL parody next? (OK, that's beyond the scope of this blog, but I'll be watching.)

Bottom line, no one knows yet. But we can make some guesses based on platforms and promises.

**Trump's Plan for Paid Maternity Leave.** During his candidacy Trump proposed a plan that would provide up to six weeks of paid maternity leave. Note that term – "maternity" leave. Trump's proposal does not include paid bonding time for fathers, paid time off due to an employee's own health condition, or paid time to care for an employee's ill or injured family member. Trump proposes to fund this benefit by amending the existing unemployment insurance companies are required to carry. The benefit would apply only when employers don't offer paid maternity leave, and would be paid for by reducing fraud in the program so taxes are not raised. It is questionable whether there is enough fraud that can be identified and eliminated year after year to sustain funding of this plan.

Moreover, Trump's support for paid leave of any kind has been tepid at best. He did not announce his plan until mid-September 2016, past the primary contests and well into the election campaign. With both houses of Congress controlled by Republicans, it is unlikely he will receive any pressure from the legislature to move forward on this issue. However, some political commentators think that Trump's daughter Ivanka will be a positive influence in support of Trump's proposal. We'll be watching closely.

For more information on the trend for paid family leave throughout the country, see our blog post at <http://matrix-radar.com/>.

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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 or  
Vetoed

#### Arizona | Arizona voters pass Prop 206, requiring paid sick leave.

Arizona ballot measure Proposition 206 passed on Election Day, November 8, 2016. As a result, Arizona joins Washington (more on that below) and five other states (California, Connecticut, Massachusetts, New Jersey, and Rhode Island) and many cities in requiring employers to provide paid sick leave to employees.

[Read more.](#)

#### Washington | Washington voters approve Initiative 1433.

Similarly, Washington state voters approved Initiative 1433 on Election Day, which amends Washington fair labor standards laws to provide for annual minimum wage increases up to \$13.50 per hour by 2020 and for employers to provide paid sick leave to employees. Washington state employers have more time to prepare. [Read more.](#)



Federal &  
State  
Agencies

**EEOC | The EEOC announces its Strategic Enforcement Plan for FY 2017-2021.** The November 2016 election may have an impact on the make-up and priorities of the Equal Employment Opportunity Commission. Time will tell, and we at Matrix will be watching. In the meantime, the EEOC periodically sets its “strategic priorities” for enforcement. [Read more.](#)

#### DOL | The DOL announces a new tool, “The Medical- and Disability-Related Leave Advisor.”

The DOL has announced a new tool for employers and employees – the Medical- and Disability-Related Leave Advisor. The Leave Advisor asks visitors to the site a series of questions to help identify any applicable federal laws under which an employee might be entitled to a leave of absence or other accommodation. [Read more.](#)



Court  
Opinions

#### *Sharif v. United Airlines (4th Cir. Oct.31, 2016).*

Plaintiff Masoud Sharif and his wife were employed by United Airlines at the Dulles Airport in Washington, D.C. He and his wife took vacation to South Africa from March 16 to April 4, 2014. Mr. Sharif, however, was scheduled to work on March 30 and 31. He was able to get a co-worker to cover his shift on the 31<sup>st</sup>, but was not able to get coverage for his shift on the 30<sup>th</sup>. [Read more.](#)

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## Passed by Voter Initiative

### Arizona voters pass Prop. 206, requiring paid sick leave.

Arizona ballot measure Proposition 206 passed on Election Day, November 8, 2016. As a result, Arizona joins Washington (more on that below) and five other states (California, Connecticut, Massachusetts, New Jersey, and Rhode Island) and many cities in requiring employers to provide paid sick leave to employees. The initiative, “The Arizona Fair Wages and Healthy Families Act,” requires employers with 15 or more employees to allow those employees to accrue paid sick time at the rate of 1 hour for every 30 hours they work. The law sets caps on these accruals based on employer size: employees of employers with fewer than 15 employees will accrue and can use 24 hours per year; employees of employers with 15 or more employees will accrue and can use up to 40 hours per year. These accruals begin on the later of commencement of employment or July 1, 2017, Those hired after July 1, 2017 may be required to wait until their 91<sup>st</sup> day of employment before they can use earned, accrued sick time. Employees can carry over unused earned, accrued sick time, subject to the above usage caps. Any unused accrued earned sick time does NOT need to be paid out on termination of employment. (The proposition also authorizes increases in the state minimum wage, from \$10 per hour starting in 2017, increasing yearly up to \$12 per hour and then subject to cost of living increases thereafter.)

The law allows employees to use their earned paid sick time for:

- the employee’s own or a family member’s mental or physical illness, care, diagnosis, or treatment, including preventive care;
- Needs related to domestic violence, sexual assault, abuse, or stalking, including seeking psychological service, counseling, relocating, and legal services (including to prepare for related civil or criminal proceedings);
- closure of the employee’s place of business or the child’s school due to public health emergency
- due to quarantine of the employee or a family member due to exposure to a communicable disease

The term “family member” is broadly defined to including not only the relationships we are accustomed to seeing for FMLA purposes, but also a registered domestic partner, grandparent, grandchild, or sibling (regardless of whether biological, foster, adoptive or step-relationship) as well as a catch-all for “any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship”).

Arizona employers are required to post notices of employees’ rights. Employers are not required to pay out accrued, unused paid sick leave at the time of an employee’s separation from employment. Employees who take paid sick time are protected from adverse employment actions and may pursue an administrative complaint or legal action.

Like many other paid leave policies, an employer’s existing PTO policy which, at a minimum, provides for the same accruals, leave reasons, and covered family members will be in compliance. Employers with PTO policies are cautioned to closely read the law’s provisions and consult with counsel to ensure compliance. To read the Arizona Fair Wages and Healthy Families Act,” please click [here](#).

## Arizona Fair Wages and Healthy Families Act

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### Washington State Paid Sick Leave

#### Washington | Washington voters approve Initiative 1433.

Similarly, Washington state voters approved Initiative 1433 on Election Day, which amends Washington's fair labor standards laws to provide for an annual minimum wage increases up to \$13.50 per hour by 2020 and for employers to provide paid sick leave to employees. Washington state employers have more time to prepare – the Washington law goes into effect on January 1, 2018. The Washington law covers employers of all sizes. Employees will accrue 1 hour of paid sick leave for every 40 hours worked. The law does not place a cap on the maximum annual accrual of leave, but carryover of annual accruals can be capped by employers at 40 hours in a year. The Washington law provides for the same leave reasons as Arizona and same broad definitions of a "family member." Indeed, many of the law's provisions have nearly identical wording. Accrued unused sick time does not need to be paid out upon termination of employment and employees are protected from discrimination or harassment for using or asking to use paid sick leave. To read more about the new Washington state paid sick leave law, click [here](#).

### Federal and State Agencies

#### The EEOC announces its Strategic Enforcement Plan for FY 2017-2021.

The November 2016 election may have an impact on the make-up and priorities of the Equal Employment Opportunity Commission. Time will tell, and we at Matrix will be watching. In the meantime, the EEOC periodically sets its "strategic priorities" for enforcement and it is always a worthwhile read. The latest Strategic Enforcement Plan was announced on October 17, 2016, for fiscal years 2017-2021. It will be no surprise to readers of the Matrix Radar blog that one of the areas the EEOC will continue to target – apparently with increased focus – is employers' inflexible leave policies (*i.e.*, not considering leave beyond a fixed period of time or requiring an employee to be 100% healed before returning to work). Our prior blog posts on inflexible leave policies can be found [here](#) and [here](#). Other areas of emphasis include qualification standards that adversely affect individuals with disabilities and ADA accommodations for pregnant employees.

The EEOC's six major areas of priority for enforcement are:

1. Eliminating Barriers in Recruitment and Hiring.
2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.
3. Addressing Selected Emerging and Developing Issues.
4. Ensuring Equal Pay Protections for All Workers.
5. Preserving Access to the Legal System.
6. Preventing Systemic Harassment.

In addition, the EEOC announced the following areas of emphasis:

- Revised priority on Immigrant, Migrant and Other Vulnerable Workers to identify vulnerable workers
- Narrowing the issues under the Americans with Disabilities Act to qualification standards and inflexible leave policies that discriminate against individuals with disabilities
- Under Emerging and Developing Issues, the Commission has added two areas:
  - Complex employment relationships, focusing specifically on temporary workers, staffing agencies,



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- independent contractors, and the on-demand economy.
- Focus on backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent
- Gender-based pay discrimination. In addition, the Commission will extend its equal pay priority to explicitly reach all workers
- Refining the retaliation priority to focus on significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights, as well as to focus on retaliatory policies.

The EEOC's full Strategic Enforcement Plan can be found [here, on the EEOC website.](#)

## The DOL announces a new tool, "The Medical- and Disability-Related Leave Advisor."

The DOL has announced a new tool for employers and employees – the Medical- and Disability-Related Leave Advisor. The Leave Advisor asks visitors to the site a series of questions to help identify any applicable federal laws under which an employee might be entitled to a leave of absence or other accommodation. The questions include things such as type and size of employer, whether the employer has a federal contract, and whether the employee is a military veteran. The Leave Advisor then directs the user to the laws that may provide a leave of absence for the employee at issue, such as the FMLA, the ADA, the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act, and more.

You can preview this tool on the DOL website [here.](#)

Any assistance for employers in trying to comply with the myriad state and federal leave and accommodation laws is a good thing. This resource can help employers understand which federal laws may be applicable to a specific situation and provides links to sources for more information, It will not, however, answer questions to the very tough questions that can come up in trying to administer the laws.



## Court Opinions

4<sup>th</sup> Circuit  
Court of  
Appeals –  
Fighting  
back on  
suspected  
FMLA abuse

### Asking for an Investigation? Employee Reports FMLA for One Workday in the Middle of Vacation.

Plaintiff Masoud Sharif and his wife were employed by United Airlines at the Dulles Airport in Washington, D.C. He and his wife took vacation to South Africa from March 16 to April 4, 2014. Mr. Sharif, however, was scheduled to work on March 30 and 31. He was able to get a co-worker to cover his shift on the 31<sup>st</sup>, but was not able to get coverage for his shift on the 30<sup>th</sup>.

Sharif had anxiety and panic attacks and had previously been approved by United to take intermittent FMLA for his condition. On March 30 he called in to report FMLA for that day. HR noticed that he had reported FMLA for his only scheduled workday during an extended vacation period and launched an investigation. Sharif was interviewed and gave conflicting explanations – at one point claiming he did not think he had to work that day, then claiming he could not locate a flight home in time for his shift, though he and his wife flew to visit a niece in Milan from March 31 until April 4.

As a result of these conflicting explanations, United notified Sharif of its intent to discharge him from employment for fraudulent use of FMLA and violating a United policy requiring truthfulness in communications. As a union employee, he was entitled to a hearing, but when the union advised him he would be unlikely to prevail, he elected to retire.

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Sharif then sued United, claiming the airline fired him in retaliation for taking FMLA leave. According to the 4th Circuit, the facts developed as follows:

- At 7:00 a.m. Cape Town Time (1:00 a.m. Eastern Standard Time) on March 30—the day of his scheduled shift—Sharif called United Airlines to take medical leave under the FMLA.
- He had not made any advance reservations for a return flight.
- The next day, Sharif and his wife flew from Cape Town to Milan, Italy, where Sharif’s niece lived.
- On April 3, Sharif and his wife finally departed for Washington and arrived just in time for his wife’s next shift.
- On April 23, 2014, United representatives interviewed Sharif with a union representative present. When asked about his vacation and March 30 absence, Sharif sat in silence for a period of minutes before he gave a series of inconsistent answers.
- Sharif first replied that he was not scheduled to work on March 30, and when asked why he had taken FMLA leave if he did not have a shift, Sharif responded that he “d[id] not recall being out sick this day or calling out sick.”
- After another pause, Sharif clarified that he began trying to return home flying standby (as airline employees often do) beginning March 29 but was unable to find any available flights.
- Sharif’s story later evolved to claim he actually arrived at the airport on March 28 to begin looking for a flight, and that he and his wife obtained the additional days off in April to gather with family in Pittsburg for the Persian New Year.
- As a result of his repeated unsuccessful attempts to find any means to return to Washington in time for his shift, Sharif explained that he grew anxious and was eventually seized by a panic attack which then led to his use of FMLA leave.

The district court had granted summary judgment in favor of the airline – meaning the case would not go to a jury trial. The 4th Circuit agreed with the district court and affirmed summary judgment for United. In particular, the court emphasized that Sharif had to prove that United’s explanation for its determination that he had violated its policies and that his conducted warranted termination was a pretext for retaliating against him for taking leave. Sharif failed to present sufficient evidence, and quite to the contrary, the evidence supported that United had “ample reason to believe it had been lied to,” citing to the FMLA regs. “An employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA’s . . . provisions.” 29 C.F.R. § 825.216(d).

*Sharif v. United Airlines*, \_\_ F.3d \_\_, 2016 WL6407391 (4th Cir. Oct.31, 2016).



**Pings for Employers:** The FMLA offers a few tools for employers to curb suspected abuses, including prompt action to investigate to support the suspicion of improper FMLA usage. United did a number of things well:

- They noticed that there was an issue. When someone reports leave in the middle of pre-planned vacation, that is understandably cause, at a minimum, for inquiry;
- United kept to the facts. They did not draw conclusions, but rather, asked Sharif to provide an explanation in interviews and also invited him to submit a written statement;
- The airline did not take adverse employment action until they had the objective facts to support that Sharif reported FMLA on a day that did not appear to be for a covered reason; and
- United also pursued Sharif’s violation of the Company’s policies governing dishonesty – a reason for termination independent of FMLA usage (although the dishonesty related to FMLA usage). This kind of policy should be part of every employer’s code of conduct.

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**MATRIX CAN HELP!** Matrix provides leave, disability, and accommodation management services to employers seeking a comprehensive and compliant solution to these complex employer obligations. We are experts on ways to minimize FMLA misuse and can help your company implement practices that will achieve this goal.

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 us at [ping@matrixcos.com](mailto:ping@matrixcos.com).

**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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