

On Your Radar

Draw on Our Expertise



April / May 2019

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!

Kentucky | Reasonable Accommodations for Pregnancy

Kentucky has become the latest state to pass legislation requiring employers, absent undue hardship, provide reasonable accommodations to employees with “limitations” as a result of pregnancy, childbirth or a related condition. [Learn More](#)

Maryland | Organ Donor Leave

Effective October 1, 2019, employees in Maryland can take unpaid, job-protected leave, to serve as an organ or bone marrow donor. [Learn More](#)

Washington | Lactation Accommodations

Effective July 1, 2019, Washington employers will be required to provide reasonable break time for an employee to express breast milk as well as a private location to do so. [Learn More](#)

DOL | DOL Opinion Letter FMLA2019-1-A

The US Department of Labor has issued a much-needed Opinion Letter addressing whether an employer or employee can elect not to apply the FMLA to a leave for an FMLA-qualifying event. [Learn More](#)

EEOC | EEOC Releases its Fiscal Year 2018 Enforcement & Litigation Data

On April 13, 2019, the EEOC issued a press release touting its FY2018 enforcement and litigation efforts. So how'd they do? [Learn More](#)



Legislative
Updates



Federal &
State
Agencies

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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.



Legislative Updates

Kentucky | Reasonable Accommodations for Pregnancy

On April 9, 2019, the Governor of Kentucky signed Senate Bill 18, making it the latest state to pass legislation requiring employers, absent undue hardship, to grant reasonable accommodation(s) to employees with “limitations” as a result of pregnancy, childbirth or related medical conditions. The *Kentucky Pregnant Worker’s Accommodations Act (“KPWA”)*, takes effect June 27, 2019, and applies to employers with 15 or more employees in the state.

The act provides a nonexclusive list of potential reasonable accommodations, including:

- frequent or longer break times;
- time off to recover from childbirth;
- acquiring or modifying equipment;
- seating;
- temporary transfer to a less strenuous or less hazardous job;
- job restructuring, light duty, and/or modified work schedule; and
- a private space (that is not a bathroom) in which to express breast milk.

For more information about this law, including employer notice requirements and the undue hardship defense, see our Matrix Radar [blog post](#).

Kentucky

Maryland | Organ Donor Leave

Effective October 1, 2019, employees in Maryland may take unpaid, job-protected leave to serve as an organ or bone marrow donor. To be eligible the employee must have worked for the employer for 12 months and for 1250 hours in the previous 12 months as of the first date of the requested leave. The leave entitlement is up to 30 business days to donate bone marrow and up to 60 business days to donate an organ in any 12-month period – or, for an employee with a typical 5-day work week, up to 6 weeks for bone marrow donation and up to 12 weeks for organ donation.

The leave request must be supported by written verification from a physician that the employee is going to serve as an organ or bone marrow donor and that there is a medical necessity for the donation. The employer must continue group health benefits during the leave and must restore the employee to the same or an equivalent position following the leave. In addition, the period of the leave may not be considered a break in service for the purpose of the employee’s right to salary

Maryland

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adjustments, sick leave, vacation, paid time off, annual leave, or seniority. The law also contains employee protections against discrimination and retaliation relating to organ or bone marrow donation.

An additional provision of the law prohibits life, disability, or long-term care insurers in the state from certain negative claims and coverage decisions based on the applicant's or insured's status as a bone marrow or organ donor.

Washington | Lactation Accommodations

Existing Washington law requires employers to provide reasonable workplace and scheduling accommodations for an employee's pregnancy and pregnancy-related health conditions. These currently include such things as more frequent breaks, modified food or beverage policies, transfer to a less strenuous or less hazardous position, and more.

As of July 1, 2019, Washington employers will also be required to provide reasonable break time for an employee to express breast milk for two years after the child's birth each time the employee has need to express the milk. The employer must also provide a private location, other than a bathroom, if such a location exists at the place of business or worksite, which may be used by the employee to express breast milk. If the business location does not have a space for the employee to express milk, the employer shall work with the employee to identify a convenient location and work schedule to accommodate her needs.

Matrix does not currently manage lactation breaks. The new law, WA HB 1930, is available [here](#).

Washington



DOL | DOL Opinion Letter FMLA2019-1-A

The US Department of Labor has issued a much-needed Opinion Letter addressing whether an employer or employee can elect not to apply the FMLA to a leave for an FMLA-qualifying event. Spoiler alert: *The answer is NO.*

This has never seemed like a gray area to me. We blogged about this over 3 years ago. (See prior blog posts [here](#) and [here](#).) As I said back then, “No, no, no! The employee does NOT get to choose!” The regulations are clear, and the DOL FMLA Branch Chief has spoken publicly on this issue (and so have I). Yet many employers still think employees have the right to choose whether to use FMLA for a qualifying absence.

In the new [Opinion Letter FMLA2019-1-A](#), the DOL addressed this specific question: *Can an employer delay application of FMLA to a leave that is clearly FMLA-qualifying and allow the employee to first use paid sick leave or other leave?*

But the DOL went further. As stated in the Opinion Letter:

- Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, **neither the employee nor the employer may decline FMLA protection for that leave.**
- Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, **the qualifying leave is FMLA-protected and counts toward the employee’s FMLA leave entitlement.**
- Once the employer has enough information to make this determination, **the employer must, absent extenuating circumstances, provide notice of the designation within five business days.**
- And so, the employer may not delay designating the leave as FMLA-qualifying **even if the employee would prefer that the employer delay the designation.**

Employers in the Ninth Circuit (AK, AZ, CA, HI, ID, NV, OR, WA) are left with the quandary of how to deal with an employee request not to apply FMLA to a qualifying leave due to the court’s decision in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014). In that case, the Ninth Circuit held that an employee can choose to delay application of FMLA to a leave of absence in order to save it for future use. The DOL firmly rejected that court’s holding in fn. 3 of the Opinion Letter. You will need to consult with your employment counsel to determine the proper handling of an absence in such a situation. The *Escriba* case is an example of bad facts making bad law; it is very fact specific so you must look at each claim on its own merits.





You can learn more about this Opinion Letter on our blog, [Matrix Radar](#). Earlier blog posts about the return of DOL Opinion Letters can be found [here](#) (the welcome return of DOL Opinion Letters) and [here](#) (organ donation and no-fault attendance policies).

EEOC | EEOC Releases its Fiscal Year 2018 Enforcement and Litigation Data

On April 13, 2019, the EEOC issued a press release touting its FY2018 enforcement and litigation efforts. The Agency reported that 76,418 charges had been filed in FY2018 and that 24,605, or over 32%, involved charges of disability discrimination. Of the charges of disability discrimination resolved during FY2018, 19,902 resulted in no reasonable cause finding while 1,234 resulted in a reasonable cause finding. The EEOC touted receiving \$136.5 million in monetary resolutions. In FY2018, the EEOC filed 199 lawsuits, 84 of which were ADA violations, 37 of which alleged systemic discrimination. The Agency indicated it recovered \$21.8 million in connection with its litigation of ADA violations.

As we have emphasized many times in the Matrix Radar blog and this publication, disability and pregnancy discrimination are strategic priorities for the EEOC and were the subjects of many of the systemic lawsuits (that is, alleging a pattern, practice, or policy of discrimination) filed or settled in 2018:

MEDICAL INQUIRIES IN VIOLATION OF ADA

- Absolut Facilities Management, Inc. (W.D.N.Y. filed 9/17/18): allegations of improper medical inquiry/disclosure of all medical conditions, failure to accommodate disabled, and terminating pregnant employees. Under the consent decree settling the suit, the company will pay \$40,000 in lost wages and damages to the former employee who filed the initial discrimination charge with the EEOC, and will pay \$425,000 into a class settlement fund to compensate other victims.
- Appalachian Wood Products (W.D. Va. filed 9/17/18) allegations of improper pre-employment medical inquiries and refusal to hire employees for specific positions if they disclosed certain medications, without any individualized assessment.
- Hirschbach Motor Lines, Inc. (D. Minn. filed 4/30/18) challenging use of pre-employment medical questionnaire for truck driver positions that screened out individuals with disabilities as not being job-related and consistent with business necessity.
- Imperial Trading Co., Inc. (E.D. La. filed 9/26/18) accusations of illegal medical inquiries, a no restrictions policy to screen out individuals with disabilities, failure to provide leave as an accommodation and discharging employees with disabilities.



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- JBS Carriers, (D. Colo. filed 9/28/18) allegations of post-offer pre-employment medical inquiry to screen out individuals with disabilities who may need accommodation(s).
- Loflin Fabrication LLC (N.D. N.C. filed 9/27/18) challenged unlawful medical inquiry, including firing the Office Manager for failing to disclose a lawful prescription medication.
- Oncor Delivery Systems (N.D. Tex. filed 7/11/18) alleged the company required employees to disclose prescription and non-prescription medication that could affect job performance and firing those who refuse to disclose their medications.
- Strataforce Staffing (S.D. Ind. filed 11/16/17) alleged the company subjected applicants to prohibited pre-employment medical inquiries regarding whether or not they were individuals with disabilities. Settled by the company entering into a 4-year consent decree, including providing applicants of their rights under the ADA and submit annual compliance reports to the EEOC.

INFLEXIBLE LEAVE POLICIES (e.g. 100% healed, maximum leave, etc.)

- American & Envoy Airlines (D. Ariz. filed 11/3/17) allegations of refusal to accommodate disabled employees, placing them on unpaid leave or firing them and failing to rehire them if they were unable to return to work without restrictions. Settled by consent decree, which required the airlines to pay \$9.8 million in stock, as well as policy changes and training commitments.
- Family Healthcare Network (E.D. Cal. filed 6/28/18) alleged the company refused to provide additional leave as an accommodation for disabled and pregnant employees and fired those who were unable to return to work at the end of their schedule leave. Settled by consent decree, including payment of \$1.75 million, policy changes, training commitments and centralized tracking of requests for accommodations and discrimination complaints.
- Mueller Industries, Inc. (C.D. Cal. filed 6/28/18) challenging a maximum leave policy, under which employees were discharged if they could not return to work following the 180 day policy. Settled by consent decree, including payment of \$1 million, reinstatement of affected employees, policy and training commitments, centralized tracking of complaints and reporting compliance to the EEOC.
- Nevada Restaurants (D. Nev. filed 5/24/18) 100% healed policy and failure to provide reasonable accommodation(s).



PREGNANCY DISCRIMINATION

- Absolut Facilities Management, Inc. (W.D.N.Y. filed 9/17/18): allegations of improper medical inquiry/disclosure of all medical conditions, failure to accommodate disabled, and terminating pregnant employees.
- A Plus Care Solutions, Inc. (W.D. Tenn. filed 9/27/18) alleged policy of denying pregnant employees work assignments after their fifth month of pregnancy, regardless of their ability to work.
- Century Care (M.D. N.C. filed 3/7/18) allegations that the company maintained a practice of refusing to accommodate work restrictions of pregnant employees, while accommodating those of non-pregnant employees with similar ability or inability to work.
- Family Healthcare Network (E.D. Cal. filed 6/28/18) alleged the company refused to provide additional leave as an accommodation for disabled and pregnant employees and fired those who were unable to return to work at the end of their schedule leave.
- Mx Hospital System (W.D. Tex. filed 9/25/18) alleging discrimination against pregnant employees by denying them light duty.
- Pruitt Health Raleigh (E.D. N.C. filed 4/18/18) denying accommodations to pregnant employees for limitations that were accommodated for non-pregnant employees with a similar ability or inability to work.
- Simplicity Grand Svcs. (E.D. Mich. Filed 3/28/18) denying accommodations to pregnant employees that were accommodated for non-pregnant employees with a similar ability or inability to work.
- Walmart Stores East, LP (W.D. Wisc. filed 9/20/18) suit on behalf of a class of pregnant employees denied light duty as an accommodation.

OTHER LEAVE ACCOMMODATION ISSUES

- Hawaii Med. Svcs. Assn., (D. Haw. filed 6/28/18) allegations of denying intermittent leave to employees with disabilities without discussing possible alternative accommodations, resulting in employees being forced to work without accommodation or resign.

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- Imperial Trading Co., Inc. (E.D. La. filed 9/26/18) accusations of illegal medical inquiries, a no restrictions policy to screen out individuals with disabilities, failure to provide leave as an accommodation and discharging employees with disabilities.
- Oceanic Time Warner Cable (D. Haw. filed 9/18/18) challenging policies alleged to deny leave as an accommodation for disabled employees.

OTHER MISCELLANEOUS ACCOMMODATION ISSUES

- Corizon Health (D. Ariz. filed 9/18/18) alleging the company refused to provide reasonable accommodations for employees with disabilities and requiring them to be able to work without restrictions. Settled per consent decree for \$950,000 plus mandatory training, policy changes, and ADA compliance monitoring.
- Crossmark (S.D. Ill. filed 9/24/18) a nationwide class action on behalf of disabled employees in a specific role who were denied the use of a stool but were offered alternative accommodation of sitting for no more than 10 minutes every 2 hours.
- Medstar Washington Hosp. Ctr. (D.DC. filed 9/19/18) challenging a policy or practice of requiring disabled employees whose modified duty assignments expire or are revoked to return to work without restrictions and to require disabled employees who need reassignment to compete for vacant positions for which they are qualified.

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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