On Your Radar

Draw on Our Expertise

January, 2017

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!

Passed

The Final (?) Word on San Francisco Paid Parental Leave

San Francisco Paid Parental Leave (SF PPL) went into effect on January 1, 2017. Was your company ready? If not, it may have been because the San Francisco Office of Labor Standards Enforcement did not post all final information and documents until just a few days before the deadline. Read more.

EEOC & DOL

A Game Changer: DOL Releases New ERISA Disability Claims Rules

On December 16, 2016, the DOL issued a Final Rule amending the regulations governing claims handling procedures for ERISA disability claims filed on or after January 1, 2018. Read more.

EEOC Sues *The Cheesecake Factory* for Failure to Provide a Reasonable Accommodation to a Deaf Employee

On December 20, 2016, the EEOC filed a lawsuit in a federal district court in Washington against The Cheesecake Factory. The EEOC alleges that a former employee who was deaf was denied reasonable accommodations under the Americans with Disabilities Act. Read more.

Court Opinions

Employer's Efforts in the Interactive Process Save the Day

This is a story of how one employer's adherence to the interactive process and compliance with the ADA allowed them to prevail. Read more.

Train Your Supervisors not to Ignore Accommodations Provided by Prior Supervisor

Train your supervisors and management personnel to recognize and promptly act upon employee requests for accommodation. Read more.

Employee Entitled to Advance Notice of Fitness-for-Duty Requirement after FMLA Leave

Requiring a fitness for duty or return to work release is a good practice but there's more to it than just that. 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.

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Passed Legislation

The Final (?) Word on San Francisco Paid Parental Leave

San Francisco Paid Parental Leave (SF PPL) went into effect on January 1, 2017. Was your company ready? If not, it may have been because the San Francisco Office of Labor Standards Enforcement did not post all final information and documents until just a few days before the deadline. To be fair, the San Francisco Board of Supervisors gave OLSE only about 8 months to get ready – write regulations, receive and digest public comments, and develop ancillary resources like the required poster and an employee leave request form.

Here are links to the SF PPL website and all the final documents. You can also receive a refresher on the ordinance (including some still-unanswered questions) on our blog, Matrix Radar, here.

Website: Paid Parental Leave Website, Office of Labor Standards Enforcement.

Legislation: Download the **Paid Parental Leave Ordinance** (PDF), as passed on the second reading April 12, 2016. The San Francisco Board of Supervisors passed a technical amendment to the Paid Parental Leave Ordinance on September 6, 2016. Download the the **text of the PPLO amendment**, passed in September 2016.

New! **Paid Parental Leave Ordinance Poster** - Covered Employers must post the required Paid Parental Leave Ordinance **Poster** at every work place and job site. The poster should be printed on 8.5" x 14" paper.

New! **SF Paid Parental Leave Ordinance Rules** - **Rules Implementing the Paid Parental Leave Ordinance** on December 23, 2016.

New! **SF Paid Parental Leave Form** - posted December 23, 2016. Covered Employers must provide the **SF Paid Parental Leave Form** to employees in San Francisco, and employees must complete the form to receive Supplemental Compensation.

New! **Calculation Instructions** - Step-by-step instructions on **calculating the amount of Supplemental Compensation** a Covered Employer must pay to a Covered Employee. Several different pay scenarios are included.

We expect there will be more developments as employers struggle to comply with this one-of-a-kind ordinance. Matrix will keep you posted in these monthly updates and our blog, www.Matrix-Radar.com.

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EEOC & DOL

A Game Changer: DOL Releases New ERISA Disability Claims Rules

After years of litigation flowing from disability benefits denials, the U.S. Department of Labor decided it was necessary to re-examine the ERISA regulations governing the handling of disability benefits claims.

As a result, on December 16, 2016, the DOL issued a Final Rule amending the ERISA requirements for administration of disability claims filed on or after January 1, 2018. The Final Rule allows plans a year to conform their claims handling procedures – and a good thing that is! The new rule and its explanatory preamble are heavy slogging indeed.

Here is a summary of the major changes to the ERISA regulations. A more detailed discussion of the changes is on our blog, Matrix Radar.

1. **Independence and impartiality of claims adjudicators.** Claims and appeals must be decided in a manner designed to ensure independence and impartiality of the persons involved in making the benefit determination. For example, employment decisions regarding compensation, promotion, or similar matters cannot be made based upon the likelihood that an individual will support the denial of disability benefits.

2. **Improvements to disclosure requirements.** Benefit denial notices must contain the following:
   - A complete discussion of why the plan denied the claim and the standards applied in reaching the decision.
   - The basis for disagreeing with the views of health care or vocational professionals whose opinions were provided by the claimant or obtained at the behest of the plan.
   - The basis for disagreeing with a finding of "disability" by the Social Security Administration (SSA), if applicable.
   - The specific internal rules, guidelines, etc., of the plan relied upon in making the adverse determination or, alternatively, a statement that such guidelines do not exist.
   - If the denial is based on a medical necessity or experimental treatment or similar exclusion or limit, an explanation of the scientific or clinical judgment for the determination, or a statement that such explanation will be provided free of charge upon request.

3. **Claimant's right to access entire claim file.** A claimant must be given notice, in an *initial* benefits denial, of the right to access to the entire claim file and other relevant documents upon request and without charge. The claimant must also and be provided the right to present evidence in support of his or her claim during the review process.

4. **Notice of new or additional evidence or rationales before adjudication.** A claimant will have the right to review and respond to new evidence or rationales developed by the plan during the pendency of the appeal. The new evidence or rationale must be provided to the claimant as soon as possible, and sufficiently in advance of the date on which the notice of determination on review is required of the plan. The new regulations do not extend the time frame for the plan's determination.

5. **A claimant is deemed to have exhausted administrative remedies if a plan fails to comply with claims procedure requirements.** A claimant can seek court review of a claim denial based on a failure to exhaust administrative remedies under the plan if the plan failed to comply with the claims procedure requirements, unless the violation was the result of a minor error and 4 other criteria are met.

6. **Expanded definition of "adverse benefit determination" that triggers appeals procedures.** The current ERISA regulations provide that the term ''adverse benefit determination'' includes any denial, reduction, or termination of, or a failure to provide or make full partial payment for, a benefit. Under the new rule, rescissions of coverage, including retroactive terminations due to alleged misrepresentation of fact, must be treated as adverse benefit determinations, thereby triggering the plan's appeals procedures.

7. **Notices and denials must be written in a "culturally and linguistically appropriate" manner.** If a disability claimant's address is in a county where 10 percent or more of the population is literate only in the same non-English language, benefit denial notices must include a prominent statement in the relevant non-English language about the availability of assistive language services.

Pings for Employers

Here's what employers should be working on during 2017 to be ready on January 1, 2018:

- **Review your disability benefits plans to determine if changes are needed.**
- **Review and amend your current claims handling procedures to conform with the new regulations.**
- **Review your internal rules, guidelines, protocol, or other similar criterion** that are relied upon in making adverse determinations.
- **Prepare new templates for denial letters** – for both initial denials and upholding a denial on appeal.
- **Provide training to claims examiners.** Make sure your examiners are well-schooled on the new processes – old practices may not be compliant.
- **Analyze the language make-up of your work force.** If you will be required to provide information in one or more non-English languages, engage a language service for phone calls, translation of denial notices, and other claims assistance.

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What is Matrix Doing to Comply with the New Regulations?

Matrix's disability claims handling procedures will embrace the new rules and will continue to be best in class. We have assembled a task force of experts in disability plans, claims handling procedures, ERISA, and customer service. We will undertake the steps recommended for employers above, and will review and update our claims handling software as needed. Matrix will be ready to administer our clients' disability plans in compliance with the new regulations by January 1, 2018.

Our practice leaders and account managers will be in touch with clients during 2017 to discuss changes to plan notifications, procedures, and more. If you have questions in the meantime, contact your account manager or sales representative, or send us an email at ping@matrixcos.com.

EEOC Sues Cheesecake Factory for Failure to Provide a Reasonable Accommodation to a Deaf Employee

On December 20, 2016, the EEOC filed a lawsuit in a federal district court in Washington against The Cheesecake Factory. The EEOC alleges that a former employee who was deaf was denied reasonable accommodations under the Americans with Disabilities Act. Specifically, the EEOC asserts that the former employee requested an ASL interpreter during his interview for a position as a part-time dishwasher. The request was denied and his interview was conducted through an exchange of handwritten questions.

Once hired, The Cheesecake Factory failed to provide training via either closed-captioned training videos or an American Sign Language interpreter. The employee was later fired for attendance violations. The EEOC action alleges that if he had understood the content of the orientation videos, he would have understood the need to check the weekly schedule he was assigned to work, which changed frequently. The EEOC claims that the employee's failure to understand the restaurant's time-keeping and scheduling practices contributed to the attendance issues that led to his termination. At the time of his termination the employee reminded The Cheesecake Factory that he had not been provided with an interpreter during his orientation training, but the company continued with the termination.

As is common in EEOC lawsuits, the action seeks back pay, future pay and punitive damages for the former employee, as well as permanent injunctive relief.

Pings for Employers. This case shows the importance of acting upon an employee's request for an accommodation, and how critical it is for organizations to train their supervisors regarding employee rights and employer obligations under the ADA. A trained supervisor likely would have seen the ADA red flag at the time of termination when the employee

reminded the company that he had not had an accommodation for his hearing problem during orientation. The cost of training supervisors is miniscule compared to the costs, management time, and business disruption caused by an EEOC investigation and lawsuit.

Court Opinions

[ADA] - Employer's Efforts in the Interactive Process Save the Day

The EEOC filed a lawsuit on behalf of a former employee of Windstream, Stephanie Johnson, who worked in its call center operations. Johnson began her employment in November 2013. Windstream has a "shift bid" process and in March 2014, Johnson elected to work on the Third Shift, which required her to work from 12 am to 11 am. After about a month on Third Shift, Ms. Johnson reported issues with her sleep and for the first time, told Windstream that working Third Shift was interfering with her sleep and causing problems managing her diabetes. HR requested that she complete an "ADA interactive process questionnaire," to indicate the specific accommodation she was requesting. She did so, and asked for a day shift position. There were no such positions available and, when asked, no employees on the day shift were willing to trade positions with Johnson. When informed of this, Johnson told HR she would be "tak[ing] the next step" and threatened to go to the EEOC.

HR promptly responded to her email and asked her if there were other jobs that she might be interested in, if there was anything else they could offer to help her perform the essential functions of her job, or if she would like to pursue her options under the company's leave of absence policies. Ms. Johnson subsequently told HR that she was not interested in the job available and that same day, fell asleep for 5 hours on her scheduled shift. She was written up for doing so. Johnson resigned several weeks later.

In its opinion, the court concluded that Johnson failed to participate in good faith in the interactive process: "When an employer initiates an interactive dialogue in good faith with an employee for the purpose of discussing potential reasonable accommodations for the employee's disability, the employee must engage in good faith to work out potential solutions prior to seeking judicial redress." By rejecting both the idea of an alternate open position and a leave of absence, and instead threatening to go to the EEOC and quitting, the court concluded these actions constituted a lack of good faith by Johnson. In particular, the court noted that Johnson had an obligation to explore leave of absence as a possible reasonable accommodation. Finally, the court emphasized that what Johnson really wanted was for Windstream to create a job of her choosing on the day shift and the ADA does not

require employers to do so.

Pings for Employers:

- Don't be intimidated by an employee who threatens to go to the EEOC. While this lawsuit was no doubt costly for this employer, the company prevailed because it did exactly what the ADA required it to do – acknowledge a request for accommodation once the need is made known, and consider possible accommodations to enable the employee to perform the essential functions of her position.
- Remember, the ADA doesn't require an employer to create a position, eliminate an essential function, or even grant the employee the specific accommodation he or she is requesting, as long as the alternative is reasonable and effective to enable the employee to perform the essential functions of the position.

EEOC v. Windstream Communication (E.D. Arkansas, Dec. 20, 2016)

[ADA] – Train Your Supervisors not to Ignore Accommodations Provided by Prior Supervisor

Monique Allen was an employee of Goodwill whose job involved locating job placements for hearing impaired individuals. After several years of employment, she sustained a brain injury that caused her to suffer from debilitating migraine headaches. To cope with those migraines, her supervisor informally accommodated her requests to take a walk, have a soda and crackers, or sometimes leave work entirely for Botox injections or emergency room visits.

In November 2012, Allen got a new supervisor. After she failed to show up for work, because she was hospitalized, Goodwill required Allen to provide a medical support for her condition and to call in when she was ill, unless she was on a preapproved leave of absence. Allen presented a doctor's note explaining the flare-ups associated with her migraines and told her new supervisor the accommodations she needed (having soda and crackers, taking a walk, and being allowed to dim the lights in her office). Her supervisor told her that she would have to wait until they had a meeting with an HR Representative to discuss her requests and that, in the meantime, she was prohibited from leaving the building and taking a walk, even if that would make her feel better when she had a migraine.

The following month, Goodwill initiated its progressive discipline process regarding Allen's work performance and, specifically, her failure to achieve 18 job placements for the year. Allen verbally protested that performance goal as unrealistic. Later that month, cost-cutting measures led to Allen losing her company-issued laptop and smartphone, which hampered her ability to communicate with potential job placement candidates. Goodwill terminated

her employment in January 2013, citing her poor work performance. Goodwill never did discuss with Allen her requests for accommodations.

Allen filed a complaint for disability discrimination, retaliation, and failure to accommodate in violation of the California Fair Housing and Employment Act ("FEHA"). The lower court granted summary judgment to Goodwill. The appellate court reversed, finding that a reasonable jury could conclude that the decision to end Allen's employment was a pretext and that the real reason was her supervisor's dissatisfaction with her medical needs. In particular, Allen presented testimony that another colleague heard her supervisor comment that they "had to get rid of [Allen] because she . . . had to take time off for her injury, doctor appointments and when she would call in sick."

In addition, because Goodwill never did engage in an interactive discussion with Allen about her requested accommodations for her migraine flare-ups, the court concluded that it is up to a jury to determine whether Goodwill failed to accommodate Ms. Allen in violation of the FEHA.

Pings for employers:

This case demonstrates the need to train supervisors – a point that is stressed by EEOC personnel regularly when they speak to employer groups. In particular, a supervisor new to an existing team needs to understand that

- Train your supervisors and management personnel to recognize and promptly act upon employee requests for accommodations.

Promptly set up interactive discussions with the appropriate personnel and the employee to determine reasonable accommodations that both enable her to perform the essential functions her job and that do not impose an undue hardship.

Allen v. Goodwill Industries (Cal.Ct.App. 2nd Dist., Dec. 20, 2016)

MATRIX CAN HELP! The Americans with Disabilities Act presents many challenges for employers. Addressing accommodation requests doesn't have to be one of them. Matrix's ADA Advantage management system and our dedicated ADA accommodation team helps employers maneuver through the accommodation process and reduce the risk of being involved in a lawsuit for failure to accommodate. We will initiate an ADA claim for your employee, conduct the medical intake if needed, manage the interactive process, assist in identifying reasonable accommodations, document the process, and more. Contact Matrix

at ping@marixcos.com to learn more about these services.

[FMLA] – Employee Entitled to Advance Notice of Fitness-for-Duty Requirement after FMLA Leave

Joseph Casagrande was a registered nurse at a hospital. Being a registered nurse was a second career for him, after 25 years as an accountant and CFO in his prior career. Shortly after being hired as a nurse, however, Casagrande was observed by his new employer to lack time management skills, and his core clinical skills were of concern to nurses who administered his training. Once his training ended and he began working on his own as a nurse, he continued to have performance issues. Casagrande also experienced health problems which he made known to his supervisor, including anxiety, panic attacks and severe neck pain, which he attributed to stress at work. His supervisor told him to contact the employee assistance program or to request a leave of absence. He requested, and was granted, a brief continuous leave of absence though at the time he was not eligible for FMLA because he had not been employed for 12 months.

During his leave, OhioHealth provided him with temporary disability benefits. Upon his return to work, Casagrande continued to have performance issues, including attendance and incomplete documentation. To deal with his work stress, Casagrande drank alcohol and, after failing to show up for 2 shifts, he was discovered non-responsive and taken to the emergency room. This incident led to another leave of absence starting November 2nd, that was extended ultimately through April 2013.

In spite of being on leave, just 6 days into his leave, he was informed by his supervisor that his job was being posted and that it was subsequently filled just one month into his leave. OhioHealth mistakenly believed Casagrande was still not FMLA eligible when, in fact, he had achieved eligibility as of December 2012. Casagrande sought to return to work in January 2013, but was told he could not do so without a return to work release. He ultimately provided one in February and returned to work. On March 12, 2013, OhioHealth finally looked into, and confirmed he was FMLA eligible and offered to restore him to his prior position, but Casagrande filed a lawsuit on March 16, 2013, alleging OhioHealth interfered with his rights under the FMLA. Two days later, he resumed working in his former job.

Once back in his former job, his supervisor continued to express concerns about his ability to perform his duties. He received numerous disciplinary actions, which he contended were a "set up," and which prompted him to add a retaliation claim to his lawsuit. Ultimately, OhioHealth terminated his employment.

In his lawsuit, Casagrande contended that OhioHealth interfered with his FMLA rights by

declining to restore him to his former job when he sought to return to work in January 2013 and by requiring him to provide a return to work release. Under the FMLA, an employer can require a fitness for duty or other return to work form, provided it does so consistently, and informs the employee of the requirement when the leave is designated as FMLA, and that failure to do so may result in the delay or denial of restoration to the employee's former job. The court found that OhioHealth violated Casagrande's rights because, even if it had a policy (and it failed to show that it did), Casagrande wasn't informed of it, nor of the consequences of failing to provide a return to work release. The court further found that Casagrande was entitled to have a jury decide whether the decision to terminate his employment was in retaliation for taking FMLA leave.

Casagrande v. OhioHealth Corp. (6th Cir. Dec. 20, 2016)

Pings for employers:

- The FMLA allows an employer to require a fitness for duty or return to work release form and this is a good practice. However, to have such a requirement, the employer must:

  - Only require a fitness for duty on the condition that necessitated the person to take FMLA;
  - Have a uniform policy that is applied to all similarly-situated employees;
  - Tell the employee in the notice of leave approval that a fitness-for-duty certificate will be required, and provide a copy of the required form and a copy of the employee's job description.
  - Tell the employee that the failure to return the completed fitness for duty form will delay or deny him restoration upon his return to work at the conclusion of his FMLA leave.
  - Have a policy that the employees know about- posted prominently in the workplace where employees are known to gather, like the break rooms, and in the employee handbook, and Company intranet to which all employees have access.

Matrix Absence Management can help your company navigate all the FMLA obligations required by the FMLA regulations in a timely and compliant manner. If your company would like more information, contact Matrix at ping@matrixcos.com.

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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.