

On Your Radar

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November 2018

Each month in this newsletter – and more frequently on our [Matrix Radar](#) blog – we provide updates on introduced, pending, and passed legislation. As usual, we have a lot to report this month. If you need additional information about any of the bills or passed legislation discussed in this newsletter or any other Matrix publication, please contact us at ping@matrixcos.com. We'll be happy to share information that just won't fit in these newsletters!

California Adds Military Family Needs to PFL Coverage

Under California's paid family leave law (CA PFL) employees can receive up to 6 weeks of paid leave of absence for caring for a family member with a serious health condition and bonding with a new child. [Learn More](#)

New York adds organ donation to state Paid Family Leave reasons

The Living Donor Protection Act includes a provision expanding the definition of "serious health condition". The purpose behind this expansion is to provide employees who donate an organ the ability to utilize the state's Paid Family Leave program. [Learn More](#)

Washington state paid Family and Medical Leave moves forward

Washington paid family and medical leave benefits aren't available until January 1, 2020, employers have decisions to make before employer and employee premium contributions start. [Learn More](#)

Employers: Act Now! Federal Tax Credit for Paid Family and Medical leave Benefits Can Still be Applied to All of 2018

The federal tax credit for employer paid family and medical leave benefits has received little attention. Many employers seem unaware of this tax credit and how relatively simple it can be to benefit from it for existing paid leave policies. **Employers should act now and consult their tax advisors.** [Learn More](#)

Staffing Agency Recruiter Purportedly Tells Applicant "We Don't Hire Deaf People" Sued by the EEOC

The EEOC announced a lawsuit filed against Logic Staffing, a temporary staffing agency in Western Washington behalf of a deaf applicant for a warehouse position. [Learn More](#)

EEOC Update | Staffing Agency Recruiter Purportedly Tells Application "We Don't Hire Deft People" Sued by the EEOC

A class action lawsuit accusing Absolut Care with violating the ADA and Pregnancy Discrimination Act by refusing to accommodate employees with pregnancy-related medical restrictions. [Learn More](#)

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



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Federal &
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Legislative Updates

California Adds Military Family Needs to PFL Coverage

California's paid family leave law (CA PFL) provides up to 6 weeks of paid (but not job protected) leave of absence for family reasons. Current bases for which an employee can receive paid benefits include caring for a family member with a serious health condition and bonding with a new child. Recently the California legislature passed, and the Governor signed, a bill adding military exigencies as a leave reason for which an employee can receive paid leave. The events for which military exigency leave can be taken are the same as under FMLA, when the need is related to the military member's active duty or call to active duty:

-  Matters related to short-notice deployment
-  Military events and related activities
-  Childcare and school activities
-  Financial and legal arrangements
-  Counseling (other than from a health care provider)
-  Rest and recuperation
-  Post-deployment activities
-  Care for the parent of the military member
-  Additional activities agreed to by the employer and employee

The new law will be effective January 1, 2021; not clear why the big delay! The law does not expand the total paid leave time available to employees under CA PFL, nor does it provide job protection for this leave. Eligible employees will continue to have job-protected military exigency leave for up to 12 weeks under FMLA, which will run concurrently if the leave is taken for a reason covered by both laws. However, military exigency leave is not provided by the California Family Rights Act (CFRA).

California

New York adds organ donation to state Paid Family Leave reasons

Last month we addressed some [leave of absence bills](#) pending in various state legislatures. New York's governor has signed one of these bills into law, adding organ and tissue donation to the definition of "serious health condition" under the New York Paid Family Leave law (NY PFL).

Specifically, a serious health condition will now include "transplantation preparation and recovery from surgery related to organ or tissue donation." NY PFL only applies to leave to care for a family member with a serious health condition and other family leave reasons, so this will not affect employees' own disability leaves. The law does not make any additional changes to the NY PFL, but it does include a prohibition against discrimination in the provision of life, accident, health, and long term care insurance based on the status of an insured as a living organ or tissue donor.

New York



Definitions of “organ” and “tissue” are incorporated from the [NY Public Health Law](#) as follows:

4. “Organ” means a human kidney, heart, heart valve, lung, pancreas, liver or any other organ designated by the commissioner in regulation in consultation with the transplant council.
10. “Tissue” means a human eye, skin, bone, bone marrow, heart valve, spermatozoon, ova, artery, vein, tendon, ligament, pituitary gland or a fluid other than blood or a blood derivative.

What impact will this law have on family care leaves under NY PFL? Perhaps very little. Under NY PFL an employee is already entitled to take paid time off to care for certain family members with a serious health condition. This term is defined to include an illness, injury, impairment, or physical or mental condition that involves:

- (1) inpatient care in a hospital, hospice, or residential health care facility; or
- (2) three days of incapacity due to a medical condition and continuing treatment or supervision by a health care provider

It is hard to imagine a situation where an employee’s family member is an organ or tissue donor that doesn’t already satisfy one or both of these definitions of serious health condition. As a result, there is not likely to be much, if any, increase in use of NY PFL to care for a family member due to this new law.

The text of the law can be accessed through a link on [this page](#). The new law goes into effect on February 3, 2019.

Matrix Can Help!

At Matrix we monitor state and federal legislative developments daily and report on any new or advancing leave- and accommodation-related laws to keep our clients and other business partners up to date. If you ever have questions about leave and accommodation laws – current or just introduced! – please contact your account manager or send an email to ping@matrixcos.com.

Washington state paid Family and Medical Leave moves forward step-by-step

Employer Action Items and Resources

Washington paid family and medical leave is coming (PFML). Although leaves and benefits aren’t available until January 1, 2020, employers have decisions to make before employer and employee premium contributions start in January 2019.

You can read our prior blog posts for a summary of this up-coming law and significant developments at [this link](#) or enter “Washington” in the blog’s search box.

Washington

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Employer Action Items. Time is ticking, and as a Washington employer you have things to do! At Matrix we are working with our clients and business partners to help them get ready for Washington PFML. Below is a list of key action items that all Washington employers, even those with a single employee, must address soon (and there will be more in 2019!):

- 👤 Decide whether to use the state program or a voluntary plan. Unless and until you have an approved voluntary plan, you and your employees will be covered by the state program.
- 👤 If you decide upon a voluntary plan:
 - Develop the plan and file for approval with state – allow 30 days for approval.
 - Make employer choices that are available with a voluntary plan, such as whether to use the accelerated payment option and whether to offer greater benefits (duration, amount, leave reasons, covered relationships) than required by state.
- 👤 Determine whether you will deduct from employee wages or pay the employee premiums yourself (for state plan) or bear all costs by the company (for voluntary plan). If you choose to deduct employee premiums from paychecks:
 - Communicate with your payroll service about employee deductions.
 - Communicate to employees about deductions starting 1/1/2019 (we recommend including a brief overview of benefits coming 1/1/2020).
 - For a voluntary plan, set up a separate bank account to hold premiums deducted from employee wages.
 - For the state program, be ready to pay employee and employer premiums to the state quarterly, starting April 2019.
- 👤 Post notices in your workplaces by the date required (to be announced by the state; we expect a state-issued form notice for employers' use).
- 👤 By 1/1/2020, review and revise existing STD policies/plans and other company leave policies to coordinate with the required Washington PFML benefits and ensure no duplication of benefits.

Matrix Resources. Matrix has developed a variety of resources to assist employers in preparing for Washington PFML, making the necessary choices, and developing a compliant voluntary plan:

- 👤 Webinar on Washington PFML generally (recording available)
- 👤 Webinar on voluntary plans specifically (recording available)
- 👤 Washington PFML Comparison – State Program vs. Voluntary Plan
- 👤 Washington PFML – State Program or Voluntary Plan? Employer Considerations
- 👤 Sample voluntary plan

We can help you make the decision – state or voluntary – and file and administer your voluntary plan if that is your election. If you would like to receive any of these resources or discuss your options, the process, and more, contact your Matrix account manager or practice leader, or send your questions to us at ping@matrixcos.com. We are constantly updating and adding to our materials, so stay in touch!



Washington Resources. The Washington Employment Security Department (EDS) administers the PFML program. Its [website](#) has many resources for employers and employees. One of the latest additions is the [Employer's Toolkit](#), which provides an overview of the PFML program, employer responsibilities, premium calculations, and sample communications to employees about PFML, including a handbook insert, an email or blog notice to employees, and a paystub insert. Another helpful resource is the [Voluntary Plan Guide](#) which provides an overview of voluntary plan requirements.

The state is drafting and implementing rules that provide details on the PFML program, benefits, voluntary plans, the claims process, and more. The rules are divided by topic into 6 phases. All draft and final rules can be accessed on the ESD's [Rulemaking Page](#). Here is the status so far:

- 👤 **Phase 1:** Finalized and in effect. Topics:
 - [Collective Bargaining Agreements](#)
 - [Premium Liability](#)
 - [Voluntary Plans](#)
- 👤 **Phase 2:** Finalized on November 2 and will go into effect December 3, 2019. Topics:
 - [Employment Security Rule Governance](#)
 - [Definitions](#)
 - [Assessing and Collecting Premiums](#)
 - [Voluntary Plans](#)
 - [Employer Responsibilities](#)
 - [Penalties and Audits](#)
 - [Small Business Assistance](#)
 - [Dispute Resolution](#)
 - [Practice and Procedure](#)
- 👤 **Phase 3:** Second draft released October 25, 2018. We previously reported in the first draft of Phase Three rules [here](#). Although there is some welcome clean-up of the language and a couple of helpful additions, the content of the second draft of Phase Three rules is largely the same as the initial draft. Topics:
 - Definitions (in addition to those contained in the PFML statute itself)
 - Employee notice to employer
 - Initial application for benefits
- 👤 **Phase 4:** Scheduled release of first draft November 14. Topics:
 - Continuation of Benefits
 - Fraud
- 👤 **Phase 5:** Drafting to start in 2019. Topics:
 - Job Protection
 - Benefit Overpayments
 - Miscellaneous
- 👤 **Phase 6:** Drafting to start in 2019. Topic:
 - Appeals

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Keep watching this blog. We will provide updates as rules are drafted and finalized.

Matrix can help! Washington paid family and medical leave imposes many new employer obligations and challenges. We can help you through the morass. Call on your account manager or practice leader, or contact us at ping@matrixcos.com.

Federal and State Agencies






Employers: Act Now! Federal Tax Credit for Paid Family and Medical leave Benefits Can Still be Applied to All of 2018

On September 24, 2018, the federal Office of Associate Chief Counsel (Tax Exempt and Government Entities) issued a Notice providing guidance on the employer tax credit for paid family and medical leave under §455 of the Internal Revenue Code. [Notice 2018-71](#) does not have the force of regulations which are yet to come, but it does offer employers with much-needed interpretive direction on how the tax credit works and what an employer must do to claim the credit.

We previously blogged about the tax credit when it was passed, and I am happy to say that nothing in the Notice contradicts our interpretations back then. You can read our summary of the tax credit [here](#). I suggest you go back and read our prior blog post before proceeding here – it will all make more sense!

Possible extension of tax credit. The tax credit is set to expire on December 31, 2019 – and so is in effect for only 2 years! However, on September 6 the US Senate introduced a bill (S. 3412) that would extend the tax credit by 3 years, through December 31, 2022. This bill also would require a study to examine the effectiveness of the tax credit for paid family and medical leave. We'll be watching and will report any significant movement on that bill.

Highlights of Notice 2018-71. The Notice has questions and answers on the following topics:

-  Eligible Employers
-  Family and Medical Leave
-  Minimum Paid Leave Requirements
-  Calculating and Claiming the Credit
-  Effective Date



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Here are some of the more helpful bits of guidance. ***All of these answers and examples depend, of course, upon the employer's policy otherwise meeting all the requirements for the paid leave tax credit.***

- 👤 **Required policy provision – non-interference.** Employers may voluntarily provide paid family leave to employees who are not eligible for FMLA leave (called “added employees” in the Act) and receive the tax credit for such payments as long as the employer has a policy that complies with the Act. One of the policy requirements is a provision against interference with the employee’s policy rights to paid leave, and a provision against termination of an employee for complaining about a violation of the policy. The Notice provides some sample language for a policy provision that will satisfy this requirement. *Q&A 3*
- 👤 **Effective date of tax credit for your policy.** An employer’s written policy demonstrating compliance with the tax credit law must be effective before the paid leave is taken; but for 2018, this can include a policy with a retroactive effective date if the employer pays the leave benefit to any employees who took leave after the retroactive effective date. *Q&A 5 and 6*
- 👤 **Purposes for use of paid leave.** The employer’s paid leave must be available only for FMLA leave reasons to qualify for the tax credit.
 - So, for example, a paid leave policy that allows an employee to use the paid leave for vacation as well as FMLA leave reasons would not qualify for the tax credit. *Q&A 9*
 - On the other hand, a policy that limits the pay benefit to FMLA-covered reasons but includes family relationships not covered by the FMLA (*g.*, siblings or grandparents) will get partial coverage by the tax credit. Any leave time taken to care for a spouse, for example, will qualify for the tax credit, while other time taken to care for a sibling will not, even if the employee provides a pay benefit for both. *Q&A 10*
 - The employer’s policy does not need to provide paid leave for all FMLA leave reasons. The Notice provides the example of an employer who offers 6 weeks of paid leave only for parental/bonding leave. Any paid leave provided pursuant to that policy will qualify for the tax credit even though other FMLA leave reasons are not covered. *Q&A 9*
- 👤 **Existing short term disability plans can count!** Paid leave provided under an employer’s short-term disability program, whether self-insured by an employer or provided through a short-term disability insurance policy, may be characterized as family and medical leave under § 455 if it otherwise meets the requirements for the tax credit. *Q&A 11*

The Notice provides much more information and examples regarding calculation of wages, the tax credit, and many other issues. If your company is considering taking advantage of this tax credit, do yourself a favor and read the full Notice.

TINGS FOR EMPLOYERS

Our recommendations at this time remain the same as when we first blogged about the federal PFML tax credit. Remember, Matrix is not a tax or financial advisor, so you need to:

- 👤 **Consult your tax advisor.** As with all things tax-related, you should consult with your tax advisor to determine whether your existing plan is covered by the new paid leave tax credit or what changes you need to make to qualify.

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- 🔗 **Consult your financial advisor.** If you don't have a paid leave plan for your employees, consult with your financial (and tax) advisor to determine whether the incentive provided by the tax credits is enough to justify offering a paid leave benefit to your employees.
- 🔗 **Consider benefits beyond monetary.** In this day of strong competition for good employees, remember that a superior benefits package can be a lure. But, with the tax credit scheduled to last only two years, also consider whether your company can continue the benefit if the tax credit expires on December 31, 2019. Even if the law is extended by 3 years as proposed by Senate bill 3412, taking away the benefit might not be a good employee relations move at a later date.

MATRIX CAN HELP!

As state and federal programs proliferate, 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.

If you have questions, contact your Account Manager or ping@matrixcos.com.

EEOC Update | Staffing Agency Recruiter Purportedly Tells Application “We Don't Hire Deaf People” Sued by the EEOC

The EEOC announced a lawsuit filed against Logic Staffing, a temporary staffing agency in Western Washington. The lawsuit was filed on behalf of a deaf applicant for a warehouse position. The EEOC alleged that the applicant used a Video Relay Service to return a call from a Logic Staffing recruiter after he sought a warehouse position; during this call, the EEOC claims that he was told that his deafness would pose a safety risk and that the applicant informed the recruiter that he had performed similar work without incident in the past. It is further alleged that the recruiter placed him on hold to consult with a manager and then apparently returned to apprise the applicant they did not hire deaf people.

Pings for Employers: The lawsuit was just filled so we don't know about Logic Staffing's defense (though we do know that conciliation was not successful); however, this press release highlights the obvious need to train your managers – and recruiters! – not to act on stereotypes – each applicant or employee and his or her restrictions and capabilities need to be evaluated on an individual basis. Remember that the ADA applies to applicants as well so your pre-employment processes need to be up to snuff. The ADA in general and applicant process in particular continue to be strategic enforcement priorities for the EEOC.

[EEOC Press Release 11-01-2018](#)



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EEOC Update | Chain of Nursing and Healthcare Facilities Settles Class Action Pregnancy and Disability Discrimination Lawsuit for \$465,000



As we have reported a number of times in On Your Radar monthly updates, patterns and practices of discrimination, especially with regard to pregnant employees, is another strategic enforcement priority for the EEOC. They recently announced the settlement of a class action lawsuit accusing Absolut Care, a chain of nursing and healthcare facilities in upstate New York, with violating the ADA and Pregnancy Discrimination Act by making impermissible medical inquiries, failing to accommodate individuals with disabilities, denying leave as an accommodation, refusing to allow employees to return to work unless they were without medical restrictions, and firing and refusing to accommodate employees with pregnancy-related medical restrictions.

Pings for Employers: Wow! That's quite a list, and virtually all of those violations could have been avoided with appropriate management training. In addition to this substantial monetary settlement, Absolut entered into a three-year consent decree which requires revision of leave of absence, discipline, and attendance policies, and – \$465,000 later – training for its corporate and HR staff.

[EEOC Press Release 10-22-2018](#)

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.

Disclaimer This communication is intended as general information only and does not constitute a legal opinion or legal advice.