On Your Radar

Draw on Our Expertise

September, 2017

Welcome to our September issue of *On Your Radar*. The dog days of summer also bring an end to many state legislative sessions; meaning not much current activity. Only a small handful of states still have legislatures in session. Whew! The break is a bit of a relief in what has been a very active year. Take a look back at the March 2017 issue of *On Your Radar* for an overview of the leave-related bills that had been introduced in various state legislatures in just the first two months of 2017, and that we have been tracking.

Even though there is not much current legislative action, we promise to keep you up to date, so here are summaries of what we have been watching in the past month. Take particular note of the EEOC press releases – no summer lethargy there!

State Legislative Updates

California | Proposed Expansion of CFRA

California Senate Bill 63 would amend the California Family Rights Act (CFRA) to provide 12 weeks of parental/bonding leave to employers with 20-49 employees. Read more.

New York | Paid Family Leave Update

Important and much needed guidance on the tax implications of the looming New York Paid Family Leave program. Read more

Rhode Island | Paid Sick and Safe Leave

Rhode Island legislature putting the final touches on a paid sick and safe bill before submitting it to the governor. Read more

Federal & State Agencies

EEOC | Inflexible Leave Policies Again

UPS writes a $2,000,000 check. And that was the easy part. Read more.

EEOC | Pregnancy and Parental Leave Lawsuits Abound

The EEOC is sending a message to employers – *Know the rules about the job rights of pregnant employees and new parents!* Read more.

EEOC | Other EEOC Pregnancy and Disability Cases of Note

Some important decisions for your reading pleasure. Read more.

Court Opinions

Walker v. Verizon Pennsylvania (E.D. Pa. August 25, 2017)
Verizon learns an important (and expensive) FMLA lesson. Read more.

Draw on Our Expertise

GET TO KNOW

Marti Cardi, Esq.
Vice President, Matrix Absence Management

Gail Cohen, Esq.
Director, Employment law and Compliance, Matrix Absence Management, Inc.

READ OUR BLOG
Learn about our insights in absence management and workplace accommodations, and how they affect you and your business.

RELIANCE STANDARD
A MEMBER OF THE TOKIO MARINE GROUP

MATRIX
ABSENCE MANAGEMENT
A MEMBER OF THE TOKIO MARINE GROUP

On Your Radar

Draw on Our Expertise

State Legislative Updates

California

California | Proposed Expansion of CFRA

California Senate Bill 63 is a leave-related bill that is still active and of great interest. The bill would amend the California Family Rights Act (CFRA) to provide 12 weeks of parental/bonding leave to employees of employers with 20-49 employees. Currently CFRA applies only to employers with 50 or more employees. The bill would not expand CFRA coverage for other leave reasons (an employee's own serious health condition or to care for a family member with a serious health condition).

SB 63 provides that if an employer employs both parents and they are entitled to leave pursuant to this bill for the same birth, adoption, or foster care placement, the employer can limit the parents' leave to a maximum of 12 weeks total. Employers would have discretion to grant (or deny) simultaneous leave to both employees. The bill also requires the employer to continue group health coverage.

The bill is nearing completion of the state legislative process but would have to be signed by the California governor to go into effect. Interestingly, Governor Brown vetoed a similar bill last year that also would have provided parental leave to employees of employers with 20-49 employees, but which only required 6 weeks of leave. In vetoing that bill in October 2016, the governor expressed concern "about the impact of the leave particularly on small businesses and the potential liability that could result."

We'll be watching this bill with interest to see if the Governor has had a change of heart in 2017.

New York

New York | Paid Family Leave

Effective January 1, 2018, New York employers will be required to provide paid family leave benefits to eligible employees. This law was passed as part of the state's 2016 budget and is another benefit available in addition to the state's worker's compensation and employee disability pay benefits. We have written about the New York Paid Family Leave law (PFL) in previous blog posts in July 2017, May 2017, March 2017, and April 2016.

Recently the state of New York released much-needed guidance on the tax implications of employee premium contributions and benefits under the new PFL. According to the New York Department of Taxation and Finance:

- *Benefits paid to employees will be taxable non-wage income* that must be included in federal gross income.
- *Taxes will not automatically be withheld from benefits*; employees can request voluntary tax withholding.
- *Premiums will be deducted from employees' after-tax wages.*
- Employers should *report employee contributions on Form W-2 using Box 14* – State disability insurance taxes withheld.
- Benefits should be *reported by the State Insurance Fund on Form 1099-G and by all other payers on Form 1099-MISC.*

The Department released this guidance upon consideration of applicable state and federal laws and

	regulations, and after consultation with the federal Internal Revenue Service (IRS). The Department warns, however, that every employee, employer, and insurance carrier should consult with its own tax advisor. The Department's Notice can be found here: https://www.tax.ny.gov/pdf/notices/n17_12.pdf.
Rhode Island	**Rhode Island | Paid Sick and Safe Leave** The Rhode Island legislature is in the final stages of passing a paid sick and safe leave bill (H 5413) before submitting it to the governor. If enacted, the law will provide Rhode Island workers with one hour of paid leave time for every 35 hours worked, up to a maximum of 24 hours of paid leave in 2018, 32 hours in 2019, and 40 hours in 2020 and thereafter. The law will allow employees to use the paid time off for their own or a family member's health care needs, closure of the employee's place of business or a child's school or care facility due to a public health emergency, and when the employee or a family member is a victim of domestic violence. We will continue to watch this bill and will report in greater detail if it becomes law.

Federal and State Agencies

EEOC | Inflexible Leave Policies Again – UPS's $2 Million Payment in the Easy Part of this Settlement

Each year since 2011 (and in some prior years) the EEOC has announced at least one major consent decree settlement with an employer who was still using some form of an inflexible policy that restricted or prohibited a disabled employee's return to work following a leave of absence. You can see a chart we put together here. These policies have *always* been a violation of the ADA since it became law in 1991. It's just that the EEOC's big settlements have brought more awareness of the issue in recent years.

United Parcel Service is the latest company to pay the price – $2 million – for not learning the lesson earlier. UPS had an inflexible leave policy that required termination of disabled employees automatically when they reached 12 months of leave, without engaging in the interactive process to determine whether more leave or an on-the-job accommodation would enable the employee to return to work. The lawsuit was filed by the EEOC in 2009 (these things take time!) and for a company the size of UPS, that $2 million is the easy part of the settlement. **The real cost,** as is common when a company enters into a court-supervised consent decree to settle a case with the EEOC, is that UPS has agreed to many nonmonetary terms that will keep the company under the EEOC's watch for years to come. UPS will update its policies on accommodation of disabilities, improve implementation of those policies, and conduct training for employees who administer the company's accommodation process. Most notably, however, UPS will provide the EEOC with reports on the status of *every accommodation request it receives over the next 3 years* to ensure the efficiency of its procedures.

Two types of policies in the EEOC crosshairs. For those new to this issue (where have you been?), here are the two basic types of leave policies the EEOC is targeting:

- *Maximum or inflexible leave policies* (sometimes referred to as "no fault" leave policies) take many different forms. A common policy, especially for entities covered by the FMLA, is a flat

limit of 12 weeks for both continuous and intermittent leave. Some employers not covered by the FMLA set lower overall caps. Others tie the maximum leave to the duration of short-term disability benefits. *Any* inflexible cap may result in an ADA violation because it does not allow for the interactive process and individualized consideration of whether additional leave or some other reasonable accommodation will enable the employee to return to work.

- *100% recovered or healed* policies are those that require an employee to have no medical restrictions – that is, to be "100%" healed or recovered – before returning to work. These also have huge potential to violate the ADA because the employer does not engage in the interactive process to discover whether the employee can perform essential functions with on-the-job reasonable accommodation(s).

We have lots of information to help employers understand this issue and remedy their policies if needed. Last year we blogged about home improvement giant Lowe's consent decree with the EEOC for $8.6 million and similar nonmonetary provisions. You can find that story here. It contains that chart mentioned above, listing employers in recent years subject to EEOC consent decrees due to inflexible leave policies of one sort or another. We also blogged about extended leave as an ADA accommodation here when the EEOC released its resource document Employer-Provided Leave and the Americans with Disabilities Act.

Matrix Can Help

Matrix's industry-leading ADA Advantage™ offers meaningful assistance to employers, whether dealing with accommodations for employee disabilities or with accommodations requested due to pregnancy and related conditions. We help you all the way, from intake to medical assessment to assisting with the interactive process, and of course follow-up, recordkeeping, and reporting – but you get the say in which accommodations to provide or deny. Our experienced ADA Specialists are supported by the Matrix Clinical and Compliance teams.

Find out more from your Account Manager or local Reliance Standard sales representative, or contact us at ping@matrixcos.com.

EEOC | Pregnancy and Parental Leave Lawsuits Abound

The EEOC has either been more active in filing lawsuits against employers for violations of the Pregnancy Discrimination Act, or just more aggressive about announcing its filings. Either way, the agency's new lawsuits (plus a striking win) in the past month are sending the message loud and clear to employers: *Know the rules about the job rights of pregnant employees and new parents!*

Of course, not every case the EEOC files will ultimately end in a judgment against the employer or a large settlement. But every case *will* cause the employer disruption to business operations, bad press, and costly legal fees.

Pay heed to these EEOC actions and be proactive in protecting your company against lawsuits based on alleged pregnancy discrimination and failure to accommodate. Before we get into the cases, here are some . . .

On Your Radar

Draw on Our Expertise

Pings for Employers

- Read – no, study – the EEOC's 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues. It provides insights into the protections available to pregnant workers under the federal Pregnancy Discrimination Act (part of Title VII), the Americans with Disabilities Act, the FMLA, and other laws.
- Review your policies to ensure you:
  - Acknowledge pregnancy and related conditions as a protected class
  - State clearly that discrimination and harassment based on an employee's pregnancy will not be tolerated
  - Provide employees with at least two avenues to register a complaint about possible pregnancy discrimination, harassment, or failure to accommodate
- Train your supervisors on:
  - The rights of pregnant workers, including possible workplace accommodations
  - The responsibility of employers to treat pregnant and non-pregnant workers equally
  - Making work-related decisions based on the pregnant employee's capabilities, not assumptions about her condition
  - Going to HR for help with pregnant workers
- For more tips on how to protect your pregnant employees and how to protect your company, go back and reread the last section of the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues.

Manager Who "Didn't Want to Get Screwed Over" on Scheduling Challenges Provides EEOC a Win in Pregnancy Discrimination Case

In a lawsuit, each party usually has the opportunity to file a motion for summary judgment prior to trial. Summary judgment may be granted if the undisputed facts support judgment in favor of one of the parties. Why go to trial if there is nothing left to prove? Read on to learn how one manager treated a pregnant employee so badly that the only question left is, "How much does the employer have to pay?"

Hayley Macioce was a part-time server for a Bob Evans restaurant in Pennsylvania and was pregnant. Bob Evans had an automatic shift scheduling process to staff its restaurants based on the employees' stated availability. In July 2014, Macioce and her manager, Jay Moreau, had a conversation about her future work schedule. Despite telling him that she intended to work until she had her baby, Moreau asked her to change her availability in the system because he "didn't want to get screwed over if [she had] the baby." When she did not change her availability, Moreau did so for her and removed her from the automatic scheduling system. Moreau testified he did this because he believed her due date was imminent and that made it unpredictable when she could work. Moreau was never told Hayley's due date.

The EEOC brought a lawsuit on behalf of Macioce alleging violations of the Pregnancy Discrimination Act ("PDA"). Bob Evans argued Macioce was removed from the automated schedule due to "the unpredictability of her attendance" because Moreau believed her leave was imminent. *Au contraire,* said the judge. Moreau's decision to remove Macioce from the schedule, even if her upcoming availability was

unpredictable, was still *because of pregnancy*. In his order granting summary judgment the judge stated, "It is the rare lawsuit in which the record entitles a plaintiff to the grant of summary judgment in its favor. This is one of those cases."

One essential element of a discrimination case is proof that the employee suffered an adverse employment action due to the employer's discrimination. The Judge concluded that Hayley suffered an adverse employment action because she was removed from the automatic scheduling system, resulting in fewer and less predictable work hours, and that this change was motivated by her manager's unfounded assumptions about her pregnancy.

On to a trial on possible damages for Macioce, including lost wages and emotional distress. In addition, Bob Evans faces a real possibility of an award of punitive damages against it. Bob Evans has policies prohibiting discrimination and harassment, but pregnancy and related conditions are *omitted from the identification of protected classes, and the restaurant chain had not provided any meaningful training for management or servers on Bob Evans' anti-discrimination policies.*

Pings for Employers

- No matter how well intentioned, an employer cannot make decisions on whether and how much a pregnant employee can work. The decision to work, even including hazardous aspects of a job, is the employee's alone.
- We usually think of adverse employment actions as things like termination, demotion, or failure to promote. This case also shows that an unfavorable change in work schedule can also be an adverse employment action.
- Train supervisors on the basics of employee rights and employer responsibilities under various employment laws and company policies, including antidiscrimination, leaves of absence, disabilities, and more. And train them that attitude matters. Watch what you say!

EEOC v. Bob Evans Farms, LLC (W.D.Pa. August 17, 2017)

Dads are Parent, Too!

We are used to seeing lawsuits alleging that female employees did not get the same compensation and benefits as male employees – it happens all too often, in fact. But this time it is the male employees who were getting the short end of the stick.

A male employee working as a stock person for cosmetics giant Estée Lauder in a Maryland store sought parental leave benefits after his child was born. He requested, and was denied, the six weeks of child-bonding leave that biological mothers can receive, and was allowed only two weeks of leave to bond with his newborn child.

The EEOC has now sued Estée Lauder on behalf of male employees for not providing equal leave entitlement to moms and dads for bonding with a new child. According to the suit, in 2013 Estée Lauder adopted a new parental leave program that offered new mothers 6 weeks of paid child bonding

leave (in addition to paid leave to recover from childbirth if applicable) and 4 weeks of flexible return-to-work benefits when the bonding leave expires. New fathers were only offered two weeks of leave to bond with a child and no flexible return-to-work benefits upon expiration of the bonding leave.

For a long time, employers have believed they are safe from sex discrimination charges if they provide different parental leave benefits to fathers and mothers, as long as the mothers were treated better. It is now quite well established that such conduct violates Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Pay Act of 1963, which prohibit discrimination in pay or benefits based on sex.

The EEOC explained its interpretation of this issue in its 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues:

> For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).
>
> Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions. However, **parental leave must be provided to similarly situated men and women on the same terms.** If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

Pings for Employers

- Check your policies to ensure you are providing equal benefits to mothers and fathers, including bonding leave (paid or unpaid), continuation of benefits during leave, and return to work practices and policies.
- If birth mothers receive extra leave (paid or unpaid) make sure it is clearly defined to apply only to disability due to pregnancy, childbirth, and related conditions, including recovery after delivery.

EEOC Press Release 8-30-17

EEOC | Other Pregnancy Cases of Note

Verona Restaurant & Spa is the target in another EEOC lawsuit focusing on pregnancy and accommodations. After being diagnosed with gestational diabetes, a front desk agent requested that she be allowed to sit occasionally during her shifts and to wear open-toed shoes. The company denied these pregnancy accommodations and terminated her, claiming that her pregnancy impacted her ability to perform her job. *EEOC Press Release 7-27-17*

Dependable Health Service, Inc., a health care staffing agency, has been sued by the EEOC for alleged violations of the Americans with Disabilities Act after terminating a pregnant employee with complications

due to sickle-cell anemia. Because of restrictions on her lifting and bending, the employee requested an accommodation of no longer working on mobile blood drives. Dependable initially refused the accommodation, but then provided it when the employee had premature contractions while working on a mobile blood drive. Near the end of her maternity leave the employee indicated she would return to work on February 28, 2017. Dependable terminated the employee on February 27, claiming that it had decided to have her position backfilled immediately. *EEOC Press Release 8-14-17*

The EEOC has sued **Tarr, Inc., and Zenith LLC,** a company that sells dietary supplements (merged in 2016) for violations of the Pregnancy Discrimination Act. The company terminated an employee 10 days after learning of her pregnancy. The EEOC alleges that the company also discharged other pregnant employees or refused their requests to return to work after taking maternity leave. *EEOC Press Release 8-18-17*

Silverado is a network of memory care, at-home, and hospice care centers. A Wisconsin employee was fired when she requested light duty due to her pregnancy, even though Silverado routinely offered light duty to non-pregnant workers injured on the job. The EEOC has filed a lawsuit against Silverado, alleging violation of the Pregnancy Discrimination Act. Gregory Gochanour, regional attorney of the EEOC's Chicago District Office, said, "The Supreme Court made clear in Young v. UPS that if an employer provides light duty or other accommodations to a large proportion of non-pregnant workers while denying those opportunities to a large percentage of pregnant workers, the employer may be violating our nation's civil rights law prohibiting pregnancy discrimination. In this case, Silverado deprived Ms. Burton of an accommodation that it consistently offered to its non-pregnant workers." *EEOC Press Release 8-22-17*.

Court Opinions

FMLA Retaliation in Layoff Costs Verizon $800,000: A Lesson in FMLA Damages

Employers rarely understand the costs they can incur if an employee wins a judgment in an FMLA lawsuit. Verizon has learned the lesson in a big way. The $800,000+ judgment is only part of the cost to Verizon. In addition to the award to Walker, Verizon will have incurred substantial expenses for its own attorneys' fees (almost always more than the fees incurred by the plaintiff), and will have experienced substantial business disruption and loss of productivity by its employees who had to prepare and serve as witnesses, locate documents, and assist with other inevitable litigation-related tasks. Here's the story, and your opportunity to learn the lesson.

Suzette Walker worked for Verizon for over 36 years, starting as an intern and working her way up to a position paying over $93,000. She had a history of good reviews except for 2013, when she was dinged for being absent from work – due to the need to take FMLA leave to recover from a shoulder injury. In 2015, that review cost Walker her job.

Verizon's employee evaluation system had 4 ranking levels: Leading (the top score and rarely given); Performing (employee met and periodically exceeded expectations); Developing (employee had not met objectives and requirements, and improvement was needed) and New (employee had not worked long enough to be evaluated).

On Your Radar

Draw on Our Expertise

In 2013 Walker was assigned to a new position but then had to take FMLA leave for shoulder surgery and recovery. Walker's manager, Brian Magee, wrote in her mid-year evaluation:

> Suzette [Walker] was moved to Conduit/Highway in the first half of the year due to existing knowledge of conduit and the City Permit process. GPIS review has been a positive transition, but conduit design has been hard to transition. Suzette has missed time due to an injury, which has made the transition difficult. The conduit area is still setup for the former Conduit Engineer and I have received complaints about the conduit mailbox being full. We are not where the Conduit/Highway Team needs to be at this time. [Emphasis added.]

This was written when Walker had been out on FMLA leave for nearly 2-1/2 months and back to work at her new position part time for only about 3 weeks. In the 2013 year end performance review, which incorporated the mid-year review, Magee gave Walker a "Developing" rating, although she had always received a "Performing" score in past years (and was also rated as "Performing" in 2014) .

In 2015 Verizon instructed Magee and another manager to eliminate one person from their two teams as part of a reduction in force. The managers were trained on a "rate and rank" process and instructed to use that process to determine who to terminate. Instead, they spoke by telephone and agreed to select Walker for layoff. Magee then contrived rate and rank scores that justified the decision. Walker ended up on the bottom of the rankings, in part because of her Developing score in 2013 which counted as only 1 point in the rate and rank process. A Performing score counted as 3 points. Walker received a total score of 13 and would have tied with the other lowest employee who received a 15, but for the hit on her 2013 evaluation.

The court recognized that Magee didn't really conduct a rate and rank to reach his decision to select Walker for termination. However, in the fake 2015 rate and rank form, Magee wrote that Walker was slow to learn her job responsibilities in 2013. The judge stated that a jury could reasonably infer from this that Magee decided to fire Walker in 2015 because she hadn't learned quickly enough in 2013 due to her FMLA time off. The judge also stated the jury could believe that Magee's comments on the rate and rank form were evidence of the reasons he had in mind in selecting Walker for termination. Jury verdict for Walker affirmed.

So how much Suzette Walker receive? Here is rundown of the potential damages in an FMLA case and the amounts awarded to Walker:

FMLA DAMAGES ITEM	DESCRIPTION	AMOUNT
Back pay	Common award in termination case – lost wages up to date of judgment	$188,000
Front pay	Awarded if employee has not yet become re-employed at time of judgment – lost wages looking forward	$256,000
Pre-judgment interest – on back pay only	Always awarded, at the "prevailing rate"	$6,001

On Your Radar

Draw on Our Expertise

Liquidated damages**	Similar to punitive damages – equal to amount of back pay plus pre-judgment interest (see **below)	$194,001
Plaintiff's attorney's fees	Employer pays if employee wins	$153,356
Plaintiff's costs	Employer pays if employee wins	$6,213
TOTAL FMLA AWARD TO PLAINTIFF		**$ 803,571**
Employer's estimated attorney's fees and costs	Employer always pays (and is usually larger than employee's attorney's fees)	$ 160,000 est.
TOTAL COSTS TO VERIZON		**$963,571**

*** Liquidated damages are routinely awarded in FMLA cases. The employer can avoid liquidated damages only if it proves that it had a good faith belief that its act or omission was not a violation of the FMLA. An explanation for the employer's actions is not enough; the employer must also prove it took affirmative steps to ascertain the requirements of and comply with the FMLA in the particular situation.*

Pings for Employers:

We sound like a broken record, but you must TRAIN YOUR SUPERVISORS AND MANAGERS on employee rights and employer obligations under the FMLA. Without that ill-advised comment in Suzette Walker's 2013 mid-year review, Verizon might have succeeded in defeating her FMLA claim.

Walker v. Verizon Pennsylvania, LLC (E.D.Pa. August 25, 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.