On Your Radar

Draw on Our Expertise

August, 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!

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State Legislative Updates

Hawaii

HAWAII - Adds Siblings as a Covered Relationship for Family Leave

On July 10, 2017, the governor of Hawaii signed an amendment to the state's family leave law, adding siblings as a family member for whom an employee can take leave. The amendment took effect immediately. Under the Hawaii law, employees who have worked for an employer for at least 6 consecutive months are entitled to 4 weeks of unpaid, job-protected leave per 12-month period:

- To bond with a newborn biological child or newly adopted child (a newly placed foster child is not covered); and
- To care for the employee's child, spouse, reciprocal beneficiary, sibling, or parent with a serious health condition.

The terms "child" and "parent" are defined broadly by the Hawaii statute for the purpose of caring for a family member with a serious health condition:

- Child: biological, adopted, or foster son or daughter, a stepchild, or a legal ward of an employee.
- Parent: biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law.

Employers with 100 or more employees must comply with the law.

The Hawaii family leave law does not provide leave for an employee's own serious health condition. However, the state does have a pregnancy disability leave law; temporary disability benefits for up to 26 weeks per year through an employee/employer funded state program; and leave to donate an organ, bone marrow, or peripheral blood stem cells.

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Connecticut and Massachusetts

CONNECTICUT and MASSACHUSETTS - Enact Laws Providing More Workplace Pregnancy Protections

The move toward significant workplace protections for pregnant employees continues state by state. In July Connecticut and Massachusetts joined 14 other states plus Washington, D.C. with similar rights for pregnant employees. These laws typically provide protections well beyond those existing under the Americans with Disabilities Act, in that they do not require the employee to be disabled by the pregnancy or a related condition in order to receive a reasonable accommodation and other workplace rights.

Connecticut

On July 6, 2017, Connecticut Governor Dannel Malloy signed into law "An Act Concerning Pregnant Women in the Workplace." The Act, effective October 1, 2017, amends the Connecticut Fair Employment Practices Act (CFEPA) to provide several new protections for pregnant workers.

Under the existing CFEPA it is unlawful for an employer:

(A) To terminate a woman's employment because of her pregnancy;

(B) To refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy;

(C) To deny to that employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer;

(D) To fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits upon her signifying her intent to return unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

The Act now makes it also unlawful for an employer:

(E) To limit, segregate or classify the employee in a way that would deprive her of employment opportunities due to her pregnancy;

(F) To discriminate against an employee or person seeking employment on the basis of her pregnancy in the terms or conditions of her employment;

(G) To fail or refuse to make a reasonable accommodation for an employee or person seeking employment due to her pregnancy, unless the employer can demonstrate that such accommodation would impose an undue hardship on such employer;

(H) to deny employment opportunities to an employee or person seeking employment if such denial is due to the employee's request for a reasonable accommodation due to her pregnancy;

(I) To force an employee or person seeking employment affected by pregnancy to accept a reasonable accommodation if such employee or person seeking employment (i) does not have a known limitation

related to her pregnancy, or (ii) does not require a reasonable accommodation to perform the essential duties related to her employment;

(J) To require an employee to take a leave of absence if a reasonable accommodation can be provided in lieu of such leave; and

(K) To retaliate against an employee in the terms, conditions or privileges of her employment based upon such employee's request for a reasonable accommodation.

The Connecticut Act also requires employers to provide written notice to employees of the right to be free from discrimination in relation to pregnancy, childbirth and related conditions (including lactation), including the right to a reasonable accommodation to the known limitations related to pregnancy. Notice must be provided to new employees at the commencement of employment; to existing employees within one hundred twenty days after the effective date of the Act; and to any employee who notifies the employer of her pregnancy, within 10 days of such notification. An employer may comply with these notice provisions by displaying a poster in a conspicuous place, accessible to employees at the employer's place of business that contains the information required by this section in both English and Spanish.

Reasonable accommodations and undue hardship. Undue hardship is recognized by the Act as a defense to the employer's duty to provide a reasonable accommodation. "Reasonable accommodations" for employees affected by pregnancy, childbirth, and related conditions include without limitation being permitted to sit while working, more frequent or longer breaks, periodic rest, assistance with manual labor, job restructuring, light duty assignments, modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth or break time and appropriate facilities for expressing breast milk.

"Undue hardship" is defined as an action requiring significant difficulty or expense when considered in light of factors such as the nature and cost of the accommodation; the overall financial resources of the employer; the overall size of the business of the employer with respect to the number of employees, and the number, type and location of its facilities; and the effect on expenses and resources or the impact otherwise of such accommodation upon the operation of the employer.

Unlike the new Massachusetts pregnancy protection law (see below), the Connecticut Act does not specify a procedure for an employer to obtain documentation in support of a pregnant employee's need for an accommodation.

Massachusetts

On July 27, 2017, Massachusetts Governor Charlie Baker signed House Bill 3680 establishing the Massachusetts Pregnant Workers Fairness Act.

The Massachusetts Act, effective April 1, 2018, provides broad rights for employees and prospective employees who are pregnant or have conditions related to pregnancy. Key provisions include the following:

- Employers cannot deny an employee's request for a reasonable accommodation due to an employee's pregnancy or condition related to pregnancy, including lactation or expressing breast milk.
- Employers must engage in a timely, good faith, and interactive process to determine effective reasonable accommodations to enable employees to perform the essential functions of their jobs.

- Employers can require documentation to support a request for a reasonable accommodation. The Act identifies a broad list of types of health care providers who can supply the documentation, including not just physicians but also a variety of other medical professionals, assistants, and therapists.
- Documentation cannot be required for employee requests for: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds.
- The employer can deny an employee's request if it can show that the accommodation would impose an undue hardship, defined as significant difficulty or expense. Factors to consider include the nature and cost of the requested accommodation, the financial resources, size, and facilities of the employer's business, and the impact of the requested accommodation on the employer's expenses, resources, or other impact on the employer's business.
- Employers cannot require an employee to accept an unnecessary accommodation, including a forced leave of absence.
- The Act prohibits discrimination and retaliation against a pregnant employee or prospective employee in hiring and in terms and conditions of employment, or for requesting an accommodation.

Employers must provide written notice of employees' rights under the Act, including the right to reasonable accommodations for conditions related to pregnancy. Required notices include a notice of the rights under the Act in an employee handbook, notice to all new employees upon starting employment, notice to existing employees on or before January 1, 2018, and notice to an employee within 10 days of notification to her employer of her pregnancy and/or her need to express breast milk for a nursing child.

New York

NEW YORK PAID FAMILY LEAVE – The Final Regulations are Here!

On July 19, the New York Workers' Compensation Board issued its final regulations in support of the state's Paid Family Leave Law (NY PFL), which requires employers to provide paid leave benefits to employees starting January 1, 2018. The final regulations follow a public comment period on the proposed rules issued on May 24, 2017. The Board received 58 comments and has also issued an Assessment of Public Comment on Revised Proposed Regulations which provides a summary of the comments received and the Board's response. Few substantive changes were made as a result of the comments, but the Assessment provides helpful clarifications on many provisions – even those on which it did not make any changes.

Here is a summary of the more noteworthy (or more interesting) changes and clarifications.

Coverage of employees outside the state of New York.

Several comments requested the Board to change the regulations so that employees who do not live and work in New York are not covered by NY PFL. The Board declined to make this change and clarified that an employee is entitled to NY PFL leave and benefits if some of his or her work is performed in New York and the employee is either: (1) based in New York; (2) controlled from New York; or (3) lives in New York.

In addition, the Board received a request to amend the regulations to allow employers to include non-New York employees in their coverage under NY PFL. The Board pointed out it does not have authority to regulate employees or insurance outside the state of New York and declined to amend the regulations per this request.

Multiple or extended leaves under NY PFL and other programs.

The Board confirmed that an employee may be able to take leave in 2017 under company policies (or the

FMLA) and then be entitled to leave and benefits under NY PFL for the same qualifying event in 2018. Examples:

- An employee who receives a new child on August 1, 2017, could take bonding leave under company policies (which may provide a pay benefit) and/or FMLA in 2017, then take up to 8 weeks of bonding leave under NY PFL any time from January 1 through July 31 in 2018.
- An employee could take up to 12 weeks of FMLA leave in late 2017 to care for a covered family member with a serious health condition, then take up to 8 weeks of leave starting January 1, 2018, to continue care for the same family member.

Fortunately, this anomaly will only occur for certain leaves in 2017 and 2018, and not for subsequent years.

Notice of payroll deductions to employees.

There is no requirement in either the statute or the regulations for employers to give notice to their employees of NY PFL payroll deductions. However, Matrix recommends that employers should, in fact, provide notice of the employees' contributions and other aspects of NY PFL so that employees have the facts and appropriate expectations. Matrix has prepared a sample introductory communication to employees for consideration, and will work with clients to craft additional messaging in Q4 2017. Employers should consult with employment counsel to ensure employee communications are appropriate to the law as well as their own corporate policies and practice.

Military exigency leave.

NY PFL provides leave to care for several defined family members with a serious health condition, including the employee's child, spouse, domestic partner, parent, grandchild, and grandparent. However, the Board has confirmed military exigency leave under NY PFL (which adopts the provisions of the FMLA for this leave) is NOT available for leave necessitated by the military service of a grandparent or grandchild.

Leave and benefits under both New York disability and paid family leave laws.

The Board received an inquiry about an employee's ability to receive both disability (DBL) and PFL benefits for the birth of a child. The Board pointed out that the regulations clearly state an employee can collect both disability benefits and paid family leave in the post-partum period, but not at the same time. Thus, a new mother could receive disability benefits for some period of time following giving birth, and then take paid family leave within the one year period following the date of birth.

The Board did not address the possibility of using NY PFL for the week following birth during the 7-day waiting period for disability benefits, then switch to disability benefits followed by more paid family leave for bonding. There appears to be nothing in the statute or the regulations that would prohibit this, since NY PFL can be taken in increments of one day or more.

The NY disability and PFL laws limit an employee's total benefits under both programs to 26 weeks in a 52-week period. The Board clarified that because the employee's use of benefits is calculated retroactively backward from each day of usage, this will bridge the 52-week period back into year 2017 during 2018.

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Employee waiver of NY PFL coverage and deductions.

NY PFL allows an employee who expects that his/her term of employment will be less than 26 weeks for employees working 20 hours per week or more (or 175 work days for employees working fewer than 20 hours per week) can elect to waive coverage and payroll deductions. In response to a request for clarification, the Board has amended the regulations such that employers MUST provide notice to employees of their right to waive coverage. The waiver must be in writing and if the employee's term of employment exceeds 26 weeks or 175 work days, the employer must start payroll deductions and can collect back premiums from the employee. The regulations do not address how the employer is allowed to collect the back premiums, but other provisions make it unlikely that additional deductions from the employee's paycheck would be permissible.

Employers will not be permitted to automatically waive PFL coverage for short-term workers. According to the Board, it is the employee's election to make.

Notice to employee of completed pre-filed claim.

The draft regulations required carriers to provide employees who pre-filed a claim a confirmation of receipt of the completed claim within one business day. Due to objections about the practicality of processing and assessing a claim for completeness within one day, the regulations have been changed to allow a carrier or self-insured employer three business days to send the confirmation. The payment must still be made within 18 days of receipt of the complete claim.

Inconsistency between carrier's and employer's determination of NY PFL benefits and leave rights.

The Board received a comment recognizing that "there could be a disconnect between the carrier's determination and the employer's determination about whether or not leave should be denied." I'm quoting here because I'm not sure how else to explain this issue: The Board's less-than-satisfactory response is, "Because the employer does not decide whether to approve or deny a paid family leave claim, and if the employer suspects fraud it is free to contact the carrier, no change to the regulations has been made." The Board did not address the question whether the employer would be acting properly if it chooses to use the carrier's benefits determination as a proxy for the leave determination, thus eliminating the possibility of such inconsistency.

Rights of employees with more than one job.

An employee working simultaneously for more than one New York employer will have NY PFL contributions deducted from his/her pay from each employer. The Board confirmed that yes; an employee can take NY PFL leave and receive benefits from multiple employers at the same time for the same leave reason. The Board acknowledged that this might result in the employee receiving total benefits in excess of the statutory cap available from employment with a single employer. However, the Board confirmed that the total number of weeks of NY PFL leave and benefits available to an employee in a 52-week period is still subject to the 8-week limit in 2018 (increasing to 12 weeks by 2021).

WHAT IS MATRIX DOING NOW?

In June Matrix presented webinars, FAQs, and other materials to help employers and brokers understand and prepare for New York Paid Family Leave. Over the coming days and weeks, we will use the final regulations and

	comments to update all materials, and develop additional information as warranted. In August we will host another round of webinars. In the meantime you can always learn more about the law as follows: • Check out these prior blog posts (but remember some information has changed due to revisions to the regulations, including those discussed above): May 2017 March 2017 April 2016 • Watch our June webinar (again, remember some information has been updated since then, but this is a great introductory primer). Ask a question **OR** sign up for our NY PFL Tip-Of-The-Week by emailing nypfl@rsli.com.
Washington	**WASHINGTON | Ten Years Later, Washington Makes Its Paid Family Leave Dream a Reality** Many of you remember last month's On Your Radar, where we outlined for you Washington's newly enacted Paid Family Leave legislation. We did have one last bit of information for you regarding this particular piece of legislation. The existing Washington Family Leave Act (WFLA) is repealed by the new paid family and medical leave law, but remains in effect until December 31, 2019, the day before the paid leave law starts providing benefits. There are many unanswered questions about this law and how it will interact with leaves already pending under the WFLA, which provides 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.

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Federal and State Agencies

ADA DIRECT THREAT: Company Sued for Refusing to Hire Deaf Applicant Due to "Safety Concerns"

Employers ignore the interactive process with employees and applicants at their peril when there is a safety concern. "Direct threat" is available as a defense to an ADA claim when, due to a disability, an employee or applicant poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

The EEOC announced it recently filed a lawsuit alleging discrimination in violation of the ADA on behalf of a deaf applicant denied employment with a warehouse, Capstone Logistics. In its Complaint, the EEOC alleges that the applicant, George Harris, was contacted to arrange an interview and when he arrived, was told that his interview was cancelled and would be rescheduled when an interpreter and Human Resources representative could be present. Ultimately, he was informed by text that he would not be hired. The Capstone manager who sent him that text told him the company had "determined that there was no job [they] could offer that would be safe . . . . There is too much equipment traffic in our work areas and being able to hear a horn or equipment is paramount for safety. I would not want to put you in any dangerous position." According to the Complaint, Capstone didn't ask Harris about his ability to perform any of the job functions, nor how he expected to perform those functions, with or without reasonable accommodations.

If true, Capstone's actions are a textbook example of the types of employer conduct the ADA is intended to prohibit – that is, making assumptions about an applicant's capabilities based on myths or stereotypes. According to the EEOC, "Mr. Harris was qualified for the warehouse laborer position but Capstone refused to communicate with him about his ability to do the job let alone explore possible reasonable accommodations that would address any purported safety concerns." Such alleged conduct violates the ADA, which requires employers to undertake a rigorous assessment of whether a disabled employee poses a safety threat in the workplace. The EEOC's regulations state that an employer's direct threat assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." Considerations include (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. In addition, the employer must consider whether any reasonable accommodations would eliminate the risk of threat or reduce it to an acceptable level. *See* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r).

The EEOC filed suit in U.S. District Court for the District of Maryland, Baltimore Division, after first attempting to reach a pre-litigation settlement through its conciliation process. As part of the suit, the EEOC is seeking back pay and compensatory and punitive damages, as well as injunctive relief prohibiting the company from engaging in any employment practices that discriminate based on disability in the future.

EEOC v. Capstone Logistics, LLC, Civil Action No. 1:17-cv-01980. *EEOC Press Release 7-14-17*

Pings for employers: If you have a concern about the ability of an employee to perform his job

safely:

- Remember that the there are several aspects of the "direct threat" defense that an employer must consider before denying employment to a person with a disability on that basis.
- Do not act on assumptions about the employee's abilities, limitations, or possibility of harm, or on stereotypes about the employee's condition or medications.
- Get adequate medical information about the employee's condition and medications so that you can engage in the interactive process fully armed with accurate information about the employee and his specific circumstances. Remember, though, that any medical inquiry must be job related and consistent with business necessity – don't go too far afield in the medical inquiry.
- In addition to considering accommodations that will help the employee perform the essential functions of his job, be sure to consider possible accommodations that could reduce the threat of harm to an acceptable level. The employee's medical provider can be of particular help here, and the Job Accommodation Network has a wealth of resources to consult.

Believe It or Not: Some Employers Still Fail to Engage in the Interactive Process

Damon Hendrix, an employee at manufacturing facility in Michigan, had a seizure while at work. He was driven to the hospital by his supervisor. As a result of his seizures, he was placed on a medical leave and restricted from operating heavy machinery. During his absence the manufacturing facility was purchased by PPG Industries. Hendrix contacted the new human resources director and provided him with updated medical information. However, the HR director refused to provide any accommodations, and fired the employee the day after he submitted that updated medical.

The EEOC sued PPG and in its complaint, alleges that the company denied Hendrix reasonable accommodations. The EEOC stated, "In this case, PPG could have considered a temporary change in duties or a six-month medical leave to coincide with this man's medical restrictions. When employers flatly refuse to even explore such measures, the EEOC will step in to make things right."

And remember, when the EEOC "steps in," they carry hefty potential clout. If successful, court-ordered relief may include back pay, front pay, attorney's fees, interest, penalties, and an injunction requiring such things as workforce ADA training and posting of notices to employees about the case.

EEOC Press Release 7-12-17

Even Health Services Employers can Violate the ADA – Inflexible Leave Policies in the Spotlight Again

At a recent conference of the DMEC*, my friend and fellow blogger Jeff Nowak opined that, at this point, we should all be generally familiar with the EEOC's position on inflexible leave policies. Jeff pointed out that what we are seeing lately in EEOC enforcement is a focus on what the employer has done to try to keep employees on the job rather than forcing them onto leave of absence. Well, apparently there are some employers out there; including a provider of health and employment services that still haven't heard the message. So let's say it again. Employers:

- Policies that allow termination of an employee after a set amount of leave or if the employee cannot return to work 100% healed may run afoul of the ADA, big time. No matter what your policies say, you must engage in the interactive process to determine whether some at-work reasonable

accommodation will enable the employee to perform the essential functions of his or her job, or whether an extended leave of absence is a reasonable and effective accommodation.

So now about the most recent EEOC lawsuit. According to its website, "Connections Community Support Programs, Inc. provides a comprehensive array of health care, housing, and employment opportunities that help individuals and families to achieve their own goals and enhance our communities." Apparently, Connections has not quite fulfilled its aspirations with respect to its own employees. The EEOC has filed a lawsuit against Connections alleging that it unlawfully denied reasonable accommodations to a class of employees and fired them pursuant to an inflexible maximum-leave policy.

As alleged by the EEOC, the company as a matter of course refused to provide a leave of absence for an employee's own health condition beyond the 12 weeks allowed by the Family and Medical Leave Act and discharged employees who were not able to return to work at that time. The EEOC also alleges that Connections denied other forms of reasonable accommodations that would have allowed qualified individuals with disabilities to remain employed, such as reassignment to vacant positions. Instead, according to the EEOC, Connections forced employees with a disability onto FMLA leave rather than considering on-the-job accommodations that would enable them to continue to work – and then fired them at the end of 12 weeks of FMLA leave.

The EEOC has been beating this drum for several years now, and as indicated by this new lawsuit, shows no signs of letting up. EEOC Commissioner Lipnic has called these lawsuits "low hanging fruit" for the EEOC because, once the Commission discovers that an employer has a policy like this, it knows the Commission will find many, many violations and can benefit the entire workforce with their enforcement actions.

Pings for Employers. For more information on this issue – which is included among the EEOC's top 6 national priorities – check out our prior blog posts that summarize judgments against employers with these policies and provide tips for employers, here and here. In addition, you can review the EEOC's take on leave as a reasonable accommodation by reading its resource document Employer-Provided Leave and the Americans with Disabilities Act.

** Disability Management Employer Coalition (DMEC) is a not-for-profit organization that provides focused education for absence management professionals in a variety of venues and formats. Check them out at http://dmec.org/.*

Hershey Accused of Denying ADA Reasonable Accommodation and Firing Sales Representative with Lifting Restrictions

In a lawsuit filed by the EEOC on behalf of Kristina Williams, a former Retail Sales Merchandiser with spinal stenosis against The Hershey Company, the EEOC alleges that Hershey refused to provide accommodations requested by Williams. Upon return from a medical leave of absence in May 2015, Williams provided restrictions from her treating provider, including permanent restrictions on her ability to lift. In addition, she requested flexibility to divide her daily break into smaller portions to help her stay within her lifting restrictions. The Complaint alleges that Williams provided updated information on a number of occasions, but does not specify what those updated medical documents said. In the time that Hershey was evaluating her requests they did not allow Williams to return, effectively suspending her for 3 months. Ultimately in August 2015, Hershey

told her that she was not qualified for her position because of her permanent restrictions and terminated her employment.

The Complaint says nothing about whether Hershey engaged in any interactive process with the employee. In any event, employers should be wary of undue delay in responding to a request for accommodation. While there is no set time frame to do so, employers should be able to demonstrate what actions they were taking in good faith to explore the possibility of the requested accommodation, or alternate effective accommodations – especially if they do not respond for several months and keep the employee off work without pay during this process.

EEOC Press Release 7-19-17

DOL Announces It Will Review ERISA Disability Claims Handling Rules Slated for 1/1/2018

As we all know, the ERISA disability claims handling rules were revised by the US Department of Labor, to be effective for claims filed on or after January 1, 2018. As part of the ever-changing governmental landscape under the current president, **the DOL has quietly announced that it is "reviewing these amendments for questions of law and policy."** The DOL announcement indicates it will issue a Notice of Proposed Rulemaking in September, but there is no indication as to the scope of its review or potential subjects within the amended rules that will be reviewed. Possibilities include repealing the amendments entirely, modifying or repealing parts them, and/or simply delaying the effective date. The DOL's stealth announcement can be found here: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1210-AB39 .

A Notice of Proposed Rulemaking (NPRM) is a public notice issued by law when one of the independent agencies of the United States government (like the DOL) wishes to add, remove, or change a rule or regulation as part of the rulemaking process. It is a process for announcing proposed regulatory changes and taking public comment on the proposals changes to the regulations can be made. So, we may be in limbo for a while. Even once the NPRM is issued, there will still be unanswered questions as we go through the period of public comment and await any revisions and finalization.

For a refresher on the requirements of the new ERISA rules, review our prior blog post http://matrix-radar.com/2017/01/a-game-changer-dol-releases-new-erisa-disability-claims-rules/.

So what to do now? If the rules in fact go into effect for claims filed on or after January 1 in their present or similar form, there is not enough time to put all preparations on hold. Moreover, we need to remember that many of the changes made to the ERISA claims handling rules are based on federal court rulings in cases where claimants challenged the plan's decision and procedures. As a result, many aspects of the current new rules are still good guidance on how to manage disability claims.

Employers with ERISA disability plans should consult with their legal counsel for advice with respect to their specific plans and procedures. In the meantime, here are some suggestions on where employers might want to place focus while the regulatory process runs its course:

- Revamp **denial letters** to clearly and adequately explain why the employee's medical condition (or other factors) does not qualify the claimant for disability benefits under the employer's plan
- Review **claims handling procedures** and revise as necessary to ensure impartiality and avoid conflicts

of interest
- Providing updated refresher **training** for claims management personnel to ensure good practices and consistency in determining claims

What is Matrix Doing? At Matrix we have been working diligently to prepare for the new rules. Regardless of the outcome of the DOL review and NPRM, Matrix will be ready to administer our clients' disability plans in compliance with the new regulations by January 1, 2018, or other new effective date. To this end, we have assembled a task force of experts in disability plans, claims handling procedures, ERISA, and customer service. Our practice leaders and account managers will be in touch with clients during 2017 to discuss changes to plan notifications, procedures, and more. If you have questions in the meantime, contact your account manager or sales representative, or send us an email at ping@matrixcos.com.

Court Opinions

Medical Marijuana May Qualify as a Reasonable Accommodation

In a landmark case, the Massachusetts Supreme Judicial Court has ruled that an employer may have a duty to allow an employee to use medical marijuana outside of work hours as a reasonable accommodation for a disability. The case hinges on the specific language of the Massachusetts medical marijuana law and is not binding on federal court or the courts in other states. As a result of the opinion, however, employers need to be wary about automatically denying off-the-job medical marijuana use as a reasonable accommodation. Here's the story and important lessons to be learned even outside of Massachusetts.

The Facts. Cristina Barbuto was offered an entry-level position with defendant Advantage Sales and Marketing (ASM) in the late summer of 2014, and accepted the offer. An ASM representative later left a message for Barbuto stating that she was required to take a mandatory drug test. Barbuto told the ASM employee who would be her supervisor that she would test positive for marijuana.

Barbuto explained that she suffers from Crohn's disease, a debilitating gastrointestinal condition; that her physician had provided her with a written certification that allowed her to use marijuana for medicinal purposes; and that, as a result, she was a qualifying medical marijuana patient under Massachusetts law. She added that she did not use marijuana daily and would not consume it before work or at work. Typically, Barbuto uses marijuana in small quantities at her home, usually in the evening, two or three times per week. As a result of her Crohn's disease, and her irritable bowel syndrome, she has "little or no appetite," and finds it difficult to maintain a healthy weight. After she started to use marijuana for medicinal purposes, she gained fifteen pounds and has been able to maintain a healthy weight.

The supervisor told Barbuto that her medicinal use of marijuana "should not be a problem," but that he would confirm this with others at ASM. He later telephoned her and confirmed that her lawful medical use of marijuana would not be an issue with the company. On September 5, 2014, Barbuto submitted a urine sample for the mandatory drug test. On September 11, she went to an ASM training program, where she was given a uniform and assigned a supermarket location where she would promote the products of ASM's customers. She completed her first day of work the next day. She did not use marijuana at the workplace and did not report to

work in an intoxicated state. That evening, ASM's Human Resources representative informed Barbuto that she was terminated for testing positive for marijuana. The HR rep told Barbuto that ASM did not care if Barbuto used marijuana to treat her medical condition because "we follow federal law, not state law."

Barbuto filed a verified charge of discrimination against ASM alleging, among other claims, handicap discrimination based on ASM's failure to accommodate her use of medical marijuana. ASM's defenses included that allowing the use of medical marijuana was not a reasonable accommodation because it is still illegal under federal law. ASM also argued that Barbuto was not a qualified individual with a handicap because her only requested accommodation was illegal. (The Massachusetts antidiscrimination law uses the term "handicap" rather than "disability.") The trial court dismissed Barbuto's claims at the outset for failure to state a legal claim, meaning there was no need for the case to continue. On appeal, the Massachusetts Supreme Judicial Court overturned that decision, ruling that Barbuto had stated a claim for failure to accommodate and the case could continue.

The Massachusetts Medical Marijuana Act. Under the Massachusetts medical marijuana act, a "qualifying patient" is defined as "a person who has been diagnosed by a licensed physician as having a debilitating medical condition." Crohn's disease is expressly included within the definition of a "debilitating medical condition."

The act protects a qualifying patient from "arrest or prosecution, or civil penalty, for the medical use of marijuana" provided the patient "(a) [p]ossesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (b) [p]resents his or her registration card to any law enforcement official who questions the patient . . . regarding use of marijuana." The act also provides,

> Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions.

Under federal law, however, marijuana continues to be a Schedule I controlled substance under the Controlled Substances Act, whose possession is a crime, regardless of whether it is prescribed by a physician for medical use. Consequently, a qualifying patient in Massachusetts (or any other state) who has been lawfully prescribed marijuana remains potentially subject to federal criminal prosecution for possessing the marijuana prescribed.

Handicap Discrimination. Massachusetts' antidiscrimination law provides that it is an "unlawful practice . . . [f]or any employer . . . to dismiss from employment or refuse to hire . . . , because of [her]handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."

Barbuto alleged that she is a "handicapped person" because she suffers from Crohn's disease and that she is a "qualified handicapped person" because she is capable of performing the essential functions of her job with a reasonable accommodation to her handicap; that is, with a waiver of ASM's policy barring anyone from employment who tests positive for marijuana so that she may continue to use medical marijuana as prescribed by her physician.

A "Facially Reasonable Accommodation." ASM argued that argued that Barbuto was not a qualified individual with a handicap because her only requested accommodation was illegal. Because the use of medical marijuana

is legal under Massachusetts law, the court likened a strict policy against its use in any circumstances akin to refusing to allow an employee to use any other legally prescribed medication, such as insulin for a diabetic. "[O]ne generally would expect an employer not to interfere with the employee taking such medication, or to terminate her because she took it." The court found that an exception to an employer's drug policy to permit an employee's use of medical marijuana is a facially reasonable accommodation. To hold otherwise would be a violation of the act by denying an individual "any right or privilege" as a result of his or her use of medical marijuana in accordance with the act.

The court recognized in a footnote that the language of the Massachusetts medical marijuana act distinguishes this case from a California Supreme Court decision that denied an employee's challenge under the State's handicap discrimination law to a termination based on the employee's use of medical marijuana. Unlike the Massachusetts law, the California medical marijuana law in does not contain language protecting medical marijuana users from the denial of any right or privilege. In other published cases where state supreme courts have rejected employees' claims for relief from their termination of employment because of their use of medical marijuana, the employees did not bring handicap/disability discrimination claims.

Federal Law. ASM also argued that, because the prescribed medication is marijuana, which is illegal to possess under federal law, an accommodation that would permit the plaintiff to continue to be treated with medical marijuana is unreasonable in and of itself. The court rejected this argument also. It recognized that since 1970 when Congress determined that marijuana was a Schedule I controlled substance that "has no currently accepted medical use in treatment in the United States," nearly ninety per cent of the states have enacted laws regarding medical marijuana that reflect their determination that marijuana, where lawfully prescribed by a physician, has a currently accepted medical use in treatment. The court observed that to declare an accommodation for medical marijuana per se unreasonable out of respect for federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of states, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.

What about Other Accommodations? In an important reminder to employers, the court also reinstated Barbuto's failure to accommodate claim because ASM did not explore other possible reasonable accommodations before terminating Barbuto.

> [E]ven if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer here still owed the plaintiff an obligation under [the Massachusetts antidiscrimination law] before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy. This failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination provided the plaintiff proves that a reasonable accommodation existed that would have enabled her to be a "qualified handicapped person."

And Finally . . . Undue Hardship. All is not lost for ASM, however. The court recognized that even if Barbuto's off-duty use of medical marijuana is a facially reasonable accommodation, ASM still has the opportunity to prove that this accommodation would impose an undue hardship on ASM's business. Possible undue hardships could include:

- That the continued use of medical marijuana would impair the employee's performance of her work or

- pose an "unacceptably significant" safety risk to the public, the employee, or her fellow employee, or
- That the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business. This defense might be available particularly for employers subject to Department or Transportation rules or for employers who are federal contractors.

Because Barbuto's continued use of medical marijuana under the circumstances of this case is not facially unreasonable as an accommodation for her handicap and because Barbuto alleged that ASM failed to participate in an interactive process with her to determine whether there was an alternative reasonable accommodation for her handicap, Barbuto's claim alleging handicap discrimination gets to continue through the court process, and possibly to a jury trial.

Pings for Employers. If you are presented with a request for off-duty use of medical marijuana as a reasonable accommodation for a disability;

- Consult with your employment counsel to determine what protections the employee has under applicable state laws. Every state's medical marijuana law is different and some might provide similar employment protections as the Massachusetts law.
- Don't forget to engage in the interactive process! Once the employee has disclosed a disability and requested an accommodation, an employer can safely decline to accommodate the employee only if the accommodation requested by the employee is not reasonable, would not be effective, or will impose an undue hardship.

Barbuto v. Advantage Sales and Marketing, LLC (Mass. SJC July 17, 2017).

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