On Your Radar

Draw on Our Expertise

November, 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!

Legislative Updates

Federal | Protection for Victims of Domestic Violence Introduced in both the House and Senate

The United States Senate and House of Representatives introduced identical bills that, if passed, provide absence rights and job protection to victims of domestic or dating violence, sexual assault or stalking. Read more.

Federal & State Agencies

EEOC | Employer Agrees to EEOC Consent Decree to Settle Pregnancy Discrimination Act Claim

A California orchid grower settled a lawsuit in which they were accused of telling female employees in staff meetings not to get pregnant or they would be fired. Read more.

EEOC | Commercial Real Estate Company sued by EEOC for ADA Violation

The EEOC has sued Jones Lang LaSalle (JLS), for violations of the ADA. The suit claims the JLS withdrew an offer of employment after learning the applicant had PTSD and requested an accommodation. Read more.

Court Opinions

Pushing Back on Lengthy Leaves as an ADA Accommodation: Two Cases from the 7th Circuit

Despite two recent court opinions, favorable to the employers, the issue of how long of a leave of absence you need to provide an ADA Accommodation needs to be reviewed every time. Read more.

Lucky Employer Skates on ADA Liability

Complaints about a noisy workplace aren't enough to put employer on notice of need for an ADA Accommodation. Read more.

A Request for "Retroactive Leniency" is Not a Reasonable Accommodation

An employer isn't required to accommodate an employee's disability by overlooking their previous misconduct, even if the misconduct was a result of the disability. 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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Legislative Updates

Federal

Federal - Protections for Victims of Domestic Violence Proposed in the US House and Senate

Identical bills that propose significant leave of absence rights and job protections for victims of domestic violence, dating violence, sexual assault, and stalking were introduced simultaneously in the US Senate and House of Representatives on October 31, 2017. If passed, the bills (S 2043 and H 4198) will require employers to provide up to 30 days of job-protected and partially paid "Safe Leave" for victims – referred to as "survivors" – of these abusive personal crimes.

The bills provide some eye-opening Congressional findings regarding the impacts of these crimes, which you can read in the Congressional Findings at the beginning of each bill. The goal of the bills is "to empower survivors of domestic violence, dating violence, sexual assault, or stalking to be free from violence, hardship, and control, which restrains basic human rights to freedom and safety in the United States."

> *Several states have similar laws for the protection of victims of such personal crimes, although none of them contain pay provisions. The passage of the most recent of such laws in Nevada prompted our prior blog post on these leave laws, in which we summarized the Nevada law and identified other states with similar laws: Leave rights for victims of domestic violence: Growing need, multi-state trend.*

Summary of the bills' provisions. Here is a rundown of the key provisions of the two bills. Several key attributes of the leave rights are not specified in the bills, as noted below. We would expect that, if passed, the Department of Labor regulations authorized by the bills would clarify these points.

Keep in mind that these were just introduced and are likely to go through changes as they are considered by both houses. We will be watching their legislative journey and will report any updates on this blog.

ISSUE	*PROVISION*
Eligible employees	All employees – no eligibility requirements such as length of service or hours worked. Includes full-time, part-time, and temporary employees.
Covered employers	Employers with 15 or more employees.

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Persons entitled to leave – "survivor"	Employee who, personally or whose family or household member, is experiencing or has experienced: • Domestic violence, dating violence, sexual assault, or stalking ("abuse") (as those terms are defined in § 40002 of the Violence Against Women Act of 1994 (34 U.S.C. § 12291)). Collectively referred to as a "survivor."
"Family or household member"	Defined as: • A son or daughter, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the person is the equivalent of a family relationship; and • Is not the abuser involved.
Leave reasons	Leave can be used for the following activities related to the abuse, for the employee or the family or household member: • To seek medical attention; • To obtain services from a survivor services organization; • To obtain behavioral health services or counseling; • To participate in safety planning, temporary or permanent relocation, or taking other actions, to increase safety; or • To take legal action, including preparing for or participating in a civil or criminal legal proceeding.
Amount of "Safe Leave"	30 days in a 12-month period. COMMENT: The bills do not specify whether the 30 days are work days or calendar days, which could result in either 6 weeks or 4.3 weeks of leave respectively. The most likely interpretation is 30 work days, but we will watch for clarification.
Leave year calculation method	Not specified. COMMENT: The applicable 12-month period for 30 days of leave is not defined. FMLA permits 4 methods (calendar year, fixed year, measured forward, rolling back).
Leave usage	Not specified.

methods	COMMENT: The FMLA allows usage as a continuous/ block leave, as a reduced schedule, and as intermittent periods of leave of varying increments.
Pay provisions	• Employees will accrue up to 56 hours of paid Safe Leave at an accrual rate of 1 hour of paid leave per 30 hours worked. • Exempt employees (those not subject to overtime pay requirements) are assumed to work 40 hours per week for accrual purposes; if they normally work a shorter week, the hours worked in that normal shorter week are used for accrual. • Accrual and carryover are maxed at 56 hours of paid leave. • Employees start accruing paid Safe Leave upon hire, but cannot use accrued time until the 60th calendar day of employment. • Accrued paid leave used by the employee counts toward the total 30 days per 12 months of Safe Leave.
Employee request for Save Leave	• Must be provided to the employer orally or in writing as soon as practicable after the employee is aware of the need for leave; and • Must inform the employer of the expected duration of the leave [and, presumably, the dates]. • The employee must schedule the requested leave at a time that does not unduly disrupt the employer's operations, unless such scheduling is not practicable.
Documentation	• The employer can require documentation from the employee to support the leave. • Several types of documentation are acceptable, including a police report, court order, and sworn statement from the employee or family/household member, documentation from an attorney or medical professional, and more. • The employer cannot specify the type of documentation that is acceptable for the requested leave. • The employee must submit documentation within 30 days of the first date of Safe Leave, but an employer cannot deny leave while awaiting documentation.
Employer notice	None required.

to employees	COMMENT: The bills do not require any form of notice to employees, either in general such as posting or with respect to a specific Safe Leave request.
Job protection	An employee must be reinstated to the same or an equivalent job upon return to work from Safe Leave.
Benefits	Employers must maintain employees' coverage under any group health plan or employee welfare benefit plan during Save Leave.
Interaction with FMLA	Safe Leave under the proposed laws will be "in addition to any leave taken (directly or indirectly)" under the FMLA, not to exceed 30 days in a 12-month period. COMMENTS: • The bills are not clear whether leave for a reason that qualifies under both FMLA and these bills (e.g., leave for a serious health condition of the employee or a family member that results from domestic abuse) would count toward both. • It does appear that this leave is in addition to leave taken under the FMLA for reasons not covered by the Safe Leave law – not just additional leave reasons under the existing FMLA 12 week entitlement.
Interaction with other leave laws or employer policies	An employee may substitute other leave available pursuant to state or local law, a collective bargaining agreement, or an employer program or plan for an equivalent period of Safe Leave. COMMENT: Many states and municipalities have paid sick and safe leave laws that allow the accrued paid sick and safe leave to be used for reasons similar to the permissible uses under these bills.
Other provisions	The bills are quite detailed. At present additional provisions include: • Prohibitions against discrimination, retaliation, and interference with rights. • Federal and state entitlement to unemployment compensation when an employee is separated from employment due to circumstances related to being a survivor of domestic violence, dating violence, sexual assault, or stalking. • Key employee provision enabling employers to deny job restoration to

certain employees in limited circumstances, similar to FMLA.

- Enforcement by the DOL and by the employee, including civil actions.
- The "Survivors' Employment Sustainability Act," which protects employees and applicants from discrimination, harassment, and retaliation based on the individual's status as a survivor of domestic violence and other personal abuse (including a survivor of an unauthorized communication of an intimate image of the individual).
- Prohibitions against insurers and employers who self-insure employee benefits from discriminating against survivors of domestic violence, dating violence, sexual assault, or stalking and those who help them in determining eligibility, rates charged, and standards for payment of claims.

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Federal and State Agencies

EEOC – California Orchid Grower Agrees to EEOC Consent Decree and to Pay $110,000 to Settle Pregnancy Discrimination Act Claims

In a recent press release, Dash Dream settled a lawsuit which accused them of a multitude of truly concerning practices. In addition to telling female employees at staff meetings not to get pregnant or they would be fired, the lawsuit accused the company of failing to rehire or reinstate employees who sought to return to work after childbirth. In addition to the $110,000 payment to two aggrieved former employees, Dash Dream's consent decree requires it to retain an outside EEOC monitor to help the company create compliant policies and a reporting system for EEO complaints, as well as provide semi-annual reports to the EEOC on its progress in complying with the decree.

EEOC Press Release 10-16-17

EEOC – Commercial Real Estate Employer Sued by EEOC, Accused of Revoking an Offer of Employment After Learning of the Applicant's Disability and Need for Accommodation

The EEOC sued Jones Lang LaSalle ("JLS"), a commercial real estate firm, for violations of the ADA. In its lawsuit, the EEOC claims that JLS withdrew an offer of employment after learning an applicant had PTSD and requested an accommodation to work remotely one day a week to attend medical appointments. The lawsuit was just filed in mid-October, and JLS has not filed an answer, but it will certainly be interesting to see its asserted defenses. Is this a job whose essential functions required physical presence in the workplace? The EEOC in its press release certainly used JLS's purported touting of its flexible work arrangements as a sword against them. Stay tuned….

EEOC Press Release 10-11-17

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Court Opinions

Pushing Back on Lengthy Leaves as an ADA Accommodation: Two Cases from the 7th Circuit

An ever-present question for employers is, "How long of a leave of absence do I have to provide as an ADA accommodation?" Despite two recent court opinions favorable to employers, the issue is not resolved and employers should continue to consider each ADA leave request on its own merits and assess it against their ability to provide the leave needed without undue hardship.

The Equal Employment Opportunity Commission's consistent position is that leave is a reasonable accommodation and that there is no set limit on how long a leave can be and still be "reasonable" as long as it is of a (somewhat) definite duration and will enable the employee to perform his essential functions upon return to work.

The 7th Circuit Court of Appeals has pushed back. In Matrix's October "On Your Radar" monthly update and our Matrix Radar blog, we brought you news on this front. In a recent case, *Severson v. Heartland Woodcraft, Inc.,* the court ruled that the employer did not fail to provide a reasonable accommodation when it denied an employee's request for a 2-3 month continued leave of absence after exhaustion of FMLA. According to the 7th Circuit, a leave of absence as an ADA accommodation is not reasonable if it is expected to last more than "a couple of weeks," or if it will "span multiple months."

Less than a month after the *Severson* decision, the 7th Circuit decided *Golden v. Indianapolis Housing Agency*. Relying on the *Severson* decision, the court again held that an extended leave of absence is not a reasonable ADA accommodation. Marytza Golden was a police officer for the Indianapolis Housing Agency. She was diagnosed with breast cancer and began a long course of treatments, including a mastectomy and chemotherapy. After exhausting FMLA and another 4 weeks of leave, Golden requested an additional 6 months of leave pursuant to IHA's "General Leave of Absence (Unpaid Leave)" policy, which permits leave for a specified period of time (not to exceed six months) when no other form of leave is appropriate. The leave request was denied and Golden was terminated. Golden sued and the court, following S*everson,*

The *Golden* case has a different feel than the *Severson* case. Severson asked for 2-3 months of additional leave after FMLA exhaustion. In contrast, Golden had taken 12 weeks of FMLA, 4 more weeks of company leave, and then requested another 6 months. At that time, her doctor had not given an estimated return to work date; rather, he listed the duration of her condition as "ongoing" and her period of incapacity as "until release." A leave totaling 10 months and with no indication that

the employee will be able to return to work after that time sounds a lot more like an unreasonable accommodation request than Severson's situation.

Pings for Employers – Don't Let Your Guard Down!

- There is still no bright-line rule as to how long is too long for a leave to be a reasonable ADA accommodation. As a result, employers still need to go through the interactive process to determine the length of the leave the employee is requesting, whether that is reasonable under the circumstances – 2 weeks? 2 months? more? – and whether the provider has indicated a reasonably certain return to work date.
- For more pings, review our blog post, Pushing Back on the "Inadvertent Leave Law" – Court Rules that a Multi-Month Leave of Absence is not a Reasonable ADA Accommodation.

Pushing Back on Lengthy Leaves as an ADA Accommodation: Two Cases from the 7th Circuit

Despite the common feeling that employers have the ADA deck stacked against them, a recent case shows that courts will still closely compare the facts of an ADA failure to accommodate claim against the legally required elements of such a claim. It was a close call, but the co-employers prevailed when the employee did not raise enough racket about his mental condition to put the employers on notice of the need for an ADA accommodation.

Timothy Patton was an employee of a staffing company, Talascend. He was assigned to work at its client, Jacobs Engineering. He claimed to have been subjected to mockery and name-calling by co-workers and his supervisor because of his stutter. He also complained about the noise in his work space to his supervisor and asked that he move him to a quieter area "so that [his] nerves would not affect [his] stuttering." Patton also complained to Talascend (which offered to reassign him; he declined) and emailed a lead engineer at Jacobs about taking time off from work due to his stress.

As a result of his stress, Patton had a panic attack while driving and caused a car accident. He did not return to work at Jacobs and instead, filed a complaint with the EEOC and the Louisiana state equivalent, accusing Jacobs and Talascend of harassment and failure to accommodate his disability in violation of the ADA.

The trial court granted summary judgment in favor of co-employers Jacobs and Talascend, and the 5th Circuit Court of Appeals upheld this ruling. It strikes me, however, as a lucky call

for the employers. Let's focus on Patton's claim that Jacobs failed to accommodate him under the ADA. The ADA requires an employer to make reasonable accommodation[s], absent undue hardship, "to the known physical or mental limitations of an otherwise qualified individual with a disability." The question was whether Jacobs knew that Patton had a "disability" and was asking for an accommodation when he complained about noise in his work area.

Patton had made numerous complaints linking his nerves and stuttering to the noise in the workplace and asked to be moved to a quieter work location. The court did not find this to be sufficient. Rather, Patton needed to show that the limitations he experienced were the *result* of his disability, and that Jacobs knew it. In particular, in the case of a mental disability like Patton's, "specificity in attributing a work limitation to a disability is particularity important." Jacobs and Talascend could not be expected to know of or understand Patton's "childhood onset fluency disorder" without more specific information from him.

With respect to the ADA hostile work environment claim, Jacobs again dodged a bullet. The 5th Circuit found there was enough evidence of harassment about Patton's stuttering by quite a number of people and over an extended period of time to allow the claim to be sent to a jury. However, Patton had failed to avail himself of both defendants' anti-harassment policies and thus could not maintain his claim for hostile work environment.

Patton v. Jacobs Engineering Group, Inc. and Talascend, LLC (5th Cir. October 24, 2017).

Pings for employers:

- There are no "magic words" for an employee to request an accommodation, but as the Patton case makes clear, the employee still needs to provide enough information for the employer to understand he is seeking an adjustment in his work conditions for a reason related to his disability.
- Be wary, though! The outcome of this case was a lucky one for the employers. If Patton had phrased his complaints just slightly differently, or provided a bit more information about his condition or his need – or if the case had been determined by a different court – the outcome could have been a jury trial. In that case, the evidence of harassment based on Patton's stuttering could have had an impact on the entire case.
- When in doubt about whether an employee is requesting an ADA accommodation, ask the employee, "How can I help?" This opens the dialog without assuming the employee has a

disability or needs an accommodation. Then, with someone like Patton, you can then explore what is causing his problem and what impact it has on his ability to work.

- Make sure your policies provide employees with clear avenues (more than one!) of complaint in the event of discrimination, harassment, or retaliation – and that employees know about them. Although this case does not give us much factual detail, this type of policy saved the employers from liability because, apparently, Patton did not register his complaints in the correct manner or with the correct persons – probably the HR department.

- Finally, as we always advise, train your supervisors so they know when someone might be asking for an ADA accommodation and to whom they need to direct the employee to start the interactive process.

A Request for "Retroactive Leniency is Not a Reasonable Accommodation

Taylor Christian Profita v. Regents of the University of Colorado (October 11, 2017, 10th Circuit).

Profita was a medical student at the University of Colorado. After twice failing to successfully complete required clinical rotations, Profita was dismissed from the program. Nine months after his dismissal, he sent a letter requesting readmission to the MD program. In his letter, Profita advised the University that his "medical/psychological issues were under control." The University denied Profita readmission and denied that his request for readmission was a reasonable accommodation. Instead, the university invited him to reapply. Profita declined to do so and sued the University.

The University's Motion to Dismiss for failure to state a claim was granted and in this opinion, the Tenth Circuit agreed with that decision. In doing so, the court relied on cases from the workplace that establish the principle: "an employer is not required to reasonably accommodate an employee's disability by overlooking his previous misconduct, even if that misconduct resulted from his disability." The court also pointed out that the EEOC's Guidance on Reasonable Accommodation "makes clear that the requirement to provide reasonable accommodations under the ADA is always prospective."

Profita v. Regents of the University of Colorado

Pings for Employers:

- I am sure many of our readers and employer clients get this question a lot- "I talked to my employee about her performance issues and she claimed to have a medical condition that caused those issues." As the *Profita* case demonstrates, the employer doesn't have to "put

the brakes on an ongoing disciplinary process based on past performance deficiencies."

- Of course, once the employee says his performance issues are due to a physical or mental condition, it's time to launch the interactive process and talk to him about what types of accommodation(s) he may be requesting to perform his essential job functions going forward (if the employee has not been terminated for the poor performance or misconduct.)

- Remember, though, an employer does not have to excuse or alter its performance standards. That is not a reasonable accommodation, which should be geared to helping the employee meet those performance standards.

MATRIX CAN HELP! Matrix's start-to-finish ADA Advantage management services can help you wrangle with tough issues like accommodation decisions, including leave assessment of leave of absence requests. You always retain the final decision whether and how to accommodate, but we manage the intake, medical assessment, interactive process, recordkeeping, follow-up, and more. Our expert team of ADA Specialist is at the ready with practical advice and expert guidance. To learn more, contact us at ping@matrixcos.com.

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.