On Your Radar

Draw on Our Expertise

February, 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!

Passed

State Legislative Update

At Matrix we follow leave- and disability-related bills introduced by various state legislatures and the federal government on a daily basis. Read more.

EEOC & DOL

ADA Charges Filed with EEOC are up-Up-UP!

In January the U.S. Equal Employment Opportunity Commission (EEOC) released statistics on charges filed and resolved in FY 2016. For the second year in a row that number has increased. Read more.

Papa John's Refusal to Allow Disabled Employee's Job Coach Costs the Company $125,000…and More

A Papa John's employee with Down Syndrome was terminated for using a job coach that was provided (and paid for) by an outside assistance agency. Read more.

A Nudge Toward the Right – President Appoints Victoria A. Lipnic EEOC Acting Chair

President Trump has named Commissioner Victoria A. Lipnic Acting Chair of EEOC. Read More.

Failure to Restore Disabled Employee's Schedule of 15 Years Gets Employer Sued by EEOC

A 15 year Wal-Mart employee with Down Syndrome terminated after a schedule change she was unable to understand because of her disability. Read More.

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Employer Prevails on FMLA Claims Two Ways: Enforcement of Reporting Policy and Termination for Cause

FedEx withstands employee interference and retaliation claim. Read more.

Regular Attendance can be an Essential Function. Here's How

AT&T's policies and evidence of irregular attendance having a negative impact show that regular attendance can be an essential job function. Read more.

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GET TO KNOW

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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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Passed Legislation

State Legislative Updates

At Matrix we follow leave- and disability-related bills introduced by various state legislatures and the federal government on a daily basis, with reports from two nation-wide legislative tracking services. We are in the process of conducting a review of such laws that have been introduced so far this year. Trends so far include more paid sick and safe laws, more family and medical leaves, more paid family and/or parental leaves, and a scattering of other leave of absence protections. Watch this space next month for the bills that have caught our eye, even though it is unlikely – statistically and politically – that many of them will pass.

Remember, Matrix will keep you posted on all updates via our blog, www.Matrix-Radar.com.

EEOC & DOL

ADA Charges Filed with EEOC are up, Up, UP!

In January the U.S. Equal Employment Opportunity Commission (EEOC) released statistics on charges filed and resolved in fiscal year 2016. A detailed breakdown for the 91,503 charges of workplace discrimination the agency received in 2016 shows this is the second year in a row that the number of charges filed with EEOC has increased.

Overall, EEOC received 91,503 charges and resolved 97,443 charges – numbers that show the EEOC is catching up on its backlog of pending charges by 3.8 percent to 73,508 – the lowest pending charge workload in three years. In addition, the agency obtained more than $482 million in settlements or judgments against private and government employers.

ADA Charges Up. The greatest interest to this readership is likely to be the statistics on charges filed with the EEOC under the Americans with Disabilities Act:

- **ADA charges filed increased 44%** from 2008 (the year the ADA Amendments Act was passed) to 2016
- **ADA charges increased from 20% to 30.7% of all EEOC charges filed** (including protected classes like race, gender national origin, etc.)

It would appear that the purposes of the ADA Amendments is having its desired effect – providing

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ADA protections to more employees by lowering the threshold of what constitutes a "disability" under the Act. But are these significant increases also due to increased employee awareness, increased EEOC activity, or decreased employer compliance since the Amendments Act took effect? Hmmmm . . .

More information on the 2016 EEOC charge statistics and resolutions – including charges based on other protected classes such as race, religion, age, gender, etc., is available at the EEOC Press Release linked below.

One final note: The EEOC touts that it achieved a successful outcome in 90.6 percent of all lawsuit resolutions – all the more reason to avoid the situation that Papa John's found itself in (see next story, below).

EEOC Press Release 01-18-2017

Papa John's Refusal to Allow a Disabled Employee's Job Coach Costs the Company $125,000…and More!

Scott Bonn was employed by Papa John's in Farmington, Utah, for 5 months. Bonn has Down syndrome and had a job coach employed and insured by a third party to help him perform his job duties. According to the EEOC, an operating partner visited the Farmington location, observed Bonn working with the assistance of his job coach, and ordered Bonn to be terminated – which he was.

In most circumstances the Americans with Disabilities Act does not require an employer to provide someone to assist a disabled employee full time or to perform the employee's duties. In this case, however, the job coach was provided by an outside assistance organization which paid and insured the coach. Under these circumstances the EEOC deemed that allowing the presence of a job coach was a reasonable accommodation.

The EEOC filed suit against Papa John's affiliates alleging a violation of the ADA for failure to accommodate Bonn after it was unable to reach a settlement with the employer. Under the consent decree settling the suit, Papa John's is required to pay $125,000 to Bonn, review its equal employment opportunity policies, conduct training for management and human resources employees for its restaurants in Utah, and establish a new recruitment program for individuals with disabilities in Utah.

Pings for employers. When an employee files an ADA charge with the EEOC, the employer has opportunities to set things right before reaching the kind of publicity, costs, and sanctions Pap John's is now experiencing. Settlement discussions before, during, and/or after an EEOC investigation are likely to result in a more reasonable settlement with no publicity. Once the EEOC has filed suit, publicity of the filing and of any settlement is inevitable. The EEOC's goal will be a consent decree (a voluntary settlement that is enforced as a court order), which almost always

includes requirements for the employer to provide training, establish new policies or programs, and allow EEOC oversight for a number of years. While not all EEOC charges filed by employees have merit, consider early settlement – the process just gets uglier, more expensive, and more invasive as the charge proceeds.

EEOC Press Release 01-26-2017

A Nudge Toward the Right – President Appoints Victoria A. Lipnic EEOC Acting Chair

President Trump has named Commissioner Victoria A. Lipnic Acting Chair of EEOC. Lipnic started her service as an EEOC Commissioner in 2010 after being nominated by President Obama and confirmed by the Senate. Commissioner Lipnic's initial term ended on July 1, 2015; she was nominated and confirmed to serve a second term ending on July 1, 2020. As Acting Chair, Lipnic will be responsible for the administration and implementation of policy for and the financial management and organizational development of the Commission.

Lipnic's extensive government experience includes serving as Assistant Secretary of Labor for Employment Standards from 2002 to 2009, and many other posts. She had a large role in the major revisions to the Family and Medical Leave Act regulations effective in 2009. Although appointed by President Obama, Commissioner Lipnic has Republican leanings, as evidenced by her career prior to joining the EEOC.

I have had the privilege to visit with Commissioner Lipnic on many occasions, at the Commission's D.C. offices and at conferences. She has always been gracious and open to full discussions of those ADA issues that have employers scratching their heads.

What's next for the EEOC? Surprise! Expect more rightward leanings during the Trump presidency:

- There is an open seat on the 5-member Commission
- The terms for Commissioners Jenny Yang, Chai Feldblum, and Charlotte Burrows expire on July 1, 2017, 2018, and 2019 respectively. Each was appointed by President Obama.
- The influential position of General Counsel to the Commission is currently open. This position is also filled by presidential appointment.

More information about Acting Chair Lipnic and the Commission is available in the EEOC's January 25 press release and on the EEOC website.

Failure to Restore Disabled Employee's Schedule of 15 Years Gets Employer Sued by EEOC

Marlo Spaeth, a former Wal-Mart employee, has Down syndrome. Spaeth had a long record of successful employment with Wal-Mart, receiving multiple pay raises and satisfactory performance reviews over the years. According to the EEOC's lawsuit, Spaeth was disciplined for absenteeism

after her schedule of 15 years (12:00 pm to 4:00 pm) was changed by management. Due to her disability, Spaeth was unable to adapt to the change in routine. Managers at Wal-Mart ignored Spaeth's repeated requests to work her usual shift, insisting instead that she work the longer and later shifts that were assigned to her by a new computerized scheduling system. Because of Spaeth's disability, she was unable to adapt to the change in routine.

Spaeth's sister, who acts as her guardian, became involved after disciplinary actions resulted in Spaeth's termination. The sister tried to protect Spaeth's rights under the American with Disabilities Act, demanding that Wal-Mart rehire Spaeth and allow her to work her preferred schedule of 12:00 pm to 4:00 pm as a reasonable accommodation. Wal-Mart refused, failing again to accommodate Spaeth, in violation of the ADA.

The EEOC filed suit after first attempting to reach a pre-litigation settlement though its conciliation process. The lawsuit asks the court to order Wal-Mart to reinstate Ms. Spaeth with appropriate back pay as well as compensatory and punitive damages. The lawsuit also seeks a permanent injunction enjoining Wal-Mart from failing to provide a reasonable accommodation for disability and discharging an employee due to a disability – common remedies sought by the EEOC in its lawsuits against employers.

Pings for Employers. Beware of making changes to a work arrangement that you have provided to a disabled employee in the past. We don't have Wal-Mart's side of the story here, but generally it will be hard for Wal-Mart to argue that the requested accommodation – return to Spaeth's 15-year schedule of 12 to 4 – would not be a reasonable and effective accommodation. Moreover, having provided this schedule for 15 years, and given the size of Wal-Mart's workforce, the company will be hard pressed to argue that maintaining the usual schedule for Spaeth would constitute an undue hardship.

EEOC v. Wal-Mart Stores East, LP, (E.D.Wi. 2017, Civil Action No. 2:17-cv-70). *EEOC Press Release 01-18-2017*

Court Opinions

Employer Prevails on FMLA Claims Two Ways: Enforcement of Reporting Policy and Termination for Cause

In an encouraging case for employers, FedEx defeated an employee's FMLA interference and retaliation claims on two grounds:

- The employee failed to follow the employer's absence reporting requirements to contact the

employer's FMLA third party administrator; and

- A history of misconduct by the employee defeated the employee's argument that his termination was in retaliation for taking FMLA leave.

Corey Scales managed a team of package handlers for FedEx. His employment history was replete with disciplinary conversations and consequences about his harassing, belittling, and profane conduct in the workplace. After barely successfully completing the requirements of a 90-day Performance Improvement Plan, Scales reported to HR his need for time off to have hip surgery. The HR representative told him that he needed to call FedEx's third-party administrator (TPA) to initiate an FMLA claim and provided him with a document called "Family and Medical Leave Act Request." Plaintiff promptly emailed back the HR rep to thank her "for the info."

Scales did not call the TPA to initiate a request for FMLA. In the meantime, FedEx received an anonymous complaint about Scales engaging in further inappropriate, harassing, and discriminatory conduct of his direct reports. The investigation substantiated numerous instances of violations of FedEx policy, including inappropriate touching of a direct report, calling the package handlers who worked for him "ethnically derogatory names," and even telling one to "go kill himself." As a result, FedEx made the decision to terminate his employment, a decision that was delivered by phone to him by his supervisor the day after he apparently had his hip surgery.

Scales sued FedEx for FMLA interference and retaliation. In its decision, the court granted summary judgment to FedEx for interference, pointing out that the FMLA specifically provides: "*Complying with employer policy.* An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." 29 C.F.R. §825.302(d). The court concluded that Scales did not initiate his request for FMLA through FedEx's customary process of calling its TPA. In addition, he never provided supporting medical, so FedEx didn't have verification of his need for hip surgery, when it would take place, or how long his recovery would take.

The court also granted summary judgment to FedEx on Scales's claim of FMLA retaliation. His long history of misconduct, including recent infractions, supported FedEx's termination for cause and a reasonable jury would not conclude that the real reason for his termination was retaliation for taking medical leave.

Pings for employers:

- Have a well-publicized policy for how to request FMLA leave – put it in your handbook, post it in employee break rooms, put your policy on the internal website to which all employees have access, and send reminders to employees when they first mention a possible need for FMLA leave.

- As this case illustrates, an employee is not protected just by indicating he may need FMLA if he doesn't follow company policies. But, as a best practice, find out whether there are any unusual circumstances that prevented the employee from giving that proper notice.

- Don't shrink from disciplinary action – even termination – when you have well-documented grounds for the discipline. An employer does not have to tolerate misconduct or poor performance just because the employee has recently requested or taken FMLA leave. But if in doubt, consult your employment attorney first. For more guidance on this issue, check out Jeff Nowak's post on FMLA Insights: Bad Timing: Can an Employer Terminate an Employee Shortly After Requesting FMLA Leave?

Scales v. FedEx Ground Package System, Inc., (N.D. Ill. January 24, 2017).

Regular Attendance can be an Essential Function. Here's How.

Add one more case to the employer's side, this one holding that regular attendance can be an essential function of a position. AT&T did it right, with written policies and solid evidence of the negative impact of irregular attendance by employees in customer service roles.

Kristen Williams worked as a Customer Service Representative (CSR) for AT&T in its Memphis call center. Her job duties included answering incoming calls and assisting customers with technical-support and billing issues. To answer calls, Williams had to be physically present at her workstation and logged in to her computer. If a CSR is not at her desk, calls are routed to other CSRs. This results in decreases in the speed and quality of customer service, increased tension for other CSRs, and consequential decreased moral. For these reasons, AT&T requires regular attendance by CSRs.

Williams had a long history of significant absences from work due to her depression and anxiety attacks. Most of these absences were covered by STD and/or FMLA, but many of her absences were unexcused, far in excess of the number allowed by AT&T's attendance policy.

Toward the end of her employment, Williams failed to provide sufficient medical documentation to support an extension of her STD benefits or leave. AT&T's third party STD administrator therefore denied her request for an extension. AT&T then sent three letters to Williams inviting her to discuss her return to work and requesting further medical documentation. Williams provided doctor's notes requesting a flexible work schedule, frequent breaks, and leave for treatment, but none of the medical documentation she provided indicated how those proposed accommodations would enable her to attend work regularly. In response to the third letter, Williams said she could not return and, as a result, her employment was terminated. Williams sued, accusing AT&T of violating the ADA by failing to provide her with reasonable accommodations.

Regular Attendance as an Essential Function. The first issue addressed by the court was whether

regular attendance was an essential function of Williams' position. The court recognized that the employer's judgment regarding a position's essential functions is an important consideration, and found persuasive the company's attendance policy for CSRs, prepared long before Williams made her accommodation request. The policy allowed CSRs a lunch break, two scheduled rest breaks, and unscheduled restroom breaks as needed, and allowed up to 8 attendance points before termination. Williams had accrued 16 points.

The court also credited AT&T's evidence of the negative impacts of irregular attendance by CSRs on its customer service and its workforce. Williams offered no contrary evidence. Citing *EEOC v. Ford Motor Co.*, (6th Cir. 2015), the court acknowledged that "[r]egular, in-person attendance is an essential function . . . of most jobs, especially the interactive ones." Thus, the court concluded that regular attendance was an essential function of the CSR position and that, due to her excessive absences, Williams was not qualified for the position unless there was a reasonable accommodation that would enable her to maintain regular attendance.

Williams' Request for Flexible Scheduling as an Accommodation. Williams alleged that she would have been able to perform her essential job functions using a combination of leave, flexible scheduling, and modified break times. The court evaluated whether she would have been "otherwise qualified" for her CSR position with these proposed accommodations and, if so, whether these accommodations were reasonable. Williams' provider recommended, as accommodations, a delayed start time and ten-minute breaks every two hours, but he did not explain how these would alleviate her attendance problem. Williams admitted in her deposition that she had no way of predicting when her anxiety attacks would occur or how many attacks she would have per day. Breaks every two hours would therefore be inadequate if Williams suffered from an anxiety attack in between scheduled breaks. In addition, Williams testified and her doctor concurred that there were times when she could not work at all in a call center environment. Thus, she did not establish that her requested schedule modifications would have enabled her to maintain regular attendance and the court did not need to determine whether they constituted a reasonable accommodation.

Further Leave of Absence as an Accommodation was not Reasonable. The court stated that additional leave is an objectively unreasonable accommodation where an employee has already received significant amounts of leave and has demonstrated "no clear prospects for recovery."

In the present case, AT&T provided Williams with retroactively approved STD leave and allowed her to retain her position for many months before terminating her in July 2014. Williams submitted an evaluation from her doctor that provided a return date of August 15, 2014, but he stated that this date was only an estimate. Given that Williams had a history of taking leaves, that her condition failed to improve during those leaves, and that she repeatedly failed to return to work by dates given by her treatment providers, requiring AT&T to grant further leave as an accommodation would be unreasonable.

Pings for Employers – How Did AT&T Do It? AT&T did a good job of establishing that regular attendance was an essential function of the Customer Service Representative position. They did this

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by:

- Listing regular attendance as an essential function in the job *in advance of a dispute;*
- Having a detailed attendance policy for the position at issue, with attendance expectations and consequences clearly outlined *in advance of a dispute;* and
- Providing detailed facts to support the negative consequences of attendance issues on AT&T's business operations.

Williams v. AT & T Mobility Services, LLC, (6th Cir., January 27, 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.