

Legislative Update

July 2015

Additional information will be forthcoming related to any required change in Matrix's process, practice, written or verbal employee communications as a result of these new laws.

CFRA Regulations Update

Matrix has compiled an extensive guide to the changes in CFRA regulations. If you missed it last month, a full overview of those changes can be found at:

<http://www.reliancestandard.com/SiteData/docs/California/30fdda7c26e380a7/California%20Family%20Rights%20Act%20Update-062015.pdf>

Supreme Court Decides Obergefell v. Hodges - Same-Sex Marriages Legal in All States

The United States Supreme Court has determined that the Fourteenth Amendment of the United States Constitution requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. The Court based the decision on four (4) major tenants: 1. the inherent right of personal choice in marriage; 2. the unique nature of the fundamental right to marry; 3. the fact that protecting the right to marry safeguards children and families, which are derived from the rights of childrearing, procreation, and education, and; 4. recognition that marriage is the keystone to national order.

The ruling overturns state bans on same -sex marriage, and now provides for the recognition of same-sex marriages in all states. The *Obergefell* case did not specifically address the issue of employment rights and benefits with respect to same-sex marriage. However, the decision will most likely impact virtually every employer in the nation. Using the FMLA definition of "spouse" as defined using the place of celebration rule will increase the propensity for greater claims of interference or retaliation under the FMLA, as well an expansion of employment rights and benefits for employees.

The 5-4 decision also provided a strong dissenting opinion. Some states and groups have vowed to continue challenging the issue, and the employment law implications have not been completely resolved. Employers would be wise to monitor developments with the issue to make sure that current practices are in compliance.

The case can be viewed at: http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

IMPACT TO YOUR PROGRAM WITH MATRIX: Matrix will administer leaves for same-sex marriages in the same manner used for all spouses. This ruling does not affect Domestic Partners; Matrix will continue to administer leaves for Domestic Partners under applicable state leave laws and client policies.

California Healthy Workplaces, Healthy Families Act Effective July 2015

The California Healthy Workplaces, Healthy Families Act goes into effect on July 01, 2015. The law will require most employers to provide 1 hour of paid sick leave for every 30 hours of work, or to provide employees with 3 sick days front-loaded and to be used within one year. Employee pay stubs or an attachment thereto must provide the amount of accrued sick time. The new law applies to almost all employers, with exceptions for those operating under a qualifying collective bargaining agreement, in-home supportive services and employees of certain air carriers.

Due to the complexity and confusion contained in the Act, the Assembly has introduced Assembly Bill 304 to amend and clarify some of the provisions of the law. The proposed amendments will address such issues as the accrual method to be utilized, clarify that an employee must work for the *same* employer for 30 days for coverage, record keeping requirements, issues related to employers providing unlimited sick pay, calculation for pay while using sick time, and a myriad of other issues. Assembly Bill 304 contains an urgency clause, meaning that its provisions become effective immediately upon signature of the governor. Employers would be wise to monitor developments of Assembly Bill 304 to make sure they are in compliance.

For more specific information regarding the requirements of the Healthy Workplaces, Healthy Families Act <http://www.dir.ca.gov/dlse/ab1522.html>

For more information or to review the text of Assembly Bill 304: <https://legiscan.com/CA/drafts/AB304/2015>

IMPACT TO YOUR PROGRAM WITH MATRIX: There is no change to Matrix programs. Matrix does not administer paid sick time currently.

Massachusetts – Attorney General Announces New Sick Time Regulations

The Massachusetts Earned Sick Time Law goes into effect on July 1, 2015. Under the provisions, employees working for employers with 11 or more employees are entitled to up to 40 hours of paid sick leave time, while employees working for smaller employers may earn up to 40 hours of unpaid leave. The final regulations clarify an important point that was not clear in the original proposed regulations: An employee's use of Massachusetts earned sick time will run concurrently with the FMLA or other leave entitlements if the employee is eligible for both and the leave reason satisfies both the Massachusetts law and the FMLA or other applicable law.

Employees will earn 1 hour of sick time for every 30 hours worked, and begin accruing those hours on the date of hire or on July 1, 2015, whichever is later. Employees can begin to use earned sick time on the 90th day after hire. An employee can use earned sick time if required to miss work in order (1) to care for a physical or mental illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse; (2) to attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; or (3) to address the effects of domestic violence on the employee or the employee's dependent child. The Attorney General's Office announced certain "safe harbor" provisions to some employers last month during the implementation phase of the law.

Specific information regarding the law can be found at: <http://www.agcmass.org/news-advocacy/latest-news/new-massachusetts-sick-leave-law-effective-july-1-2015/>

The Attorney General Regulations can be found at: <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/earned-sick-time/>

For more specific information on the Safe Harbor provisions <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-safe-harbor.pdf>

IMPACT TO YOUR PROGRAM WITH MATRIX: There is no change to Matrix programs. Matrix does not administer paid sick time currently.

Oregon – Oregon Enacts Paid Sick Time Statewide

Oregon has joined California, Connecticut and Massachusetts, to become the fourth state to provide mandated statewide sick leave protections. Senate Bill 454 was signed by the governor on June 22, 2015, and will become effective on January 1, 2016.

Employees earn 1 hour of sick time for every 30 hours worked, and may accrue up to forty hours per year. The law also prohibits retaliation against employees that inquire about or utilize sick leave benefits. The law provides that employees may use sick leave in hourly increments, unless to do so would create an undue hardship for the employer. There are also special provisions for the City of Portland, some of which are more stringent than the statewide mandates.

Employees with fewer than 10 employees may provide unpaid sick time (fewer than 6 in the City of Portland). The new law preempts the Eugene, Oregon sick leave ordinance that was scheduled to become effective July 1, 2015. As the new law provides limited exceptions and provides special nuances related to the City of Portland, employers operating in Oregon in any capacity would be wise to review the provisions of the new legislation.

Senate Bill 454 can be found at: <http://gov.oregonlive.com/bill/2015/SB454/>

IMPACT TO YOUR PROGRAM WITH MATRIX: There is no change to Matrix programs. Matrix does not administer paid sick time currently.

California – Emeryville Passes Sick Leave Ordinance

On June 2, 2015, the City of Emeryville, California has passed a sick leave ordinance to go into effect on July 1, 2015. The ordinance is much more expansive than typical sick leave ordinances as it also includes leave provisions for the care of a guide dog, service dog, or signal dog.

Employers operating in Emeryville can review the new ordinance at: <http://www.ci.emeryville.ca.us/DocumentCenter/Home/View/7971>

IMPACT TO YOUR PROGRAM WITH MATRIX: There is no change to Matrix programs. Matrix does not administer paid sick time currently.

Notable EEOC Disability News:

EEOC v. Kyklos Bearing International, LLC. (ADA Claim) (employer to pay \$50,000 after firing an employee with breast cancer; despite the employee's breast cancer treatment and her own doctor clearing her to work without any restrictions, the employer refused to consider outside medical opinions and fired her). <http://www.eeoc.gov/eeoc/newsroom/release/6-24-15b.cfm>

EEOC v. United Airlines (ADA Claim) (United Airlines to pay over \$1 million in settlement. (EEOC charged that United violated the ADA by requiring workers with disabilities to compete for vacant positions for which they were qualified and which they needed in order to continue working; the company's practice frequently prevented employees with disabilities from continuing employment with United). <http://www.eeoc.gov/eeoc/newsroom/release/6-11-15.cfm>

EEOC v. Noodles Asian Bistro, Inc. (Pregnancy Discrimination) (Employer violated the Pregnancy Discrimination Act by firing two servers after management decided they were "too big" (due to their pregnancies) to wait tables; employer has agreed to pay \$25,000 to workers and provide training and other corrective actions under 3-year supervision by EEOC). <http://www.eeoc.gov/eeoc/newsroom/release/6-24-15a.cfm>

Notable Cases

Parks v. UPS Supply Chain Solutions, Inc., (6th Cir. 2015)

The employee worked as a material handler for UPS beginning in 1999. In 2003, the employee began taking leave for medical reasons. In 2009, the employee was transferred, and began experiencing severe neck pain. Consequently, the employee requested the use of 12 weeks of intermittent leave for the associated medical conditions. In 2010, the employee began receiving warnings related to poor productivity. The employee attributed the problems to his medical condition. He was advised by the company to update his "FMLA paperwork". In the event he did not update his FMLA paperwork, he would still be required to meet the production expectations.

Over the next several months, the employee received several reprimands for performance and behavior. In January 2011, the employee filed a new FMLA certification, providing that the employee would need leave for neck surgery at some point in the future. The employee alleges that he informed his employer that his surgery was to be performed on June 16, 2011; the employer denied being informed of the surgery date.

On the same day that the employee claims to have informed the employer of his scheduled surgery date, the employer discovered another problem with the employee's performance. Under the company's progressive discipline policy, the employee was terminated. He subsequently sued the employer for FMLA interference and retaliation violations.

The timing of the notification of surgery and the termination prompted the Court to declare that the employee had proven a *prima facie* case of FMLA retaliation. The burden then shifted to the employer to provide a legitimate, non-discriminatory business reason for the termination. The company produced significant documentation regarding the poor performance of the employee. Specifically, the company introduced multiple written warnings regarding performance, as well as evidence that the company provided opportunities for additional training, which the employee declined.

In this case, the employer clearly documented the performance issues of the employee, as well as the employer's offers to assist the employee in resolving the performance problems by offering additional training. Employers would be wise to take note of the thoroughness of the employer in this case in documenting the poor performance of the employee, and making the decision to terminate based solely upon performance. As the Court noted, FMLA protections provide time off for the employee, they do not provide for reduced performance standards.

Matrix's analysis of the case:

The good: UPS did a great job of working with the employee with respect to the FMLA, repeatedly encouraging him to get a more appropriate FMLA certification for his condition and warning him of his performance deficiencies. UPS also did an admirable job documenting everything. These are lessons for all employers.

The bad: The plaintiff also filed a failure to accommodate claim under the Kentucky equivalent of the ADA. UPS caught a lucky break on this one. Once UPS had knowledge of the employee's performance deficiencies and the employee's claims that his performance deficiencies were due to his condition, it should have engaged in the interactive process. It is possible that this would have resulted in a determination that there was no reasonable accommodation that would have enabled the employee to perform his duties while at work, but UPS did not follow the correct procedure here. Rather than identifying that UPS did not engage in the interactive process to try to identify a reasonable accommodation, the court looked only to the employee's request for time off for surgery as a request for leave as an accommodation. The court said:

In this case, Parks has offered no evidence that his final two performance errors were related to his disability. Parks' request for leave as an accommodation was not reasonable because it would have required UPS to forgive the performance error committed before the request and ignore the error committed shortly after the request, neither of which is required by law.

The lesson: Always engage in the ADA interactive process with an employee having difficulty performing his job due to a medical condition, even if the employee is also using intermittent FMLA time. He may need an on-the-job accommodation *and* the intermittent leave. And of course, engage in the process at the end of any job protected leave such as FMLA if the employee needs more time off and/or a workplace accommodation upon returning to work.

The court's opinion can be viewed [here](#).

Staples to pay fired employee \$275K in wages, benefits and damages after failing to inform him of FMLA protections to care for his ill spouse

The US Department of Labor is making good on its promise to investigate more violations of the Family and Medical Leave Act, this time resulting in a consent decree for an employer to pay a single employee \$275,000. This follows appearances by top DOL FMLA Branch representatives at recent absence management conferences

In September 2010 and over the months that followed, Jeffrey Angstadt, a furniture sales executive, told his employer, Staples Contract and Commercial, Inc., a subsidiary of Staples, Inc., that he needed to take leave to care for his critically-ill wife. While Angstadt was eligible for leave under the Family and Medical Leave Act for those coping with the illness of a family member, no one at Staples notified him as the law requires.

For the next two years, Angstadt used his personal, sick and vacation days, and worked remotely as needed to balance his work obligations and to care for his wife. In January 2012, his supervisors decided Angstadt wasn't meeting his job responsibilities, and the company fired him. Angstadt found himself without an income and critical health benefits when both were needed the most. Two months later, the US DOL commenced an investigation and then sued Staples for violating the FMLA in its failure to inform Angstadt of his rights.

As part of a settlement agreement reached in May 2015, the Staples defendants have agreed to pay Angstadt \$137,500 in lost wages and benefits, plus an equal amount in liquidated damages. The agreement was reached in a consent decree approved by a federal court. Not reported is the amount of attorneys' fees incurred by Staples and the management and human resources time spent responding to the DOL's investigation and lawsuit.

Angstadt's wife died in 2014.

And it doesn't end with the payment. This case is typical in that the settlement includes far-reaching compliance requirements agreed to by Staples. As a part of the settlement, the company will also promote an enterprise-wide policy for compliance with the FMLA by providing training for human resources and other managerial personnel with respect to FMLA notice and eligibility requirements; post FMLA enforcement posters in the workplace; and investigate and respond to complaints of potential FMLA violations concerning an employee's notice of FMLA rights, including correcting violations when discovered.

Lessons for employers: The FMLA requires several types of notices to employees of their rights under the act, including posting, inclusion in employer policies, and specific notice to the employee once the employer has knowledge of the employee's need for leave for a qualifying reason. Employers should be sure their supervisors are familiar with the provisions of the FMLA so they can help spot a potential FMLA situation and refer the employee to human resources. As this case shows, employers can train now voluntarily or train later under court order. The DOL's press release on the settlement can be found [here](#).

Additional information will be forthcoming related to any required change in Matrix's process, practice or written or verbal employee communications as a result of these new laws.

What You Need to Do:

Reliance Standard and Matrix are committed to keeping our clients informed and in compliance. We will provide updates on meaningful changes - and how they may affect our clients – as necessary. In the interim, for more information on how to manage productivity in the face of this and other employee leave legislation, contact your sales representative or account manager.