On Your Radar

Draw on Our Expertise

June, 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 Legislation

Texas | A New Standard in Leaves of Absence – Game On!

Our Lead Blogger, Marti Cardi, provides her take on two new bills in The State of Texas. Read more.

New York | Progress on Finalizing Details for new Paid Family Leave Law.

The New York Department of Financial Services adopted regulations setting the employee contribution rate for the state's new Paid Family Leave Law. Read more.

EEOC & DOL

EEOC Update | Employer's Assumptions Creates an ADA Liability.

An Oklahoma manufacturing company agrees to pay $106,000 and provide ADA training after failures on multiple fronts. Read more.

EEOC | Lawsuit Claims Firing was Retaliation for Posting on Social Media.

The EEOC filed a lawsuit for violation of Title VII and the ADA on behalf of an employee who had been fired in retaliation for posting complaints of discrimination on the website glassdoor.com Read more.

DOL | 2016 Interpretation on Joint Employment Withdrawn.

In January of 2016 the DOL released an Administrator's Interpretation on the responsibilities and obligations of joint employers under the FMLA. On June 7th the DOL announced it has been withdrawn. Read more.

Court Opinions

Marshall v. The Rawlings Company, LLC, 854 F. 3d 368 (6th Cir. April 20, 2017)

Gloria Marshall took FMLA leave both continuously and intermittently for her mental health issues. She filed a lawsuit accusing her employer, Rawlings Co., of demoting and ultimately firing her because of her FMLA leave. She lost in the district court on summary judgment. In this opinion, the 6th Circuit reversed that decision. Read More.

Waag v. Sotera Defense Solutions, Inc., 2017 WL2115200 (4th Circuit, May 16, 2017)

Gary Waag was employed by Sotera, a defense contractor. He fell off the roof of his home and took a medical leave of absence. Upon his return to work, Waag was placed in another job with the same pay, worksite, responsibilities, and title. When government budget sequestration hit which severely impacted funding for the defense industry, his employment was ended in a reduction in force. The decision-makers selected Waag because he was among the employees whose positions were not funded by government contracts. Read More.

Draw on Our Expertise

GET TO KNOW

Marti Cardi, Esq.
Vice President, Matrix Absence Management

Gail Cohen, Esq.
Director, Employment law and Compliance, Matrix Absence Management, Inc.

READ OUR BLOG

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

RELIANCE STANDARD
A MEMBER OF THE TOKIO MARINE GROUP

MATRIX ABSENCE MANAGEMENT
A MEMBER OF THE TOKIO MARINE GROUP

On Your Radar

Draw on Our Expertise

State Legislative Update

Texas Sets New Standard in Leaves of Absence

Texas Sets New Standard in Leaves of Absence – Game On!

By Marti Cardi, Esq.

In our March *On Your Radar* we summarized bills that had been introduced in state legislatures so far in 2017 – scads of proposals for paid family leaves, more paid sick and safe leave bills, and a variety of other leave-related bills such as pregnancy disability and caregiver protections.

Most of those bills are still winding their way through the state legislatures, but Texas House Bill 88 screamed through the process and has been signed into law by the governor. Now, in Texas, if an employer has a policy that allows an employee to take time off to care for a sick child, the employer must also allow employees time off to care for a foster child. Wow! No mandated leave here, just, "let your employees take care of their foster children if you let them take care of their other children."

And Texas hasn't stopped there! Still pending is Texas Senate Bill 285, which would allow employees to take time off from work to obtain an election identification certificate. Unfortunately, this ground-breaking leave law hasn't seen any progress since it went into committee on January 30, but I expect the success of House Bill 88 will go to their heads and the Texas legislature will usher this one right on through to the governor's desk.

The objectives of 88 and 285 are laudable, and some progress is better than none. But I feel at liberty to poke a little fun at Texas – the state with a leave law for ham radio operators in an emergency – because I was born there while my dad was teaching at Texas A&M. Hence my true name, Martha Jo. Go Aggies!

New York Paid Family Leave

New York Making Progress on Finalizing Details on Paid Family Leave Law

Employee contribution rate. On May 31, 2017, the New York Department of Financial Services (DFS) adopted regulations setting the employee contribution rate for the state's new Paid Family Leave law (PFLL), set to take effect on January 1, 2018. In 2018 employees will contribute 0.126% of their average weekly wage or 0.126% of the statewide average weekly wage ($1,305.92 for 2016), whichever is less. For subsequent years, the DFS will publish the contribution rate by September 1, effective the following January 1.

Under the law, employers are permitted but not required to start withholding employee

contributions effective July 1, 2017, even though paid leave benefits are not available for 6 more months. We at Matrix have not seen any explanation of why an employer would choose to do that, since 2017 employee contributions will not affect the employees' rights or benefits rates in the future.

Revised proposed regulations. In addition, the New York Workers' Compensation Board has issued revised regulations interpreting and supporting the PFLL that will start providing employees with pay benefits on January 1, 2018. This revised version of the regulations, published on May 24, 2017, is still not final. The Board is accepting comments for 30 days, or until June 23, 2017.

As a reminder, the law phases in from 2018 through 2021. Job-protected leave starts at 8 weeks per 12-month period and increases to 12 weeks; pay benefits start at 50% and increase to 67% in 2021. Leave is available to bond with a new child, care for a family member with a serious health condition, and tend to matters due to the active duty military deployment of a family member. A more detailed review of the law's provisions is available on our prior Matrix Radar blog post here, and a summary of changes made from the February 22, 2017, initial proposed regulations is available in our blog post here .

EEOC & DOL

Employer's Assumption About the Effects of Medication Creates $106,000 ADA Liability

UPCO, a manufacturing company in Oklahoma, employed Lydia Summers as a temporary receptionist/accounts payable clerk. After about five months in the role as a temp, the company made a conditional offer of permanent employment to her, and those conditions included a drug screen and physical examination by its third-party vendor. Ms. Summers disclosed her prescription medications, which she took for an array of medical conditions including ADHD and chronic pain syndrome. A physician for that vendor, who did not personally examine her, concluded that she should not be hired because of potential side effects of her medications, which he opined would pose a risk to her and others in the workplace. The company told her they would only employ her if she discontinued using her medications. Ms. Summers had her personal physician provide a letter that she did not have any side effects from her medications and that she could perform a light duty job (which he defined as not requiring lifting over 50 pounds). The company employed her for nearly another month, before withdrawing its offer of permanent employment based on its vendor's "medical opinion."

On Your Radar

Draw on Our Expertise

The Americans with Disabilities Act allows employers to conduct pre-employment "medical exams," as long as they are job-related and consistent with business necessity. There were innumerable things that went wrong with how UPCO handled this situation, including that Ms. Summers had performed the job well enough for five months that they offered her permanent employment. So, the notion that she suffered side effects from her medications or otherwise posed a threat in her receptionist/accounts payable clerk role was dubious at best. Given that she had a sedentary job one wonders why she was put through a pre-employment physical anyway! The employer also failed to conduct an individualized assessment of Summers' ability to perform her job and failed to engage in the interactive process with her.

In settling the lawsuit, UPCO agreed to pay $106,000 and entered into a consent decree which will include requiring the company to provide apparently much-needed training to its personnel on the ADA.

EEOC Press Release 05-31-2017

EEOC Sues on Behalf of Employee Fired in Retaliation for Complaining about Discriminatory Practices on glassdoor.com

The EEOC has filed suit accusing IXL Learning of violating Title VII and the ADA on behalf of a former employee, Adrian Scott Duane. The EEOC claims that the employee had been fired in retaliation for posting complaints of discrimination on the website glassdoor.com. According to the EEOC's complaint, Duane took eight weeks of medical leave to undergo "gender confirmation surgery." Prior to his leave, Duane claims that his co-workers were overtly interested in and often asked inappropriate questions regarding his gender and sexual orientation. He requested accommodation during his recovery to work from home on a part-time basis, which he claims was denied although other "non-disabled, cisgender and heterosexual employees" were granted accommodations to work from home on a part-time basis. Duane posted an anonymous message, accusing the company of discrimination. He also alleges he complained of discrimination and that, though his posting was anonymous, the company fired him for the posting. IXL did not reach a conciliation agreement with the EEOC and, as of this date, has not filed an Answer to the Complaint, but this is certainly a case worth watching as it progresses – and we will!

EOC Press Release 05-24-2017

On Your Radar

Draw on Our Expertise

DOL Withdraws 2016 Broad Interpretation on Joint Employment

Many employers might be in a joint employment relationship with a business partner and not realize it. Joint employment exists in many situations – even unintentionally – and can create or increase employer liability under the FMLA.

On January 20, 2016, the U.S. Department of Labor (DOL) released an Administrator's Interpretation 2016-1 (AI) on the responsibilities and obligations of joint employers. The DOL concurrently issued a new Fact Sheet #28N, which focuses on joint employer responsibilities under the FMLA.

On June 7, 2017, the DOL announced that it is withdrawing AI 2016-1. This is consistent with other Trump administration initiatives to pull back on governmental regulation of businesses as employers. The withdrawal does not change the existing law, but does eliminate the AI as the DOL's broad interpretation of the law. The AI is no longer available on the DOL website.

So far the DOL has not taken action to withdraw FMLA Fact Sheet #28N. We'll be watching! In the meantime, employers should review that Fact Sheet to gain an understanding of their possible FMLA obligations as a joint employer.

As a side note, the DOL has also withdrawn a 2015 Administrator's Interpretation on independent contractors.

For more background on AI 2016-1 on joint employers, check our blog post http://matrix-radar.com/2016/01/caution-joint-employers-the-dol-is-looking-for-you/.

On Your Radar

Draw on Our Expertise

Court Opinions

Marshall v. The Rawlings Company

Employer Gets Swiped by the Cat's Paw for Employee Termination without Conducting Investigation into FMLA Use

Marshall v. The Rawlings Company, LLC, 854 F.3d 368 (6th Cir. April 20, 2017)

Plaintiff Gloria Marshall took FMLA leave both continuously and intermittently for her mental health issues, which included depression and anxiety. She filed a lawsuit accusing her employer, Rawlings Co., of demoting and ultimately firing her because of her FMLA leave. She lost in the district court on summary judgment. In this opinion, the 6th Circuit reversed that decision.

Marshall presented evidence that numerous colleagues, including co-workers, made what she characterized as "bullying" comments because she took FMLA, and because of the mental health issues that required her to do so. During a discussion of her workload, she claimed she was told "[s]o are you planning to be out again anytime soon?" She understood these comments to be about her FMLA leave.

In addition, Marshall presented evidence that lower-level supervisors also took exception to her FMLA leave and criticized her failure to keep up with her workload upon her return. She filed an internal complaint alleging harassment by those supervisors. Instead of looking into her claims and conducting an investigation, the company's in-house attorney concluded that she had made those claims solely to avoid the consequences of the discussion of her workload and conducted no investigation whatsoever.

Employment discrimination law has previously recognized what is known as the "cat's paw" theory, which provides a cause of action when an otherwise unbiased decision-maker bases an employment decision on the recommendation of lower level employees who are shown to be biased. The phrase is based on the fable in which a monkey persuades a cat to pick chestnuts from a fire and then runs away with the chestnuts, leaving the cat to nurse its burnt paws. In other words, the monkey persuaded the cat to do its dirty work and enjoyed the spoils.

In the *Marshall* case, the Sixth Circuit applied the cat's paw theory to support Marshall's FMLA claims because the she was able to show that the personnel who decided to demote and ultimately fire her depended on information from the very supervisors she accused of harassing her for taking FMLA. The case is headed back to the lower court for trial on Marshall's FMLA (and ADA) retaliation claims.

On Your Radar

Draw on Our Expertise

Pings for Employers:

- Educate your supervisors about FMLA leave. Good training can help your supervisors understand what they can and should do when an employee requests or takes FMLA leave, and avoid the sort of ill-advised comments that doomed The Rawlings Company.

- If an employee complains about retaliation or harassment for exercising his or her FMLA rights, take it seriously and investigate before taking any adverse employment action. While an independent investigation alone might not defeat liability based on the cat's paw theory, conducting one may reveal the bias of the personnel recommending the termination and might also reveal a legitimate basis for the employment decision.

Waag v. Sotera Defense Solutions

The Employer's FMLA Obligation to Restore an Employee to His Job May Not Be Absolute.

Waag v. Sotera Defense Solutions, Inc., 2017 WL2115200 (4th Circuit, May 16, 2017)

Gary Waag was employed by Sotera, a defense contractor. He was managing a major bid to obtain substantial business from the US Army when he severely injured his hand when he fell off the roof of his home. He took a medical leave of absence. After informing his superiors he would not be reporting to work for several weeks, his critical position was given to another employee to handle in his absence. Upon his return to work, Waag was placed in another job with the same pay, worksite, responsibilities, and title. When government budget sequestration hit which severely impacted funding for the defense industry, his employment was ended in a reduction in force. The decision-makers selected Waag because he was among the employees whose positions were not funded by government contracts.

Waag sued Sotera, claiming that the company's failure to restore him to his original job and terminating his employment violated the FMLA. The Fourth Circuit agreed with the lower court and affirmed that court's decision to grant summary judgment to Sotera. In doing so, the court focused on the language of the FMLA itself, which provides for the employee, upon return from FMLA "(A) to be restored . . . to the position of employment held by the employee when the leave commenced; *or* (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29

On Your Radar

Draw on Our Expertise

U.S.C. §2614(a)(1). Emphasizing the "or" in the statute, the court concluded that an employer can either restore the employee to his original job OR an equivalent position. The court found that Waag's position upon return from FMLA leave was in fact equivalent to his pre-leave position, and that the employee does not have an absolute right to return to his original position.

Pings for Employers:

- In spite of the holding of this case, it is a better practice, if you can, to restore the employee to the same job upon his return from FMLA leave. But this case demonstrates that, if the employer places the employee in an equivalent role upon return – especially for legitimate business reasons as in the Waag case – the FMLA does not provide an absolute right to be restored to the same job.

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.