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July, 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!

State Legislative Updates

New York Paid Family Leave | Update
Matrix and Reliance Standard hosted a series of webinars to communicate the latest available information as we approach the effective date of New York Paid Family Leave (NY PFL), and here's what you need to know. Read more.

Washington State Paid Family Leave | Crosses the Finish Line
In 2007, The State of Washington was on the forefront when it passed a paid parental leave law which never went into effect. Now in 2017, a much broader bill prepares for take off in 2020 . Read more

Paid Family Leave | The Hot Topic Du Jour
A quick look at which states have enacted Paid Family Leave. Which have rejected it. And those that are still pending. Read more

California – Domestic Violence Leave Rights |REMINDER
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The EEOC has filed suit against a KFC franchise, accusing it of firing an employee, it regarded as disabled. Read more.

EEOC | Consent Decree Resolves ADA Violations
The EEOC announced a settlement of a lawsuit against Sensient. In the 2015 suit, Sensient was accused of having an inflexible leave of absence policy, terminating employees for taking leave and refusing to return them to work despite their being medically cleared to do so. Read more.

DOL | FMLA Opinion Letters Are Back
The DOL has announced that they are reinstating the practice of issuing opinion letters. Opinion letters are an important tool for employers and employees alike as it provides an official, reliable, interpretation of the FMLA and its regulations. Read more.

Court Opinions

Pollard v. New York Methodist Hospital (2nd Cir. June 30, 2017)
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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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State Legislative Updates

New York

New York Paid Family Leave | Update

There continues to be a flurry of activity as employers, administrators, and insurance companies look forward to the effective date of the New York Paid Family Leave law on January 1, 2018. In late June Matrix and our sister companies, Reliance Standard Life Insurance Company and First Reliance Standard Life Insurance Company hosted webinars on the current state of knowledge about the law. Regulations are still not finalized and many questions remain unanswered. However, our experts' body of knowledge is coming together and we have much information to share with our clients, consultants, and other business partners.

- A copy of our webinar presentation plus *a Frequently Asked Questions (FAQ)* document based on the robust Q&A that occurred during and after the webinars can be found here: http://bit.ly/2thWS8r.
- If you would like to review the webinar itself, or forward to a team member who could not attend, you may click on this link for a recorded video: https://vimeo.com/224077245/db39acbe26. You can also copy this link and paste it into your web browser.

As noted, some questions about how New York PFL will be administered are still unanswered. We are committed to helping you stay current on this important topic. Here's how:

1) We will continue to update our FAQ – you can always request a current one through your Reliance Standard contact, or by emailing NYPFL@rsli.com.

2) We will be issuing a New York PFL Tip of the Week beginning this month. If you'd like your weekly tip delivered direct to your email box, let us know at NYPFL@rsli.com.

3) Matrix Radar (matrix-radar.com) is your online home for up-to-the-moment insights into Paid Family Leave and all sorts of compliance related issues. Visit once, subscribe, and you will always be in the know.

Let us know if you have any questions by sending us a message at ping@matrixcos.com.

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Washington

Washington Paid Family Leave | Washington State Passes a Rich Paid Family Leave Law

The state of Washington has enacted a law requiring paid family and medical leave for eligible employees. The state was on the forefront of the paid family leave movement when it passed a paid parental leave law in 2007, but the law never went into effect because the legislature was unable to fund the benefit. Now, a paid family leave bill much broader than the 2007 law was signed by Governor Jay Inslee on July 5, 2017. The law will begin providing paid leave benefits to eligible employees on January 1, 2020.*

States with paid family leave programs currently in effect are California, New Jersey and Rhode Island, plus New York (benefits beginning January 1, 2018), and the District of Columbia (benefits beginning January 1, 2020). The groundswell is huge, with more than 25 states introducing some sort of paid family leave bill so far this year!

Until July 5, New York could boast of having enacted the richest paid family leave law, with benefits ultimately up to 12 weeks of leave per 52-week period paid at 67% of a worker's average weekly wages. Now Washington has outpaced New York, with leave up to 18 weeks and benefits up to 90%.

Here is a summary of key provisions of the Washington law:

Effective date

- Employees can start taking paid family leaves January 1, 2020.
- Employers can begin employee payroll deductions on January 1, 2019.

Eligible employees

- Must work 820 hours in the "qualifying period," defined as the first 4 of the prior 5 calendar quarters; OR, if the employee is not yet eligible, the preceding 4 calendar quarters. Equates to about 15.75 hours per week.

Covered employers

- An individual or entity with one or more employees; includes private companies, the state and subdivisions, and local governments.

Leave benefits reasons

- Employee's own serious health condition.
- Bonding with a newborn or newly placed or adopted child.
- Care for a family member with a serious health condition.
- Military exigency (leave necessitated for various reasons due to a family member's active duty deployment).

Duration of leave benefits

- Employee's own serious health condition – 12 weeks per 52 consecutive calendar weeks.
- Bonding with a new child, to care for a family member with a serious health condition, or due to a military exigency – 12 weeks total per 52 consecutive calendar weeks.
- Limited to 16 weeks total per 52 consecutive calendar weeks for employee's leave and family leave reasons; plus additional 2 weeks if needed for pregnancy complications.
- Maximum total leave benefit is 18 weeks per 52 consecutive calendar weeks.

Increments of leave benefits

- Minimum of 8 hours, rounded down to the next full hour.

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Waiting period for benefits

- There is no waiting period for bonding leave benefits following the birth or placement of a child.
- For other types of leave benefits, there is a waiting period of 7 calendar days.

Family members for whom leave can be taken

- Child (any age), parent, spouse, state-registered domestic partner, sibling, grandparent, grandchild.

Benefits

- Maximum of $1000 per week starting in 2020, subject to adjustment by the state for each subsequent calendar year.
- Employees who make 50% or less than the state's average weekly wage (AWW) will receive 90% of their AWW.
- Employees who make greater than 50% of the state's AWW will receive:
  - 90% of their wages up to 50% of the state's AWW; PLUS
  - 50% of their AWW in excess of 50% of the state's AWW (subject to the $1000 cap)

Funding

- For 2019 and 2020, the total premium is 0.4 percent of the employee's wages, capped at the state's AWW, beginning on January 1, 2019. Annual adjustments may be made thereafter.
- An employee pays about 2/3 of the total premium through payroll deductions.
- The employer pays about 1/3 of the total premium.
- An employer may elect to pay all or a portion of the employee's share of the premium.

Self-funded plans

- The law authorizes employers to operate their own equivalent voluntary plans.
- Miscellaneous Includes special provisions for small businesses with fewer than 50 employees.
- Allows tribes and self-employed individuals to opt in.

Job protection

- Following leave and benefits, an employee is entitled to restoration to the same position held before the leave; or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment at a workplace within 20 miles of the employee's original workplace.

What's next?

There are many unanswered questions about this law and how it will interact with the existing Washington Family Leave Act and the federal Family and Medical Leave Act, which provide unpaid job-protected leave for many of the same reasons. We expect robust regulations to be passed before the effective date of January 1, 2020. In the meantime, for your reading pleasure we provide this link to the full text of the Washington law.

*Please be patient! We have over 2 years to implement this law. In the meantime, we are working diligently to be ready for the New York paid family leave law and the ERISA disability claims handling rules changes, both effective January 1, 2018! You can find prior posts on the New York law here and here. A primer on the new ERISA regulations is available here.

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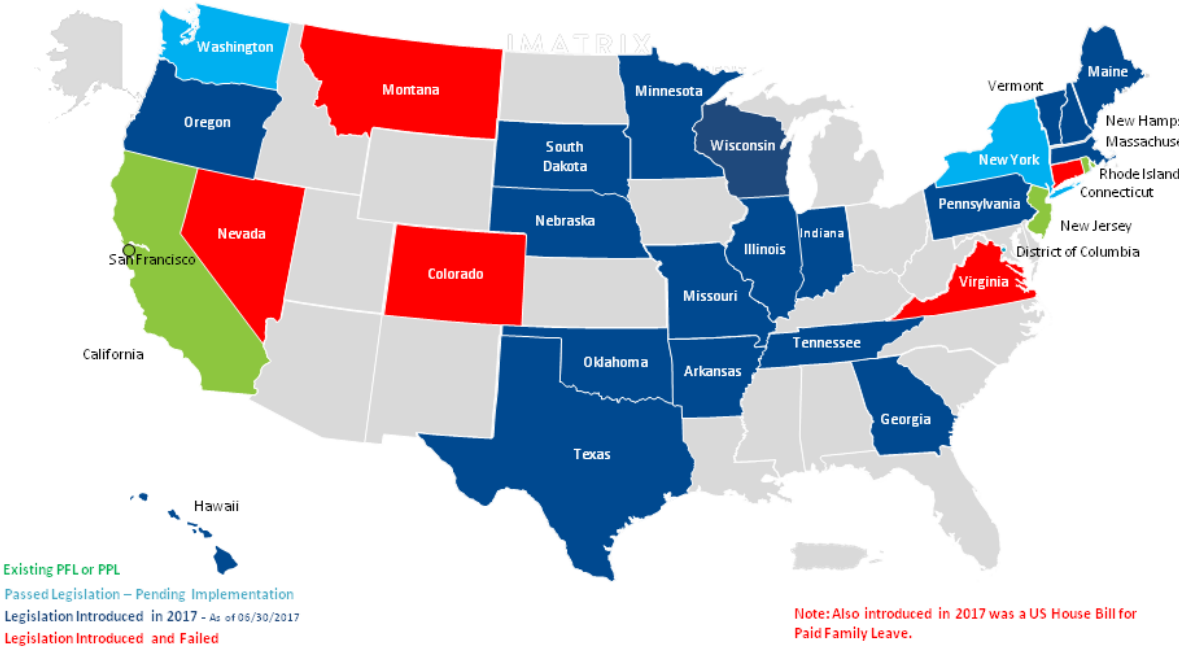
Paid Family Leave

PAID FAMILY LEAVE | The Hot Topic DuJour

We will continue to keep you updated with further information on the ever-intriguing, ever-developing topic of paid family leave, including trends in company leave policies (check out this blog post) and state law proposals. Over 25 states have proposed new legislation in 2017 for paid family leave laws. As a quick aid, here is a map showing which states have introduced PFL legislation so far in 2017.



California

REMINDER CALIFORNIA EMPLOYERS | Start Providing Notice of Domestic Violence Leave Rights July 1

California law requires employers to provide leave of absence rights for victims of domestic violence, sexual assault, and stalking. Leave reasons including taking time off from work to get help to protect the employee's and the employee's children's health, safety or welfare, including time off to get a restraining order or other court order. The text of the law can be viewed at this link.

Effective July 1, 2017, employers must provide a notice of employee rights under the law to all new workers upon hire and to other employees upon request. The Labor Commissioner has developed and posted a form that employers may use to comply with the notice requirements.

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	Pings for employers. Employers should copy the form and distribute it to all current employees and add it to their new-hire packets. In addition, although the law does not specifically require this, a great extra step is to post the notice on bulletin boards in employee break rooms and wherever other employment-related notices are posted.
Nevada	**Nevada | Leave for Victims of Domestic Violence** Effective January 1, 2018, Nevada employers will be required to provide leave to eligible employees who are a victim of domestic violence or whose "family or household member" is the victim of domestic violence. Under the Nevada law, an employee must have been employed for at least 90 days to be eligible for the leave. Eligible employees may take up to 160 hours of leave (equivalent to 20 8-hour days) in a 12-month period, continuously or intermittently, within 12 months of the date of the act of domestic violence that necessitated the leave. The Nevada leave will run concurrently with FMLA if taken for an FMLA-qualifying reason (for example, to get treatment for and recover from incapacitating injuries or care for a family member). Domestic violence is defined as an act committed by a spouse, former spouse, person with whom the victim has a dating relationship or shares a child, and other relationships, and includes acts such as assault, battery, sexual assault, stalking, larceny, compelling an unwanted action, and trespassing. Following any leave necessitated immediately by the incident of domestic violence, an employee must provide at least 48 hours' advance notice to the employer of leave for any of the following reasons: (1) For the diagnosis, care or treatment of a health condition related to an act which constitutes domestic violence committed against the employee or family or household member of the employee; (2) To obtain counseling or assistance related to an act which constitutes domestic violence committed against the employee or family or household member of the employee; (3) To participate in any court proceedings related to an act which constitutes domestic violence committed against the employee or family or household member of the employee; or (4) To establish a safety plan, including, without limitation, any action to increase the safety of the employee or the family or household member of the employee from a future act which constitutes domestic violence. Employers may require documentation supporting the need for leave, such as a police report, copy of an application for an order for protection, an affidavit from an organization which provides services to victims of domestic violence or documentation from a physician. "Family or household member" means a: (1) Spouse; (2) Domestic partner; (3) Minor child; (4) Parent; (5) other adult person who is related within the first degree of consanguinity or affinity to the employee; or (6) other adult person who is or was actually residing with the employee at the time of the act which constitutes domestic violence. The law also requires Nevada employers to make reasonable accommodation(s) to employees who are victims of domestic violence or whose family or household member is a victim of domestic violence. Accommodations may include transfer or reassignment; a modified schedule; a new telephone number for work; or any other reasonable accommodations which will not create an undue hardship deemed necessary to ensure the safety of the employee, the workplace, the employer or other employees. The Nevada bill protects employees from adverse employment actions based on taking leave as permitted by the act. Employers are required to maintain records of leave taken for 2 years and to post a notice of employee rights. The

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Nevada Department of Labor is working on a form of notice for employers to post.

To read the full text of the Nevada law, click here: https://legiscan.com/NV/text/SB361/id/1628891

Domestic violence leaves in other states

With this law Nevada joins the following states that have similar domestic violence leave laws (although they vary in details by state): California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maine, Massachusetts, New Jersey, New Mexico, North Carolina, and Oregon.

In addition to these specific "personal protection" leaves, virtually all states have laws that provide job protection for victims or witnesses for time spent testifying in court or assisting prosecuting attorneys with respect to various crimes, not just crimes relating to domestic violence. These laws generally do not have any employee eligibility requirements, notice requirements, or specific duration.

Federal and State Agencies

KFC Francise Sued by EEOC for ADA Violation for Firing an Employee the Owner "Regarded As" Disabled

On June 7th, the EEOC filed a lawsuit against a KFC franchise, accusing it of firing an employee, Cynthia Duncan, it regarded as disabled. Ms. Duncan told the owner of the KFC and her manager that she was in a hurry to leave to meet her therapist. The EEOC's Complaint alleges that the owner asked her why she was in therapy and she self-disclosed that she took prescription medication, and the kind she took for her condition. The Complaint claims that the owner told her she could not take that medicine and work at KFC, demanded she flush her medicine down the toilet, and stated that she "needed Jesus not medication." Ms. Duncan was subsequently fired. The EEOC entered its reasonable cause finding in March 2017 and, following unsuccessful conciliation, this lawsuit was filed. KFC has not, to date, filed an answer to the Complaint, so it is unknown what defense(s) they plan to assert or what the owner's version of the facts may be. However, this case is a good reminder that a "disability" under the ADA includes:

Being regarded as having such an impairment:

- Employer regards an employee as disabled . . .
  - Because of an actual or perceived mental or physical impairment or restriction . . .
  - Whether or not that impairment substantially limits a major life activity.

Although an employer is not required to provide an accommodation to an employee based on this definition of "disability," employers must nonetheless be aware of the possibility of a discrimination claim on this basis.

Pings for employers:

- If you suspect an employee has a disability that is interfering with job performance, share your observation of deficient performance and ask, "Is there anything the Company can do to help?" Do not ask if the employee has a disability!
- If the employee reveals a disability and need for help, start the ADA interactive process.
- If the employee declines the offer of help, deal with the performance issues as you usually would.
- You can also impose discipline or other appropriate action consistent with your policies regarding any

performance problems that arose before your talk with the employee, regardless of the outcome.

EEOC Press Release 06-12-2017

EEOC Consent Decree Resolves ADA Violations Based on Inflexible Leave Policies

The EEOC announced the settlement of its lawsuit against Sensient, an employer the agency accused in a September 2015 lawsuit of having an inflexible leave of absence policy, terminating the employment of employees for taking leaves of absence and refusing to allow them to return to work despite being cleared to do so, and failing to engage in the interactive process and provide reasonable accommodations. This lawsuit is particularly interesting because it demonstrates the EEOC's priority to address what they believe to be patterns and practices and how broad a consent decree can be. *See article below, "What is a Consent Decree?"* Notably, this matter started with a reasonable cause finding in 2013 on behalf of a single Sensient employee. Ultimately, the EEOC filed suit in 2015 on behalf of a handful of named individuals and also on behalf of a class of employees.

In settling the lawsuit, Sensient agreed to pay $600,000 to the 8 individuals the EEOC ultimately identified as having been injured by its practices. In addition, Sensient is required to fund a "$200,000 contingent class fund" from which currently unknown potential claimants may obtain relief, to be allocated to those claimants at the EEOC's discretion.

How is the EEOC going to find those potential claimants? The consent decree goes on to require Sensient to provide the agency with a list of all employees who lost their jobs since January 2013 (1) following an LOA taken for a medical condition; or (2) based on attendance policy violations, identified by the employee as having resulted from a medical condition. Sensient also has to provide the EEOC with a copy of the personnel file for each of those employees and the name and contact information of the HR decision-maker, who can be interviewed by the EEOC.

In our experience, this consent decree is unusually broad in its depth and breadth, but it is a good reminder that the EEOC is focused on inflexible leave of absence policies and at looking for patterns and practices of what they believe to be discriminatory practices and policies.

Pings for employers.

- Get rid of that inflexible leave policy! The EEOC regards as "low hanging fruit" leave of absence policies that limit an employee to a fixed length of leave without consideration of extended leave as an ADA accommodation, or that require an employee to be 100% healed before returning to work. Why low hangning fruit? Because as with the Sensient case, once the EEOC finds such a policy has been applied in a single worker's case, the agency will investigate your entire workforce to find more claimants and more ADA violations under the same policy.
- For more information on these topics, check out our prior blog posts here and here.

EEOC Press Release 06-30-2017

DOL – Welcome Back! FMLA Opinion Letters: A Good Move by the DOL

One of the challenges of administering leaves under the Family and Medical Leave Act is dealing with issues not well addressed by the law and the regulations – and there are many. How long can an employer rely on an FMLA third opinion certificate? How does an employer deal with an employee's fluctuating work week when it doesn't have historical information regarding the employee's work schedule? How late is too late for an employee to return an FMLA certification? The list goes on.

In years gone by, the Wage and Hour Division of the DOL (responsible for enforcement of the FMLA) issued opinion letters as guidance on the murky issues submitted in inquiries by employers or employees. In 2010 the Division stopped this practice

and instead issued occasional "Administrator Interpretations" – broad, general interpretations of a select FMLA provision applicable to all employers or broad groups. These Administrator Interpretations were few and far between (only 2 specifically for the FMLA from 2010 through the present) and gave little more than a regurgitation of information found in the regulations themselves. As a result, in the absence of opinion letters, employers and FMLA administrators had no resource for requesting official DOL guidance on the tough and tricky FMLA issues. Oh sure, we could call our local DOL office for help, but experience has shown that you can get different answers from different offices, or even from different Wage and Hour personnel within the same office. (Who answers the phone on Tuesdays?) And, the answers are verbal, never in writing, so hard to rely upon with accuracy.

Now, the DOL has announced that it is reinstating opinion letters as assistance to employers and employees. Hurray for the DOL! As the DOL explains, "An opinion letter is an official, written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting the opinion." Thus it provides an official, reliable interpretation of the FMLA and its regulations. We may not always agree with the Division's opinion, but at least we know where the agency stands.

I can provide a recent example of the value of opinion letters. In researching a thorny issue relating to FMLA leave to care for an "adult son or daughter" and the *in loco parentis* relationship, I discovered two opinion letters that will assist me in my interpretation of a specific fact situation for one of our clients. There were no court opinions that helped with my issue, so I was glad to get this guidance from the Division's library of FMLA opinion letters.

The Division has established a website where users can review existing guidance (including opinion letters, Administrator Interpretations, and other materials) and submit a request for an opinion letter. As explained on the website, "The Wage and Hour Division exercises discretion in determining which requests for opinion letters will be responded to and the appropriate form of guidance to be issued in response (i.e., Administrator-signed opinion letter, non-Administrator opinion letter, Administrator Interpretation). The Wage and Hour Division processes requests for guidance as expeditiously as possible."

Time will tell how actively the agency will resume this practice and how long it will take to receive a response to a request for an opinion letter.

Court Opinions

Strict Enforcement of Notice Requirement Brings an FMLA Lawsuit. Who will Prevail?

Jacintha Pollard was employed by New York Methodist Hospital as a medical records file clerk. On March 19, 2013, she visited her podiatrist on her lunch break about a painful growth on her foot. Her doctor gave her a choice of surgery or conservative care. She opted for surgery and scheduled that surgery for the next time available on her doctor's calendar, March 28, 2013. When she returned to work after her appointment, she requested a leave of absence under the Family and Medical Leave Act ("FMLA") for the surgery and post-operative treatment. Her employer denied her request in a letter, which explained that she was required to give 30 days' advance notice for foreseeable leave.

On March 26, 2013, Ms. Pollard provided a certification from her healthcare provider indicating that the growth on her foot was a "serious health condition" and that the treatment required was surgery on March 28th and that she required a leave of absence from March 28- April 18, 2013. In response, the hospital faxed the doctor, reiterating its policy of 30 days' advance notice of foreseeable leave, and asked for the surgery to be rescheduled to April 19. After receiving this letter, the doctor cancelled the surgery, but rescheduled it at Pollard's request. On March 28, Pollard had the surgery and her employment was terminated on April 1, 2013 for failing to report to work on March 28.

The district court granted summary judgment to the hospital, concluding that there was insufficient evidence to support that

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Pollard had a "serious health condition," as required by the FMLA. Because the district court concluded Pollard did not have a serious health condition, it never addressed the issue of whether Pollard failed to provide timely notice of her need for leave. On appeal, the Second Circuit concluded that Pollard did have a serious health condition. The FMLA defines a serious health condition to include "conditions requiring multiple treatments" and determined that the post-operative follow up visits to her podiatrist "could constitute part of the treatment for the condition that occasioned the surgery." Now that the Second Circuit concluded that Pollard was covered by the FMLA because she had a serious health condition, the case is headed back to the district court to determine whether or not she provided timely notice of her need for leave.

Pings for Employers:

- **Remember ALL the definitions of serious health condition.** It would be easy for an employer to characterize a simple surgery to remove a growth as cosmetic or elective and give short important to look beyond assumptions about an employee's condition (in this case, there was a lot of discussion of whether Pollard really seemed to be in pain between asking for time off to have surgery and the actual date of her surgery) and to review the certification of healthcare provider to determine whether one of the several definitions of a "serious health condition" has been met.

- **Be wary of denying FMLA simply for not providing timely advance notice!** What if, instead of a letter outright denying Pollard's request for leave for failing to give 30 days' notice, the hospital had a conversation with her to discuss scheduling planned medical treatment? The FMLA requires the employee "to consult with her employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations." The FMLA contemplates that the employer is going to "initiate discussions with the employee and require the employee to make such arrangements, subject to the approval of the healthcare provider." 29 C.F.R. § 825.302(e). It is indeed quite possible that this employer would have been in a better position if they had not faxed the doctor to apprise him of Pollard's violation of its policy that required advance notice and, instead, talked to her about whether she could try to reschedule and why the date she had planned was "unduly disruptive" to the hospital's operations. Yes, policies are great and we would be the last to suggest not requiring employees to comply with your usual and customary policies, but sometimes relying on a policy instead of talking to your employee is a sure way to have a lawsuit on your hands.

Pollard v. New York Methodist Hospital (2nd Cir. June 30, 2017)

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.