On Your Radar

Draw on Our Expertise

October, 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!

Passed or Vetoed

CALIFORNIA |San Francisco amendments to Paid Parental Leave Ordinance
As we informed the readers of our Matrix Radar blog in April 2016, San Francisco passed a Paid Parental Leave ordinance to require San Francisco employers with 50 or more employees to provide supplemental compensation above the amounts their employees would otherwise receive from the state of California. Read more.

CALIFORNIA |Mandatory notice obligations
California employers now have mandatory notice obligations related to domestic violence, sexual assault, and stalking. Read more.

CALIFORNIA |Two bills expanding CFRA vetoed
California governor vetoes 2 bills expanding employees' rights under California Family Rights Act (CFRA). Read more.

Berkley, California and Morristown, NJ l Berkley, California and Morristown, NJ Join the City Onslaught of Paid Sick Laws
Two more municipalities had enacted paid sick and safe laws. Effective October 1, 2017, the Berkley ordinance allows eligible employees who have not yet accrued California paid sick leave to do so at the rate of 1 hour for every 30 hours worked. Read more.

Pending

US HOUSE OF REPRESENTATIVES | Proposed amendments to the Family and Medical Leave Act
A number of bills proposed by various Democratic members of the House of Representatives this past summer have recently moved to Committee. Read more.

WASHINGTON, D.C. | Employment Protections for Victims of Domestic Violence
DC Bill 211, previously introduced in June 2015, has been re-introduced to Committee. The bill proposes to amend DC's Accrued Sick and Safe Leave Act of 2008 to require employers to provide reasonable accommodations to employees who are victims of domestic violence or sexual assault. Read more.

Federal & State Agencies

EEOC | EEOC Sues Wynn Las Vegas for Disability Discrimination
The EEOC recently filed a lawsuit against Wynn Las Vegas, accusing it of disability discrimination on behalf of a Wynn security guard with PTSD. Read more.

EEOC | EEOC Lawsuit Against M & T Bank ADA Discrimination for Employee with a Record of Disability
The EEOC has filed suit against M & T bank on behalf of a former bank manager who took FMLA and short-term disability leave to have surgery. In anticipation of her return to work, the EEOC claims that she was given 10 days to find another job. Read more.

Court Opinions

Eastern District of California | *Zapata v. The Neil Jones Food Co. 2016 WL 4764674*. A California employer is headed for trial on its employee's claims that it violated the California Fair Employment and Housing Act ("FEHA") when the employer failed to accommodate her disability and terminated her employment. Read more.

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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

California	**SAN FRANCISCO CA |San Francisco amendments to Paid Parental Leave Ordinance** As we informed the readers of our Matrix Radar blog in April 2016, San Francisco passed a Paid Parental Leave ordinance to require San Francisco employers with 50 or more employees to provide supplemental compensation above the amounts their employees would otherwise receive from the state of California for Paid Family Leave ("PFL") benefits. On September 14, 2016, San Francisco passed a "technical amendment to its ordinance to incorporate changes made by the state to the CA PFL increasing the weekly maximum PFL benefit to 70% for lower income workers, and 60% for higher income workers (up from 55%) effective January 1, 2018. As a result, the amount of supplemental compensation San Francisco employers will need to pay will decrease somewhat. In addition, the amendments change the methods for employers to identify the pay and hours worked to determine employee eligibility. The amendments also set forth employee notice requirements, anti-retaliation protection, and calculation of post-termination supplemental compensation obligations. Here are some helpful links: • Matrix radar blog post: http://matrix-radar.com/2016/04/1-2-3-leave-california-san-francisco-and-new-york-state-pass-new-or-increased-paid-family-leave-benefits/. • San Francisco ordinance: http://sfgov.org/olse/paid-parental-leave-ordinance • Text of the amendment:https://sfgov.legistar.com/View.ashx?M=F&ID=4686751&GUID=81EBAD4D-FA26-436F-860B-6896090FB104
California	**CALIFORNIA | California employers now have mandatory notice obligations related to domestic violence, sexual assault, and stalking** In late September California Governor Jerry Brown signed a new law requiring employers to give notice to California employees of their existing employment rights as a victim of domestic violence, sexual assault, or stalking. Effective January 1, 2017, employers with 25 or more employees must inform each employee in writing of his or her rights established under the two Labor Code sections cited below. The information must be provided to new employees upon hire and to other employees upon request. However, the law also directs the Labor Commissioner to develop by July 1, 2017, a sample form that employers can use to comply with the new notice requirement. Employers are not required to comply until the Labor Commissioner posts the form on the commissioner's website. The new law amends two current laws (CA Labor Code §§ 230 and 230.1), which allow victim employees to take time off from work for the following purposes: • To seek medical attention for injuries caused by domestic violence or sexual assault. • To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault. • To obtain psychological counseling related to an experience of domestic violence or sexual assault. • To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation. • To obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child. The current laws also make it unlawful for employers to discharge, threaten with discharge, demote, suspend, or in any manner discriminate or retaliate against victims of such crimes in the terms and conditions of employment by his or her employer because the employee has taken time off for those purposes. Leave for the first 4 reasons listed above is limited to the 12 weeks provided by FMLA even if the leave reason is not covered by FMLA. For example, if an employee has already taken (to obtain protective court orders) is not similarly limited.

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California

CALIFORNIA | California governor vetoes 2 bills that would have expanded CFRA leave rights.

Also in late September, California Governor Brown vetoed 2 bills that would have expanded employees' rights under the California Family Rights Act (CFRA).

Vetoed: Parental leave for employees of smaller employees. Governor Brown vetoed SB 654, which would have provided up to 6 weeks of job-protected unpaid parental leave to eligible workers employed by companies with 25-49 employees. Currently the California Family Rights Act (CFRA) requires companies with 50 or more employees to provide up to 12 weeks of job-protected unpaid leave to eligible employees. The proposed law would also have required the continuation of health care benefits during the leave.

Vetoed: Expanded CFRA definition of "family member." One bill (SB 406) would have amended CFRA by expanding the definition of "family member" for which California employees can take leave when the family member has a serious health condition. The bill would have added leave rights to care for the employee's grandparent, grandchild, sibling, domestic partner, or parent-in-law. The bill also would have removed the 18-years age restriction on the definition of "child" so that employees could take CFRA time to care for an "adult" child with a serious health condition even if the adult child does not have a disability.

None of these relationships is covered under the federal Family and Medical Leave Act (FMLA). As a result, an eligible employee would be able to take up to 24 weeks of leave per year in some circumstances. For example, when leave is first taken to care for a family member not covered under FMLA such as a sibling or grandparent, the leave would not count against the employee's 12 weeks of FMLA entitlement, which would still be available for use if the employee meets the eligibility requirements at the beginning of the requested leave.

A few states with family and medical leave laws allow this anomaly to occur due to their broader definition of a "family member" for whom an employee can take leave:

- California: by regulation, includes domestic partner in the definition of spouse
- Colorado: provides for FMLA-like leave rights to care for a civil union partner with a serious health condition
- District of Columbia: family member includes a person to whom the employee is related by blood, legal custody, or marriage; and a person with whom the employee shares or has shared, within the last year, a mutual residence and with whom the employee maintains a committed relationship (thus, covering many more family and personal relationships than the FMLA)
- Hawaii: civil union partners, reciprocal beneficiaries, parents-in-law, grandparents (including grandparents-in-laws)
- Maine: siblings (when mutually committed to supporting one another), domestic partners; no age limit on "child"
- New Jersey: civil union or domestic partners
- Oregon: civil union or domestic partners, parents-in-law, grandparents, grandchildren
- Rhode Island: civil union partners, parents-in-law; no age limit on "child"
- Vermont: civil union partners
- Washington: civil union partners, parents-in-law, grandparents
- Wisconsin: domestic partners, parents-in-law (including the parent of a domestic partner)

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Berkley, CA & Morristown, NJ	**Berkley, California and Morristown, NJ | Berkley, CA and Morristown, NJ Join the City Onslaught of Paid Sick Laws** Two more municipalities had enacted paid sick and safe laws. Effective October 1, 2017, the Berkley ordinance allows eligible employees who have not yet accrued California paid sick leave to do so at the rate of 1 hour for every 30 hours worked. Small businesses, i.e. those with 25 or fewer employees, can cap the annual accrual to 48 hours; for all other businesses, the cap is set at 72 hours and employees can carryover from year to year any accrued leave they have not used, up to the applicable cap. Employees can begin taking their accrued time after 90 days of employment for their own condition, pregnancy, or to care for a family member (including grandparents, siblings, and registered domestic partners). Berkley employers can require the employee to document that leave was taken for a permissible purpose, provided that doing so will not require the employee to incur more than $15 in expenses. This ordinance is one to watch for Berkley employers, because there are 2 competing ballot initiatives on the November ballot that will either expedite this leave or do away with it. Morristown, NJ also has passed a paid sick leave law effective January 11, 2016 (originally set to be effective on October 4, 2016). Eligible employees (those who have worked 80 hours or more in a calendar year for a private entity in Morristown) can accrue paid sick leave of up to 40 hours, and can use that for their own medical condition or to care for a family member. Employees who use this time must confirm that they have done so for a covered reason, but employers are not allowed to obtain medical information.

Pending Legislation

United States Congress	**US HOUSE OF REPRESENTATIVES | Proposed amendments to the Family and Medical Leave Act** A number of bills proposed by various Democratic members of the House of Representatives this past summer have recently moved to Committee. • House bill 5165 would provide a partial exemption to veterans from the eligibility requirements (12 months and 1,250 hours worked). • House Bill 5496 proposes to extend FMLA protections to part-time employees. • House Bill 5518 and 5535 seek to amend the FMLA to add as covered reasons for leave participation in or attendance at a child's or grandchild's school functions, attendance at routine family medical appointments, and provide assistance to elderly relatives. • House Bill 5519 and 5701 propose to amend the definition of covered family member to include domestic partner, parent-in-law, adult child, sibling, grandchild and grandparent. Given the current political climate, it is unlikely that any of these bills will gain traction, but we will continue to monitor and report on their progress, if any, in future editions of this. On Your Radar monthly update.
Washington DC	**WASHINGTON, D.C. | Employment Protections for Victims of Domestic Violence** DC Bill 211, previously introduced in June 2015, has been re-introduced to Committee. The bill proposes to amend DC's Accrued Sick and Safe Leave Act of 2008 to require employers to provide reasonable accommodations to employees who are victims of domestic violence or sexual assault and to protect those employees from discrimination and adverse employment actions such as discharge or demotion.

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Federal and State Agencies

EEOC Sues Wynn Las Vegas for Disability Discrimination

The EEOC recently filed a lawsuit against Wynn Las Vegas, accusing it of disability discrimination on behalf of a Wynn security guard with PTSD. The lawsuit accuses Wynn of violating the ADA by requiring him to submit "burdensome doctor's notes" to support his requests for accommodation and of retaliating against him for requesting reasonable accommodations under the ADA by suspending him pending an investigation.

Pings for Employers: The ADA limits the medical inquiry an employer can undertake in response to an employee's request for accommodation. A sufficient certification describes: 1) the nature, severity, and duration of the employee's impairment; 2) the functional limitations imposed by the impairment specific to the functions of the employee's position, and 3) accommodations that will assist the employee in performing the essential functions of the position, including the employee's requested accommodation and others. If the documentation you receive provides this information, it is sufficient and an employer who requires more information is at risk of being accused by the EEOC of failing to participate in the interactive process in good faith or worse, as seen by the Wynn Las Vegas matter- of exacerbating the employee's condition.

EEOC Lawsuit Against M & T Bank ADA Discrimination for Employee with a Record of Disability

The EEOC has filed suit against M & T bank on behalf of a former bank manager who took FMLA and short-term disability leave to have surgery. The EEOC claims that she was told that her position would be filled if she was not medically cleared to return to work within ten days and that, when she finally did receive such clearance, she had to locate a vacant position.

Pings for Employers: The ADA protects employees with a "record of" a physical or mental impairment. This means that the employer is aware that the person, at some point, had a qualifying disability; in this instance, because this bank manager took FMLA and short-term disability leave. As a result, once she had exhausted her leave and was "medically cleared" to return, if her position was no longer available, the bank had an obligation to provide her with reassignment to a vacant position for which she was qualified. The employer is required to (1) search for a vacant position for which the employee is qualified and (2) assign employee to that position without having to apply or compete for the positions. See our blog post on reassignment as a reasonable accommodation.

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Court Opinions

California

Eastern District of California *Zapata v. The Neil Jones Food Co. 2016 WL 4764674*.

A California employer is headed for trial on its employee's claims that it violated the California Fair Employment and Housing Act ("FEHA") when the employer failed to accommodate her disability and terminated her employment. . In May 2013, Zapata learned she suffered from degenerative disc disease, which caused her pain when standing. As a result, she requested, and was approved for, a continuous leave of absence under the Family and Medical Leave Act ("FMLA"), concurrently with California Family Rights Act ("CFRA") leave. Her FMLA/CFRA leave expired in August and she requested extended leave. The company had a policy that allowed for an additional 30 days of leave and this too, was granted. In anticipation of the expiration of her company leave, and losing her health insurance along with her job, Zapata called her boss to let him know that she would be released to return to work October 15th (so, needed only an additional 3 weeks of leave). Her boss went to bat for her and emailed the CEO, asking if the company could grant her request, given that she had been a strong performer for 10 years. In response, the CEO told him to talk to HR. He did so, and was told by the Director of HR that the company could not extend Zapata's leave "due to the need to consistently apply the rules." As a result, Zapata's employment was terminated, though she was "welcomed to reapply once she feels better."

Sure enough, the Plaintiff did just that and was rehired, with an array of accommodations that she has argued in her lawsuit would have afforded her the ability to perform her job, had the company engaged in an interactive process as she ended her planned leave of absence. This court concluded that the questions of whether she could actually perform the essential functions of her position, with or without accommodation, at the time she requested an extension of her leave, and whether a reasonable accommodation was available, are questions to be resolved by a California jury.

Pings for Employers: This case presents many lessons for employers. First, your HR Director needs to be familiar with the ADA and, if you are an employer in California, it is critical that your HR personnel know the FEHA, which like so many California laws, is more generous than the federal law and laws in many other states. When we speak before employer groups on the ADA, we emphasize that the ADA can be counterintuitive. While you want to be consistent with your policy application for all other HR issues, with respect to the ADA and FEHA, you are required to conduct an "individualized assessment" of the employee's restrictions and what she needs to perform the essential functions of her job. Modification of company policies such as leave of absence. Denying what purports to be a short extension on the basis of a policy is rarely (never?) the right answer to a request for accommodation. As we have hammered home time and again in this Update and on the Matrix Radar blog, employers with inflexible leave policies are a major target for the EEOC.

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.