On Your Radar

Draw on Our Expertise

March, 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!

Pending

STATE LEGISLATIVE UPDATES | 2017 Happenings
The beginning of each year is usually quite busy in the state legislatures, and 2017 is no exception. Read more.

FAMILY & MEDICAL LEAVE | 2017 Proposed Bills
We all know the intent of FMLA, however, One trend reflected here is that most of the new FML-type bills introduced have companion provisions for employee pay benefits during the job-protected leave. Read more

PAID FAMILY LEAVE | 2017 Proposed Bills
Here you'll find several states' proposals to improve upon the 6 weeks of federal pay benefits for maternity leave only. Paid "family" leave covered by the introduced legislation may or may not include leave taken because of the employee's own health condition. Read more

PREGNANCY DISABILITY & ACCOMMODATIONS | 2017 Proposed Bills
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Learn about our insights in absence management and workplace accommodations, and how they affect you and your business.

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Pending Legislation

State Legislative Update

STATE LEGISLATIVE UPDATE | 2017 Happenings

The beginning of each year is usually quite busy in the state legislatures, and 2017 is no exception. We have been tracking leave-related bills introduced so far this year. Here are the ones that have caught our eye, even though it is unlikely – statistically and politically – that many of them will pass. Those that do pass ultimately may go through significant revisions in the process. As a result, we are not providing great detail here but will be happy to provide a copy of the current version of any bill upon request.

Remember as you review below: These are *PROPOSED* laws. Still, there are things to be learned from the state trends.

Family & Medical Leave

FAMILY & MEDICAL LEAVE | 2017 Proposed Bills

Family and medical leave laws generally provide job-protected time off due to an employee's own serious health condition, to care for a family member with a serious health condition, and/or to bond with a new child.

One trend reflected here is that most of the new FML-type bills introduced have companion provisions for employee pay benefits during the job-protected leave. Previously, such laws provided either job protection OR pay benefits but not both (Rhode Island being one exception). Consider these bills and also take a look at the "Paid Family Leave" section below.

STATE	DESCRIPTION and BILL NUMBER
ILLINOIS:	Bill for family and medical leave for bonding, employee's or family member's serious health condition, and military exigencies; 12 weeks per 12-month period; includes a pay provision funded by employee payroll contributions. *IL S 1721*
HAWAII:	Expands existing Hawaii family leave act from 4 weeks to 12 weeks per year; adds new covered relationships and military family member events as covered reasons; includes a pay provision funded by employee payroll contributions. *HI S 408*
	Adds sibling as new covered relationship and bereavement as new leave reason to existing Hawaii family leave act. *HI H 213*
	Adds leave related to domestic violence and similar events to leave reasons under existing Hawaii family leave act. *HI S 516, HI H 678*
MISSISSIPPI:	Proposed family and medical leave similar to FMLA; died in committee. (Wow, that was fast!) *MS S 2820*
MISSOURI:	Bill for family and medical leave for bonding, employee's or family member's serious health condition, and school activities; 640 hours of leave per 12 months (equivalent of 80 8-hour days); paid by employer at 65% of employee's usual compensation. *MO S 54*
	Leave for up to 6 weeks in a 52-week period for bonding, employee's or family member's serious health condition, and military family member call to service; paid at 100%, funded by employee payroll contributions. *MO S 69*
TEXAS:	Up to 30 days of job-protected leave for reasons that mirror the federal FMLA, but also adds (1) leave for victims of family violence, sexual assault, sexual abuse, stalking, or trafficking; and (2) leave to care for a sibling, parent-in-law, grandchild, grandparent, and grandparent-in-law, in addition to the family members covered by the FMLA. Also provides wage replacement benefits. *TX H 656*

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Paid Family Leave

PAID FAMILY LEAVE | 2017 Proposed Bills

Currently:

- 3 states provide paid family leave (California, New jersey, and Rhode Island)
- 2 jurisdictions have enacted paid family leave that is not yet in effect (New York – effective January 1,2018) and District of Columbia (still subject to possible action by the U.S. House and Senate – if not overturned, contributions start in 2019 and benefits start phasing in in 2020)
- 1 state has a paid family leave law but has never provided funding to implement it (Washington).

During his campaign President Trump proposed 6 weeks of federal pay benefits for maternity leave only, but not if a company already provides benefits. Apparently this plan is not cutting it for many state legislators. Here are the states' proposals for better benefits. As indicated below, paid "family" leave covered by the introduced legislation may or may not include leave taken because of the employee's own health condition.

CONNECTICUT: Provides a tax credit to employers that provide paid family and medical leave to employees. Includes benefits during leave for employee's own health condition. *CT H 6614*

ILLINOIS: Paid family and medical leave for up to 12 weeks per 12-month period; funded by employee payroll contributions. Includes benefits during leave for employee's own health condition. *IL S 1721*

HAWAII: Paid family leave for up to 12 weeks; funded by employee payroll contributions. Does not include pay benefits for the employees own health condition. *HI S 408*

MISSOURI: Paid family leave for up to 640 hours; paid at 65% by employer. Includes benefits during leave for employee's own health condition. *MO S 54*

Paid family leave for up to 6 weeks in a 52-week period; funded by employee payroll contributions. Includes benefits during leave for employee's own health condition. *MO S 69*

OKLAHOMA: Paid family leave for up to 6 weeks; paid at 65%; funded by employee payroll contributions. Does not include pay benefits for the employees own health condition. *OK H 1815*

OREGON: Tax credits for employers who provide paid family leave, including leave due to the employee's own health condition. *OR S 543*

SOUTH DAKOTA: Up to 4 weeks of leave paid at 100% and funded by the employer. This leave is called "maternity" leave but also applies to adoption. Not clear if the leave is available to fathers or non-birth mothers. *SD S 150*

TENNESSEE: Up to 6 weeks of paid bonding leave. *TN S 1141, TN H 1184*

TEXAS: Part of proposed Texas family and medical leave act; would provide up to 30 days of wage replacement benefits funded by employee payroll contributions. Includes benefits during leave for employee's own health condition. *TX H 656*

Bonding leave up to 8 weeks; paid at 100% by employer. *TX H 718*

WASHINGTON: The state passed paid family leave in 2007 but the law never went into effect; the state failed to fund the measure due to the poor economy at that time. Now legislation has been introduced in both the state senate and house to provide funding for the existing paid family leave law. *WA S 5149, WA H 1116*

VIRGINIA: The state senate proposed a paid family leave bill but the bill died in committee. *VA S 847*

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Pregnancy Disability & Accommodations

PREGNANCY DISABILITY & ACCOMMODATIONS | 2017 Proposed Bills

Many states already have laws that protect the pregnant worker beyond just leave of absence. Typical laws require employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, and prohibit discrimination on the basis of pregnancy. This trend is continuing 2017, as evidenced by the following proposed laws:

KENTUCKY: *KY H 260*

MASSACHUSETTS: *MA H 1038*

NEW MEXICO: *NM H 179*

OKLAHOMA: *OK H 1635*

WASHINGTON: *WA H 1448*

Caregiver Protections

CAREGIVER PROTECTIONS | 2017 Proposed Bills

NEBRASKA : Has introduced a bill that proposes to add "family care responsibilities" as a protected class under the state's civil rights law – prohibiting discrimination in employment on the basis of being a caregiver similar to those afforded on the basis of race, national origin, religion, etc. *NE L 372*

NEW JERSEY: Has introduced a bill that proposes to add "familial status" as a protected class under the state's civil rights law – prohibiting discrimination in employment on the basis of being a caregiver similar to those afforded on the basis of race, national origin, religion, etc. "Familial status" is defined to mean having a parent-child relationship (biological, adoptive, guardianship, visitation, etc.) or being pregnant. *NJ AB 2646*

Paid Sick & Safe Leave

PAID SICK & SAFE LEAVE | 2017 Proposed Bills

Several states have jumped on the bandwagon and have proposed paid sick and safe leave. These bills follow the common pattern of paid sick leave statutes passed in other states and municipalities, with provisions for rate of accrual, carryover, and reasons for usage. A few are very tepid employee rights in that they do not require an employer to provide paid sick leave; rather if the employer does provide paid sick leave, the employee has to be allowed to use it to tend to or assist family members (similar to the existing California Kin Care and Illinois Employee Sick Leave Act.

ALASKA: *AK H 30*

GEORGIA : *GA H 267; GA S 201 (does not require employer to provide paid sick leave but if employer does provide paid sick leave, employee must be allowed to use it for family members)*

HAWAII : *HI S 425 and HI H 1434, 986 (service or restaurant workers only), HI S 638*

MARYLAND : *MD H 1, MD H 56, MD S 230, MD S 305*

NEW YORK: *NY A 5894 (201 (does not require employer to provide paid sick leave but if employer does provide paid sick leave, employee must be allowed to use it for family members)*

OKLAHOMA: *OK H 1310, OK H 1536*

RHODE ISLAND: *RI H 5413*

VIRGINIA: *VA S 824 (died in committee)*

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Miscellaneous Other Leave Laws

MISCELLANEOUS OTHER LEAVE LAWS | 2017 Proposed Bills

Civil Air Patrol – ***WV*** *S 257* (10 days of unpaid leave)

Crime victims' leave – ***MO*** *S 268* (1 to 2 weeks per year, depending on employer's size), ***HI*** *S 516*

Bereavement – ***MA*** *S 990* (death of a family member – 10 days in 12-month period)

Jury duty – ***NE*** *L 192*

Voting – ***MS*** *H 301*

Time off to obtain an election identification certificate – ***TX*** *S 285*

Employer-provided leave to care for a child must include leave to care for foster child – ***TX*** *H 88*

Parental involvement / school activities – ***NY*** *A 1797* (16 hours per year); ***TX*** *S 191* (4 hours per month/max 20 hours per year)

State preemption of municipal authority to pass employment leave laws/benefits – ***OR*** *S 544*

Federal and State Agencies

EEOC Focus on Accommodation Obligations during the Application Process

In its latest Strategic Enforcement Plan, the EEOC announced that one of its national priorities is for "the Commission to address . . . issues involving hiring barriers and the ADA." Many of the recent settlements it by the EEOC website highlight just how seriously the EEOC is taking this strategic priority, in particular regarding applicants who request a reasonable accommodation in the pre-employment processes. Here is a summary of several:

EEOC Settlement on Behalf of Trucking Applicant for Failure to Accommodate

An applicant for a truck driver position with Covenant Transport sought accommodation on the basis of his medical condition to have a blood test, instead of providing a urine sample, in connection with the company's pre-employment drug screening. The EEOC filed suit, alleging that the company initially agreed to this request for accommodation, but ultimately reneged and declined to hire him because he could not submit a urine specimen for testing.

The oddest part of the settlement is that it requires Covenant to develop a written drug testing policy (surprised they did not have one already!) and to provide 90-minute trainings annually on the policy (that's a long time to discuss one policy!) to its recruiters and head of safety. Covenant also agreed to pay $30,000 to the applicant.

EEOC Press Release 02-24-2017

Withdrawing a Job Offer after Learning an Applicant was Pregnant Costly for Life Time Fitness

Life Time Fitness settled a lawsuit filed by the EEOC on behalf of an applicant who alleged she was offered a position at a

facility. When she wrote providing her work availability and informed Life Time she was 35 weeks pregnant, they initially stopped communicating with her, then ultimately told her that the position went to someone else. Life Time encouraged her to seek employment at another Life Time facility opening later in the year. Although not an ADA case, pregnancy-related hiring and employment discrimination issues are also on the forefront of the EEOC's attention.

Life Time agreed to pay $86,000 to the applicant. In addition, Life Time entered into a three-year consent decree with the EEOC which, among other things, requires the company to add pregnancy to its nondiscrimination policy, to disseminate it to employees, and to provide annual anti-discrimination training to management and hiring personnel.

EEOC Press Release 01-23-2017

Lawsuit settled on behalf of Deaf Applicant Denied Employment on the Basis of her Disability

Graceworks Lutheran Services sought a Site Manager for one of its housing facilities that gives preferential consideration to deaf residence applicants. The EEOC brought a lawsuit against Graceworks on behalf of a deaf applicant for the Site Manager position because, in spite of being a facility for deaf occupants, Graceworks maintained that the position required the incumbent to be a hearing individual.

Graceworks settled the lawsuit for $30,660 and, like the other companies we've written about, is also required to provide anti-discrimination training.

EEOC Press Release 02-23-2017

Cell Phone Repair Facility Settles EEOC Lawsuit on Behalf of Two Applicants Denied Reasonable Accommodation.

As part of its hiring process, S & B in Fort Worth, Texas, required applicants to participate in a "group interview" with prospective supervisors. During this interview, the EEOC contended that the two applicants on whose behalf it brought this lawsuit were observed to be engaging in American Sign Language to communicate with each other. They asked that the supervisors provide them with written questions. The lawsuit alleged that the supervisors initially did so, then declined to continue and told both applicants the company would not hire them.

This lawsuit cost S & B $110,000 but, as you no doubt can guess by now, the company is also required to maintain a written log of all disability-related complaints and report semi-annually to the EEOC. In addition, managers, supervisors, and HR personnel are required to attend a training conducted by a Dallas advocacy center for deaf individuals on the use of sign interpreters in interview and employment settings.

EEOC Press Release 02-23-2017

Pings for Employers:

1. Have compliant ADA and nondiscrimination policies. It is critical for all employers to have a comprehensive anti-discrimination policy and ensure that all your hiring personnel – HR and management – are aware of that policy and have a working knowledge of what the ADA requires.

2. Train your supervisors. The ADA applies to the application process and not just current employees. In particular, your managerial staff need to be able to recognize a request or need for reasonable accommodation, then turn to HR or other specialized personnel to discuss and provide reasonable accommodation(s) in the pre-employment process.

3. Beware of pregnancy issues – even if it is not a disability. Pregnancy is covered by the federal Pregnancy Discrimination Act, which protects pregnant employees from adverse employment decisions based on their condition. IN additions, most states have similar laws, and many are enacting laws that require an employer to provide workplace accommodations for the common conditions of pregnancy. Employers like Life Time who decline to hire a pregnant applicant are creating unnecessary risk.

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EEOC Continued Focus on ADA Enforcement – Return to Work

In a final word on the EEOC (for now!), the EEOC announced the filing of a lawsuit against L-3 Communications on behalf of a Senior Engineer who took medical leave for depression and anxiety after two major depressive episodes at work. His doctor released him to return to work. The company insisted that he undergo a fitness for duty ("FFD") exam. The lawsuit alleges that the doctor who conducted the FFD exam opined the employee could return to work safely if provided with some additional training and feedback, but that the best long term solution would be to return him to an alternate position. Instead of discussing reasonable accommodation(s) or reassignment, the company offered him an ultimatum to resign or be fired.

According to the EEOC, "L-3 Communications forced the Charging Party out rather than returning him to a position where he could continue to be successful and productive for the company. . . . Now his skills and assets will benefit other employers whose leave and accommodation policies do not deny him the opportunity to contribute to their success, and L-3 has been sued for disability discrimination. This is a lose-lose situation for them."

EEOC Press Release 02-23-2017

Pings for Employers:

1. Perhaps lurking in the background here was L-3's concern that the employee would pose a direct threat to himself or others if he returned to work. The nature and consequences of the depressive episodes at work were not explained in the EEOC press release. The ADA allows employers to terminate an "employee with a disability [who] poses a *significant risk of substantial harm* to him/herself or others (that is objective, specific, current, and non-speculative), that cannot be eliminated or reduced by a reasonable accommodation." 29 CFR §1630.2(r).

2. The EEOC, in its Enforcement Guidance on Disability-Related Inquiries, is clear that the direct threat analysis requires an *individualized assessment* of the employee's *present ability* to *safely perform the essential functions of his/her position* and cannot be based on general assumptions. Factors to consider include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood the potential harm will occur; and 4) the imminence of the potential harm. The "individualized assessment" must be made by: 1) a healthcare professional of the employer's choice; and 2) with a specialty/expertise in the employee's particular condition.

3. It sounds like the employer above had good reasons to want to require its employee to submit to an FFD. The results apparently were not what they expected! The law requires the employer to discuss possible reasonable accommodations to keep the employee in his job and, of course, if there are no reasonable accommodations which will allow him to perform his job, reassignment is the accommodation of last resort and must be considered. To read more about an employer's obligations on reassignment, please see our prior Matrix Radar Blog postings on this important topic:

   http://matrix-radar.com/2016/01/ada-accommodations-reassignment-redux/

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Court Opinions

Employee's failure to propose a reasonable and effective accommodation dooms claim that employer failed to accommodate.

Since November 2000, Calvin Braddock worked for United Parcel Service, Inc. ("UPS") as a Data Capture Clerk in Chicago. His workplace, called an Air Dock Facility, was equipped with conveyor belts. Trucks would pull up all day, receiving and delivering packages on those conveyor belts. Braddock's job required him to retrieve the packages, inspect them, and process related information using a computer at his workstation. Because the doors are open all day long, temperatures in the Air Dock Facility essentially mirror those outside, though once the Air Dock facility registers 45 degrees four industrial heaters automatically adjust to ensure this is the lowest temperature maintained.

In October 2011, Braddock was diagnosed with Reynaud's Disease, a condition that can limit blood flow to extremities in response to cold temperatures. He presented UPS with a note from his physician indicating he was permanently restricted from working in temperatures below 68 degrees. While he did not specifically ask for an ADA accommodation, UPS interpreted the note this way and provided him with its ADA packet which was to be completed by his physician. Instead, Braddock himself completed the ADA packet and returned it to UPS. At a meeting with UPS personnel, the only "accommodation" he requested was that he work at the facility in an area in which the temperature was always above 68 degrees. UPS unsuccessfully searched for an alternate position that might meet this request.

Braddock did not return to work. Instead, he sued UPS, accusing it of failing to provide him with a reasonable accommodation under the ADA. UPS filed a motion for summary judgment, asserting that Braddock could not perform an essential function of his position as Data Capture Clerk. The written job description for the position included as an essential function the ability to work in "variable temperatures [including] inclement weather." The court concluded that because the job description required him to work in the Air Dock Facility, where temperatures frequently fell below 68 degrees, he could not perform an essential function of his job.

As a result, Braddock was required to show that there was a reasonable accommodation that would have enabled him to perform the Data Capture Clerk job. He proposed that UPS allow him to use a space heater. The court concluded, however, that Braddock did not prove that this was a reasonable accommodation because he did not demonstrate that allowing him to have a space heater would be effective in maintaining the temperature of the entire facility at under 68 degrees. In addition, the court agreed with UPS that even assuming he had shown this might be effective, space heaters were prohibited because of the safety risks and requiring UPS to provide one to Braddock would therefore be an undue hardship. The only other accommodation Braddock proposed was that UPS turn up the thermostat in the Air Dock Facility so that it would always be above 68 degrees. The court concluded that this request would be too costly, potentially causing the facility to exceed its entire energy budget and, as a result, was simply unreasonable.

Braddock proposed two other possible accommodations – but waited until UPS's motion for summary judgment in the lawsuit to do so. But this was simply too late. As the court properly pointed out, the employee can't wait until summary judgment to name reasonable accommodations the employer could have offered in a failure to accommodate case. The accommodations Braddock and his attorney proposed after UPS filed its motion for summary judgment – that UPS provide him with an office 200 feet away or install heated floors under his desk – were nevertheless found to be unreasonable and, as for the floors, again prohibitively costly.

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PINGS FOR EMPLOYERS:

- We talk about this often on our blog, Matrix Radar, but it bears repeating- never underestimate the importance of a good, detailed job description that truly captures the essential functions required to perform a position.

- In this case, Braddock got a pass from the court for completing the ADA paperwork himself, but he'd already provided a note from his doctor indicating his need to work in temperatures above 68 degrees, so UPS already knew about his limitations and did not contest that he had an ADA qualifying disability. This is a good reminder of what "sufficient" certification means under the ADA. This means that you, as the employer, are entitled to medical documentation that:
  - describes the nature, severity, and duration of the employee's impairment;
  - describes the job-related activities which the impairment limits; and
  - substantiates why the requested accommodation is needed.[1]

- Ultimately, this case illustrates that an employee who accuses his employer of failing to provide a reasonable accommodation must timely show that there was one that would enable him to perform his job. The employee has an obligation to participate in the interactive process and propose accommodations that are both reasonable and effective.

Braddock v. UPS, 2017 WL 770973 (2/28/17, N.D. Ill.)

[1] EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, Question 10/page 10 of 23.

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.