On Your Radar

Draw on Our Expertise

December, 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!

Are You Ready for 2017? Here's What's Coming Down the Road.

President Obama, several states, and some counties and municipalities were active in 2016 or before, leading to new leave-related laws for employers to comply with in the New Year. Paid sick leave laws and ordinances definitely top the list, but a few other types of new laws are sprinkled in to keep us on our toes. Here is a summary of what's coming.

Passed

Executive Order | Paid Sick Leave for Employees of Federal Contractors.
With Congress unable to agree on a federal paid sick leave law, President Obama did what he could to help employees by Executive Order. Read more.

Arizona | The Arizona Fair Wages and Healthy Families Act.
The Arizona Fair Wages and Healthy Families Act was passed by Arizona voters in November. Key provisions are available within. Read more.

California | Mandatory Notice to Employees of Leave Rights.
Effective January 1, 2017, California employers with 25 or more employees must inform each employee in writing of his or her rights established under the two pre-existing Labor Code sections. Read More.

Illinois | Employee Sick Leave Act.
Illinois action that states, IF an employer provides paid sick leave, the employee must be able to use at least one-half of a year's accrual under the company policy for purposes related to family member's injury, illness, or medical appointment. Read More.

Vermont | Paid Sick Leave.
Vermont has joined the growing number of jurisdictions in the Northeast that require employers to provide paid sick leave. Read More.

Washington | Paid Sick Leave.
Voters in the State of Washington approved paid sick leave for employees, which takes effect January 1, 2018. Read More.

Local Governments | Paid Sick Leave.
31 municipalities and counties now (or will soon) require paid sick leave. Notable among them are Chicago, Los Angeles, New York City, & Philadelphia. Read More.

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Passed

Paid Sick Leave for Employees of Federal Contractors: *Executive Order 13706*

Paid Sick Leave for Employees of Federal Contractors.

With Congress unable to agree on a federal paid sick leave law, President Obama did what he could to help employees by Executive Order. Signed by Mr. Obama in September 2015, the order applies only to employers with a contract or subcontract with the federal government. Although it is tough to overturn an Executive Order by court order or act of Congress, a subsequent President can rescind an Executive Order upon taking office. Matrix will be watching for whether this Executive Order attracts President-Elect Donald Trump's attention.

- Effective Date: January 1, 2017 – although may be rescinded by President-Elect Trump after taking office.
- Covered Employers: Applicable to companies that contract with the federal government and their subcontractors (some limitations apply). Applies only to federal contracts that are new, renewed, or otherwise modified on or after January 1, 2017.
- Accrual Rate: One hour of paid sick leave for every 30 hours worked.
- Accrual or Usage Caps: Accrual capped at 56 hours accrual per year, but unused hours can be carried forward into the next year. No caps on usage.
- Leave Reasons: Employee's own or family member's medical needs, matters related to domestic violence or stalking. "Family member" is broadly defined to include any individual whose close association with the employee is the equivalent of a family relationship.
- Upon Employee Separation: Not paid out upon employee separation, but if employee is reemployed within 12 months, employer must reinstate prior accrued sick leave hours.

Executive Order 133706 can be found at https://www.whitehouse.gov/the-press-office/2015/09/08/executive-order-establishing-paid-sick-leave-federal-contractors.

Arizona

Arizona | Fair Wages and Healthy Families Act.

The Arizona Fair Wages and Healthy Families Act was passed by Arizona voters in November. Key provisions include:

- Effective Date: July 1, 2017.
- Covered Employers: All.
- Accrual Rate: One hour of paid sick leave for every 30 hours worked.
- Accrual or Usage Caps: Accrued but unused paid sick leave can be carried over from year to year, but usage caps are as follows:
  Employers with fewer than 15 employees: 24 hours per year
  Employers with 15 or more employees: 40 hours per year
- Leave Reasons: Employee's own or a family member's illness, injury, or medical appointments; matters relating to domestic violence, sexual assault, abuse, or stalking; closure of the employee's place of business or the child's school due to public health emergency; and quarantine of the employee or a family member due to a communicable disease.
- Upon Employee Separation: Accrued but unused paid sick leave does not need to be paid out at separation from employment.

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California

California | Mandatory Notice to Employees of Leave Rights.

Effective January 1, 2017, California employers with 25 or more employees must inform each employee in writing of his or her rights established under the two pre-existing 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 four reasons listed above is limited to the 12 weeks provided by the federal Family and Medical Leave Act (FMLA) even if the leave reason is not covered by FMLA. For example, if an employee has already taken 9 weeks of FMLA time, he or she will be limited to 3 more weeks of leave for the first four reasons above in the specific leave year. Leave for the reasons described in the last bulleted paragraph (obtaining protective court orders) is not similarly limited.

Illinois

Illinois | Employee Sick Leave Act (Public Act 99-0841).

In a tepid effort to join the paid sick leave bandwagon, Illinois passed this act which does not impose any requirements on Illinois employers to provide paid sick leave if they don't already do so. Rather, the law simply says that IF an employer provides paid sick leave, the employee must be able to use at least one-half of a year's accrual under the company policy for purposes related to family member's injury, illness, or medical appointment.

- Effective Date: January 1, 2017
- Covered Employers: All Illinois employers who provide sick leave benefits to their employees for the employees' own injury, illness, or medical appointments.
- Accrual Rate: Per company policy.
- Accrual or Usage Caps: Per company policy. Employee must be allowed to use at least 6 months' accrual for purposes related to a family member.
- Leave Reasons: Family member's injury, illness, or medical appointment
- Upon Employee Separation: Per company policy.

Illinois employers should also be familiar with new paid sick leave laws applicable in the City of Chicago and Cook County, both effective July 1, 2017.

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Vermont

Vermont | Paid Sick Leave

Vermont has joined the growing number of jurisdictions in the Northeast that require employers to provide paid sick leave. Here are the basics of the Vermont law:

- Effective Date:
  - January 1, 2017: Employers with more than 5 employees to provide 3 days of paid sick leave per year.
  - January 1, 2018: Employers with 5 or fewer employees to provide 3 days of paid sick leave per year.
  - January 1, 2019: All employers to provide 5 days of paid sick leave per year.
- Covered Employers: All Vermont employers, per phase-in schedule above.
- Eligible Employees: Those working at least 18 hours per week or 21 weeks per year.
- Accrual Rate: One hour of paid sick leave for every 52 hours worked.
- Accrual or Usage Caps: Accrual can be limited to 24 hours in a 12-month period in 2017 and 2018. Starting in 2018, accrual can be limited to 40 hours in a 12-month period.
- Leave Reasons: Employee's own or a family member's illness, injury, or medical appointments, (including matters relating to long-term care), matters for the employee or family member relating to domestic violence, sexual abuse, or stalking, and caring for a family member whose usual school or place of business is closed for public health or safety reasons.
- Upon Employee Separation: No pay required for unused sick leave. Various provisions regarding usage and accrual depending on the circumstances of termination and rehiring, if applicable.

http://legislature.vermont.gov/assets/Documents/2016/Docs/ACTS/ACT069/ACT069%20As%20Enacted.pdf

Washington

Washington | Paid Sick Leave

Voters in the state of Washington also approved paid sick leave for employees, but this law is not effective until 2018. Plenty of time to get ready!

- Effective Date: January 1, 2018.
- Covered Employers: All employers, regardless of size.
- Accrual Rate: One hour of paid sick leave for every 40 hours worked.
- Accrual or Usage Caps: No accrual caps; carryover of accruals limited to 40 hours per year.
- Leave Reasons: Employee's own or a family member's illness, injury, or medical appointments, (including matters relating to long-term care), matters for the employee or family member relating to domestic violence, sexual abuse, or stalking, and caring for a family member whose usual school or place of business is closed for public health or safety reasons.
- Upon Employee Separation: Accrued but unused paid sick leave does not need to be paid out at separation from employment.

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Local Governments

Local Governments | Paid Sick Leave

31 municipalities and counties now (or will soon) require paid sick leave. Notable among these are Chicago and Cook County, Los Angeles, numerous cities in New Jersey, New York City, Philadelphia, Pittsburgh, San Diego, and San Francisco. One new twist is the Montgomery County, MD, sick leave law that was recently amended (effective immediately). It allows usage of the annual accrual of up to 56 hours for the birth or placement of a new child for adoption or foster care, and for bonding.

A chart summarizing the local government and state paid sick leave laws produced by *A Better Balance – The Work and Family Legal Center* can be found on the organization's website.

San Francisco Paid Parental Leave. We have previously reported on the groundbreaking move by San Francisco to require employers to provide San Francisco employees with paid parental leave. The reason for leave is limited to bonding with a new child. This fast-moving ordinance will be effective in phases. Covered employers will have to comply as of the following dates:

- 50 or more employees: January 1, 2017
- 35 or more employees: July 1, 2017
- 20 or more employees: January 1, 2018

The employer's obligation is to top off paid family leave benefits the employee is receiving from the state of California to 100% of the employee's regular compensation, subject to a salary cap. The benefit is paid fully by the employer with no contribution or payroll deduction from employees.

The San Francisco Office of Labor Standards Enforcement has published the ordinance, an amendment, the draft rules supporting the law, and a form for employer use – and one of the darned cutest baby photos we've ever seen! – on the OLSE website. You can also get more details on our Matrix Radar blog post. Final rules and forms are expected before the initial effective date of January 1, 2017.

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Court Opinions

Wagoner v. Lewis Gale Medical Center

One Out of Seven Loses Case for Employer – When That One was ADA-Related.

A recent case from a federal court in Virginia reminds employers that improper handling of an employee with a disability might trump all the valid reasons for the employee's termination. Jim Wagoner was hired by Lewis Gail Medical Center as a security officer at its hospital. Wagoner revealed that he had dyslexia which made it difficult for him to comprehend the hospital's complicated work schedule. Wagoner repeatedly asked his supervisor for a copy of the schedule but he was told he could not have a copy and would have to write his schedule down instead.

The PIP. Wagoner had difficulties with his job performance, which were documented by Lewis Gale. On May 29 the hospital put him on a performance improvement plan addressing seven areas in which Wagoner needed to improve. One of the seven was attendance – he had missed some work days which he attributed to his inability to comprehend the work schedule. None of the other six areas identified on the PIP related to Wagoner's dyslexia. Lewis Gale told Wagoner it expected improvement within 30 days and immediately began retraining Wagoner. Over the next few days Wagoner showed improvement in some areas, but training was delayed in some respects due to unavailability of his assigned trainer. The trainer planned to continue the training the following week.

On June 5 Wagoner missed a shift, which he attributed to his inability to read and understand the schedule and Lewis Gale's failure to give him a copy. The trainer confirmed that he had reminded Wagoner of his obligation to know his schedule, but also verified that he "was unable to make [Wagoner] a copy of the schedule." Wagoner was terminated for failure to report on June 5, only seven days after the PIP began. The only reason cited by for the termination was the failure to report to work on June 5.

So what happened next? Lewis Gail argued that Wagoner could not have been qualified for his position or he would not have been put on a performance improvement plan. Au contraire says the court. If Wagoner was put on a PIP rather than terminated for his performance deficiencies, Lewis Gale must have felt that Wagoner was capable of meeting the basic requirement of the position. Accordingly, because its only reason for termination related to Wagoner's known disability and Lewis Gale's failure to provide an accommodation, the case was appropriate for submission to a jury.

Wagoner v. Lewis Gale Medical Center (W.D.Va. Dec. 7, 2016)

Pings for Employers: Always be sure to go through the interactive process with an employee who claims a disability and requests an accommodation. If the employee has performance issues – whether related to the disability or not – deal with those separately. No matter what grounds you may have for terminating an employee, be sure you have followed correct ADA processes for addressing the disability.

Castro-Ramirez v. Dependable Highway Express

Reprise – That duty to accommodate an employee because of association with a disabled individual lives on.

In California the Fair Employment and Housing Act (FEHA) provides worker protections based on disability similar to the Americans with Disabilities Act (as well as other protected classifications). One little-known FEHA provision was put to the test in *Luis Castro-Ramirez v. Dependable Highway Express.* In this case, the California Court of Appeal ruled in April 2016 that an employee with a son who required dialysis on a scheduled basis was entitled to an accommodation under FEHA to meet his son's dialysis needs. The ruling was based on the language of the statute

which defined a "physical disability" to include an employee who is associated with a person who has, or is perceived to have, a physical disability. Examples include, as in this case, time off from work to provide required medical care or transportation to appointments.

The opinion was vacated on later rehearing in August but the Court of Appeal kept the issue alive. While not directly deciding whether an employer must accommodate an employee who is caring for a family member with a disability, the majority stated that FEHA (Gov't Code §12940) "may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." The employer, Dependable Highway Express, appealed the August decision to the California Supreme Court but the high court denied the petition for review on November 30. As a result, California employers are left with the strong indication – but not a legal ruling – that employers have the obligation to provide a reasonable accommodation to an employee who is associated with someone with a disability.

Castro-Ramirez v. Dependable Highway Express **(Cal.App. 2 Dist. 2016)**

Pings for Employers:

- California Employers. The plain language of the FEHA supports the California court's interpretation of the definition of disability to include those associated with an individual with a disability. As a result, California employers should engage in the interactive process if an employee requests an accommodation related to an individual with a disability with whom the employee is associated. As with an accommodation request because of the employee's own disability, the employee will need to make known to the employer the reason for the accommodation request – that it is due to the employee's association with a person with a disability and the need to help that person in some fashion related to the disability.

- All Employers. The federal ADA does not contain a similar provision but that does not mean employers should not be cognizant of the issue. The "association provision" of the ADA prohibits employment discrimination against a person because of his or her known relationship or association with a person with a known disability. This means that an employer is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of a family member or anyone else with whom the applicant or employee has a relationship or association. For example:

    - An employer cannot terminate an employee because her husband (or best friend or roommate or…) has been diagnosed with cancer and the employer is concerned the employee will miss time from work to care for her husband and take him to medical treatments.
    - An employer cannot discriminate against an applicant because his spouse has an illness that may cause the employer's health insurance rates to increase if the employee is hired and signs up for coverage under the employer's policy.

- All Employers – There's More. There are several other ways in which employees are protected from adverse action in employment because of their association with an individual with a disability, specifically including serving in a caregiver role for a child parent, or others. For a summary of these issues see our blog post, *"What Employers Need to Know about Caregiver Protections under the ADA, FMLA, Title VII… and in*

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California" available at http://matrix-radar.com/2016/08/what-employers-need-to-know-about-caregiver-protections-under-the-ada-fmla-title-vii-and-in-california/.

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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