

On Your Radar

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May / June, 2018

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

State Legislation | Paid Family and Medical Leave Update

Earlier this year we told you about some paid family and medical leave legislation making its way through the various state legislatures. Let's get an update on which have failed. Which are still pending. And which have passed. Spoiler alert; none have passed! [Read more.](#)

State Legislation | Colorado Living Donor Support Act

Colorado has passed a law which creates a tax credit for employers who voluntarily make paid leave available for employees who are acting as an organ donor. [Read more.](#)

State Legislation | South Carolina Enacts Pregnancy Accommodations Act

South Carolina has joined the growing number of states that provides workplace protections and accommodations to women affected by childbirth or related conditions. Like the states that have come before them; South Carolina has some unique provisions. [Read more.](#)



Federal &
State
Agencies

DOL | FMLA Forms are Expired – Big Deal or Not?

Some of you may have noticed that the Department of Labor's optional FMLA forms have expired. Not to worry, the DOL is aware. The content is still correct. And revisions are on the way. [Read more.](#)



Court
Opinions

Court Opinions | Temporary ADA "Accommodation" is Not a Concession That Function is Non-Essential

At last – some good news for employers struggling with accommodations for disabled employees. [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.



Paid Family and Medical Leave Update

In our February/March *On Your Radar* we provided details on paid family and medical leave (PFML) bills that had been introduced at that time by various state legislatures. You can find that summary [here](#). Now, three months later, let's take a look at which bills have failed, which are still pending, and which have passed.

Oh, wait – so far *none* of the bills have passed. OK, then, which bills are still alive and what's the status of each?

PFML bills still pending as of June 1, 2018:

Hawaii [S 2990] – This bill was originally introduced as a full paid family leave proposal (Hawaii already has a disability benefits program for an employee's own health condition). It has been changed substantially from the original bill; now, if passed, it will direct the legislative reference bureau to conduct, by September 1, 2019, a study to determine the most appropriate framework or model for the establishment of paid family leave for the State. This bill is on the Governor's desk, with a signing deadline of July 10, 2018.

Illinois [H 2376] – Paid family leave for bonding or the serious health condition of a family member, but provides no coverage for employee's own serious health condition. On April 27, 2018, the bill was referred to the House Rules Committee.

Massachusetts [H 2172; H 3134; S 1048; H 4110 Initiative Petition] – Proposal for family and medical leave insurance. House and Senate bills are presently in the Joint Committee on Labor & Workforce Development; on May 3, the action deadline was extended to July 2, 2018.

New Hampshire [H 628] – Paid family and medical leave insurance. On April 26, 2018, referred by the Senate for interim study.

New Jersey [S 2528] – Proposed revisions to existing NJ family and temporary disability leave law to expand covered family members and other details. On May 10, 2018, referred to the Senate Committee on Budget and Appropriations.

New York [S 7723; S 8380] – Proposed amendments to existing New York Paid Family Leave law to add as leave reasons (1) victim of domestic violence (introduced in February 2018 and no activity since); and (2)



bereavement (introduced May 4, 2018).

Ohio [S 261; H 550] – Paid family and medical leave for bonding, serious health condition of a family member, employee’s own serious health condition, and other reasons covered by FMLA. Sent to respective committees in March 2018; no activity since.

FAILED PFML bills as of June 1, 2018:

Most of these bills failed during the state legislative session without passage; vetoed bills are noted:

- Colorado
- Connecticut
- Iowa
- Indiana
- Kentucky
- Maine (vetoed by governor)
- Maryland
- Missouri
- Mississippi
- Utah
- Vermont (vetoed by governor)

The details of the state bills for paid family and medical leave vary greatly, including the duration of leave, whether the employee or employer pays for the benefit, covered family members, amount of benefit, and so on. If you are interested in a particular bill or state, let us know and we will help out.

Colorado Living Donor Support Act

Colorado

Colorado has passed a law creating a state tax credit for employers who voluntarily provide a paid leave of absence for an employee to serve as an organ donor. The tax credit is limited to leaves of absence up to 10 working days or the hourly equivalent. An employer may claim as the tax credit 35% of (1) the amounts the employer pays to the employee during the leave of absence; and (2) costs incurred by the employer, if any, for temporary replacement help during the employee’s leave.

The tax credit does not apply to any period during which the employee uses other paid leave already offered by the employer such as vacation, paid time off, or sick days. In addition, the tax credit does not apply to paid leave provided to an employee who receives wages of \$80,000 or more from the employer



during the applicable tax year. If the employer cannot use the full tax credit in the year in which the paid leave was provided, it can carry over any unused tax credit amounts for up to five years.

The employer must be able to provide documentation from the employee's medical provider verifying the organ donation to support the claimed tax credit. Although not addressed directly, this implies that the employer can (and should) require medical documentation from the employee as a condition of receiving the paid leave of absence.

The law will go into effect for leaves of absence on or after January 1, 2020, and sunsets on December 31, 2024. You can view the full text [here](#).

Colorado's law does not require employers to provide time off for organ donation, nor does it provide job protection for the leave of absence; that will depend on the employer's policies. Several other states do have laws providing employees with time off for donation of an organ, bone marrow, and blood or its components. See our previous blog post summarizing those state laws [here](#).

South Carolina Enacts Pregnancy Accommodations Act

South Carolina has joined a legion of other states by passing a law that provides workplace protections and accommodations for women affected by pregnancy, childbirth, or related medical conditions, including lactation. Each state puts its own stamp of originality on the provisions of such laws, but many common themes carry through – for example, these laws do not require the employee to be “disabled” by pregnancy to be entitled to an accommodation.

The South Carolina Pregnancy Accommodations Act (H 3865) was signed by the Governor on May 17, 2018, and became effective immediately. Here are some of the key provisions of the law.

Reasonable accommodations. The law requires employers to provide a reasonable accommodation for medical needs of an employee or applicant arising from pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's business. “Reasonable accommodation” is defined to include:

- 🐼 Providing more frequent or longer break periods (but the employer is not required to compensate the employee for breaks that exceed normal paid breaks in duration or frequency);
- 🐼 Providing more frequent bathroom breaks;
- 🐼 Providing a private place, other than a bathroom stall, for the purpose of expressing milk;
- 🐼 Modifying food or drink policy;
- 🐼 Providing seating or allowing the employee to sit more frequently if the job requires the employee to stand;

South
Carolina

On Your Radar

Draw on Our Expertise



- 🦋 Providing assistance with manual labor and limits on lifting;
- 🦋 Temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified;
- 🦋 Providing job restructuring or light duty, if available;
- 🦋 Acquiring or modifying equipment or devices necessary for performing essential job functions; and
- 🦋 Modifying work schedules.

Notice to employees. Employers must provide written notice to employees of “the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions” pursuant to the law. This notice must be provided to new employees upon hire and to existing employees within 120 days after the effective date of the act. Such notice must also be posted in the employer’s business at a place accessible to employees.

Miscellaneous provisions. The law also extends existing nondiscrimination protections for workers based on numerous protected categories to include employees affected by pregnancy, childbirth, and related conditions. In addition, employers must ensure that existing facilities used by employees are readily accessible to employees with medical needs arising from pregnancy, childbirth, or related medical conditions (as well as to others with disabilities).



Pings for Employers

- 🦋 Develop, post, and start providing the required notice to employees right away. The law was effective upon the Governor’s signature on May 17, so any new hires are already entitled to receive the notice and existing employees 120 days thereafter.
- 🦋 Oddly, the notice requirement, as quoted above, only addresses the right to be free from discrimination, not the right to reasonable accommodations for pregnancy and related conditions. Unless and until the state provides a prototype notice form, employers should play it safe and include the right to accommodations in the notice as well.
- 🦋 Unlike some other recent pregnancy protection laws, the South Carolina act does not address what documentation an employer can require to verify an employee’s accommodation request. Employers should consider providing the simpler accommodations such as a seat, modification of food and beverage rules, or more frequent breaks – without the need for medical documentation. Other types of accommodations may justify a request for medical support, if the need for the accommodation is not obvious and/or is outside of the normal types of pregnancy-related

On Your Radar

Draw on Our Expertise



conditions or limitations employees may experience.

Matrix can help! Matrix will assist employers in administering the accommodations provisions of this new law if the client has engaged Matrix for ADA services.

On Your Radar

Draw on Our Expertise



Federal and State Agencies

DOL – FMLA Forms are Expired – Big Deal or Not?

Here is news that will raise a lot of questions but will have little, if any, real impact. The Department of Labor’s optional FMLA forms and notices technically expired on May 31 but not to worry. The DOL has not proposed any changes to the forms other than updating the expiration date, and that date printed on the forms is rather immaterial as long as the content is correct. So, until revised forms with the new expiration date are issued by the DOL, there is no need to update the DOL forms you use monthly to show the extended date.



For more details on the regulatory process and forms status (and some of his FMLA humor), check out Jeff Nowak’s blog post on FMLA Insights [here](#). As Jeff points out, the expiration of the form does not in any way excuse compliance with the FMLA and its regulations.

At Matrix we have designed our own FMLA certifications for an employee’s own or a family member’s serious health condition – completely compliant with the regulations, of course! – so for most clients we will not be making any changes. The Matrix forms have yielded better results in getting complete and sufficient certifications from providers, including clearer frequency and duration for intermittent claims. If you would like more information about the Matrix certification forms, contact us at ping@matrixcos.com.

Court Opinions

Temporary ADA Accommodation is not a Concession That Function is Non-Essential



A recent court opinion from the First Circuit provides good news for employers struggling with accommodations for disabled employees. The court’s decision starts with a message that I wish every employee would hear:

Today’s opinion is a lesson straight out of the school of hard knocks. No matter how

On Your Radar

Draw on Our Expertise



sympathetic the plaintiff or how harrowing his plights, the law is the law and sometimes it's just not on his side.

The facts. Victor Sepulveda-Vargas was an Assistant Manager for Caribbean Restaurants, LLC, which operates a number of Burger King fast food restaurant locations in Puerto Rico. One evening, while making a bank deposit for Caribbean, he was held up at gunpoint, hit over the head, and carjacked. As a result of this incident, Victor was diagnosed with post-traumatic stress disorder.

Caribbean required all of its Assistant Managers, including Victor, to rotate among locations and to work various schedules. Due to his PTSD Victor asked his employer to provide him with a permanent accommodation for his disability – that he be given a fixed work schedule at a location “not prone to crime.” Caribbean initially granted Victor’s request on a temporary basis, but ultimately concluded it was unfair to his peers to handle all the difficult shifts and told him he had to resume working a rotating shift. Victor resigned and ultimately brought a lawsuit contending, among other things, that his employer violated the ADA by failing to grant his requested accommodation.

Rotating shifts was an “essential function.” Caribbean was able to present evidence that the ability to work rotating shifts was an essential function of the Assistant Manager position. This requirement was not only explicitly set forth on the job application and advertisement for the position, but Victor himself conceded this as well. The court agreed that rotating shifts was an essential function that Caribbean does not have to excuse.

So here’s the good news for employers: Temporary accommodation is not an admission. Caribbean initially granted Sepulveda the accommodation on a temporary basis. That fact was not a concession by Caribbean that rotating shifts was a “non-essential” function. “To find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers.”

In conclusion, the court ruled that:

- 🌿 Victor was not a “qualified individual with a disability” because he could not perform the essential function of working rotating shifts; and
- 🌿 Caribbean’s unwillingness to relieve him of that essential job function permanently did not constitute a violation of the ADA.

[*Sepulveda-Vargas v. Caribbean Restaurants, LLC \(1st Cir. April 30, 2018\)*](#)

On Your Radar

Draw on Our Expertise



Pings for Employers:

-  The ADA only requires employers to provide reasonable (and effective) accommodations to enable an employee to perform his or her essential job functions. Employers are not required to eliminate those functions because, by their very nature and name, they are fundamental to the position.
-  Try an accommodation on a temporary basis. Often, discrimination occurs when an employer makes decisions based on unfounded assumptions (“that service dog will bark too much”). When you try an accommodation, then you have objective facts to determine whether or not it is effective in enabling the employee to perform his job. In this instance, Caribbean tried and ultimately concluded it was just too onerous to others in the same job to excuse this employee from rotating job shifts.

MATRIX CAN HELP! Matrix’s start-to-finish ADA Advantage management services can help you wrangle with tough issues like accommodation decisions requests. You always retain the final decision whether and how to accommodate, but we manage the intake, medical assessment, interactive process, recordkeeping, follow-up, and more. Our expert team of ADA Specialist is at the ready with practical advice and expert guidance. To learn more, contact us at 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.

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