On Your Radar

Draw on Our Expertise

January, 2018

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

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Legislative Updates

Federal

Federal - Paid Family and Medical Leave Tax Credit is Part of the New Tax Bill

A little-publicized provision of the new Tax Cuts and Jobs Act (the Act) establishes a tax credit for employers who provide paid family and/or medical leave to employees within certain parameters. You can review the specific provisions of the law at the link above – the "Employer Credit for Paid Family and Medical Leave" starts at page 221 of the bill (page 223 of the PDF).

The tax code provision is based on a bill previously introduced into the House and Senate as the Strong Families Act, which has received strong criticism from pro-family groups. Google it and you can find websites criticizing and supporting the Strong Families Act. Politics aside, let's take a look at what is now the law. (But please remember, we at Matrix are not tax advisors – consult your own attorneys or tax advisors for specific details!)

Summary. The Tax Cuts and Jobs Act (the "Act") provides employers with a partial tax credit for wage benefits paid to employees during leave taken for reasons covered by the federal Family and Medical Leave Act (FMLA). But note this: The credit is in effect only for tax years 2018 and 2019, and then automatically sunsets unless Congress takes further action.

Employee and employer coverage. The tax credit coverage is not limited to employees and employers covered by the FMLA. Benefits paid to full time and part time employees are available for the tax credit. However, to qualify for the tax credit, payments must be to employees who:

- Have been employed by the employer for at least 1 year
    - The Act does not specify whether that has to be 12 consecutive months of employment or whether, like FMLA eligibility, the employee only needs to have worked an aggregate total of 1 year
- Make no more than $72,000 per year

Employers may voluntarily provide paid family leave to employees who are not eligible for FMLA leave (called "added employees" in the Act) and receive the tax credit for such payments as long as the employer has a policy that complies with the Act. So, for example, an employer could provide paid leave benefits to an employee who has not worked 1250 hour in the past 12 months, or who has already exhausted her FMLA entitlement, and still get the tax credit. "Added employers" with fewer than 50 employees or those with small worksites not covered by the FMLA can also make paid leave benefits available to employees and use the tax credit.

Policy requirements include a minimum of 2 weeks of paid leave benefit, a provision against interference with the employee's policy rights to paid leave, and a provision against termination of an employee for

complaining about a violation of the policy.

Leave reasons. Leave benefits must be paid for one or more of the leave reasons available under the FMLA – the employee's own serious health condition, a family member's serious health condition, birth or placement of and bonding with a new child, military exigencies, and caring for a seriously ill or injured servicemember. An employer's policy does not need to cover all of the FMLA leave reasons to qualify for the tax credit. For example, an employer may provide paid leave only for bonding with a new child and still qualify for the tax credit if all other conditions are met.

Amount of leave. The employer's policy must provide at least 2 weeks of paid leave. The maximum amount of paid leave that qualifies for the tax credit is limited to 12 weeks per employee in a 12-month period (the same as FMLA leave rights).

Percentage of pay provided. The employer must provide a paid leave benefit of at least 50% of the employee's wages as defined in the tax code.

Amount of tax credit. An employer providing paid family and/or medical leave benefits can receive a tax credit ranging from 12.5% to 25% of the amount paid to employees. The credit starts at 12.5% of benefits paid at the 50% level and caps at a 25% credit for benefits paid at full wage replacement. For every percentage point over 50% of wages that the employer pays in benefits, the tax credit increases by one-quarter of a percent. Examples:

Percentage of Paid Leave Benefit	Percentage Points above 50%	Multiplied by 0.25%	Employer's tax credit percentage
50%	0	0 x 0.25% = 0	**50%**
70%	20	20 x 0.25% = 5%	Base 12.5% + 5% = **17.5% tax credit**
90%	40	40 x 0.25% = 10%	Base 12.5% + 10% = **22.5% tax credit**
100%	50	50 x 0.25% = 12.5%	Base 12.5% +12.5% = **25% tax credit**

Applicable tax years. The paid family leave tax credit is available only in tax years 2018 and 2019, unless extended by Congress. Otherwise, it expires automatically on December 31, 2019.

Relationship to state/local paid family leave. The Act provides that any leave which is paid or required by a state or local government is not taken into account in determining the amount of the tax credit. Thus, the credit applies only to benefits paid voluntarily, not required by state or local law.

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PINGS FOR EMPLOYERS

- **Consult your tax advisor.** As with all things tax-related, you should consult with your tax advisor to determine whether your existing plan is covered by the new paid leave tax credit.
- **Consult your financial advisor.** If you don't have a paid leave plan for your employees, consult with your financial (and tax) advisor to determine whether the incentive provided by the tax credit is enough to justify offering a paid leave benefit to your employees.
- **Consider benefits beyond monetary.** In this day of strong competition for good employees, remember that a superior benefits package can be a lure. But, with the tax credit scheduled to last only two years, also consider whether your company can continue the benefit if the tax credit expires on December 31, 2019. Taking away the benefit might not be a good employee relations move at that time.

MATRIX CAN HELP! At Matrix we offer a full suite of leave of absence and disability management tools. This includes management of employer-specific leave plans, as well as FMLA, state leave laws, leave (and more) as an ADA accommodation, and disability plans. To learn more, ping us at ping@matrixcos.com.

State Leave Legislation

State Leave Legislation – 2017 Year in Review

2017 was a very active legislative year in the realm of leave of absence bills. Highlights:

Paid family and medical leave bills. This was by far the category that received the most attention. In 2017:

- Nearly half of the states introduced bills for paid family and/or medical leave legislation.
- Out of these, the bills in 11 states are still alive and pending as of January 1, 2018 – although most of them have not seen any legislative activity in several months.
- Two jurisdictions (District of Columbia and Washington State) passed paid family and medical leave laws which will begin providing paid leave benefits on January 1, 2020.
- The federal government passed the Tax Cuts and Jobs Act in December 2017, which includes an employer tax credit for paid family and/or medical leave benefits (see story above).
- As the effective date for New York Paid Family Leave neared (and has now passed, January 1, 2018), untold hours of effort and head scratching went into understanding the law and regulations and developing compliant benefits and leave management programs. Even the New York Workers' Compensation Board – charged with interpreting and enforcing the law – could not answer all questions and frequently changed its previous answers. Definitely a work in progress for 2018!

Take a look at the map on the following page to view the status of paid family and medical leave in the U.S, at the close of 2017.

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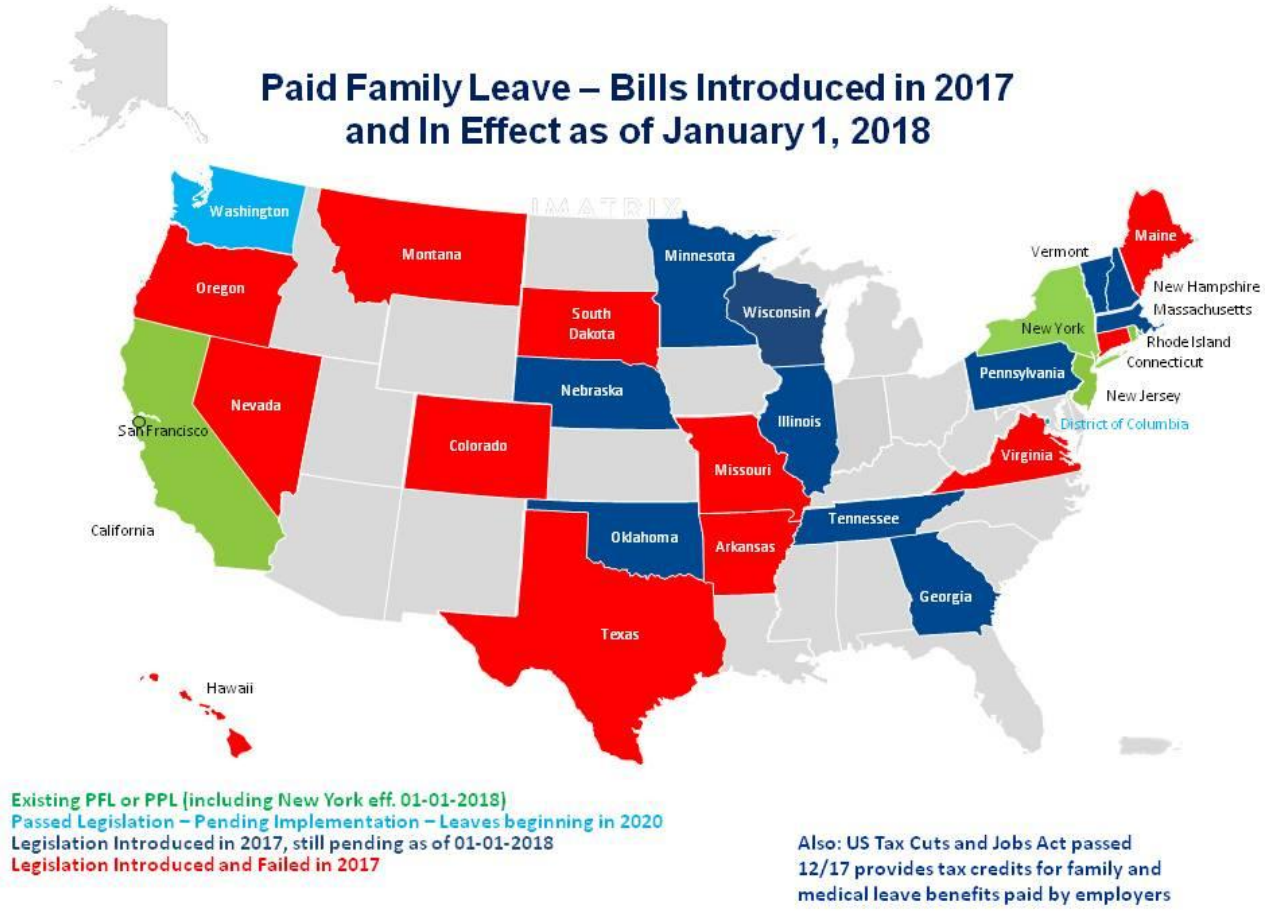

Other leave laws in 2017. A few other new leave-related laws passed in 2017:

- **California** enacted the New Parent Leave Act to amend the California Family Rights Act (CFRA). Effective January 1, 2018, employers with 20 or more employees will be required to provide 12 weeks of leave for bonding following the birth, adoption, or foster placement of a child. This expands CFRA coverage for bonding only beyond the prior employer size of 50 or more employees. We wrote about this new law here.
- **Hawaii** added siblings as a covered relationship for whom employees can take Hawaii family leave. The addition was effective upon signing by the Governor on July 10, 2017. For more details of this law, click here.
- **Nevada** enacted a new domestic violence leave law, effective January 1, 2018, allowing an employee to take up to 160 hours of unpaid leave to tend to matters relating to domestic violence, which is defined to include assault, battery, sexual assault, stalking, larceny, compelling an unwanted action, and trespassing. You can review details of this new law at our blog post here.

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- **Texas** blazed the trail for leave rights by enacting a law effective September 1, 2018. Employers that have a leave policy under which an employee is entitled to personal leave to care for or otherwise assist the employee's sick child, will have to allow employees also to take time off under that policy to care for or assist a foster child in the same manner. No mandated leave rights for anyone here – the law just says IF an employer provides leave to parents, it must extend the same leave rights to employees who have a foster child.

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Federal and State Agencies

EEOC – Meet your 2018 Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission will be undergoing some changes under the Trump administration in 2018. The Commission is made up of five commissioners, one serving as chair. No more than three commissioners may be from the same political party. As of this writing, there are two vacancies on the commission and the current make-up is 2 Democrats and 1 Republican.

Current commissioners:

- **Acting Chair Victoria A. Lipnic,** Republican, was appointed to the Commission by President Obama in 2010 and reconfirmed for a second term in 2015, ending July 1, 2020. She was appointed by President Trump to serve as Acting Chair in January 2017.
- **Commissioner Charlotte A. Burrows,** Democrat, was nominated to serve as a Commissioner of the EEOC by President Obama and was confirmed by the Senate for a term expiring July 1, 2019.
- **Commissioner Chai R. Feldblum,** Democrat, also appointed by President Obama, began her service as a Commissioner of the EEOC in April 2010. She was confirmed by the Senate for a second term, which will end on July 1, 2018. President Trump has nominated her for another term. If confirmed by the Senate, Commissioner Feldblum will serve until July 1, 2023.

For the two vacant EEOC positions President Trump has nominated two Republicans:

- **Daniel Gade,** Army veteran, former West Point professor, and former Bush administration employee has been tapped for a Commissioner position.
- **Janet Dhillon,** General Counsel to Burlington Stores, Inc. has been nominated for the EEOC Chair position. (Acting Chair Lipnic would return to her prior Commissioner role.)

Also currently vacant is the position of General Counsel to the EEOC, to be appointed by the President. The General Counsel supports the Commission and provides direction, coordination, and supervision to the EEOC's litigation program.

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EEOC – December Consent Decrees

Dependable Health Services to pay $38,000 to settle ADA failure to accommodate claim. According to the EEOC, Dependable Health Services Inc. (DHS), a health care staffing agency, will pay $38,000 and furnish significant equitable relief to settle a disability discrimination lawsuit brought by the Commission. According to the suit, Sheena Berry began working as a phlebotomist at Walter Reed National Military Medical Center in Bethesda, Md., in March 2016 and continued employment with DHS when the company acquired the medical services contract at Walter Reed.

Berry requested a reasonable accommodation of not staffing mobile blood drives due to sickle-cell anemia-related pregnancy complications. DHS initially refused to provide the accommodation but later did so by temporarily transferring Berry to the out-patient phlebotomy department, EEOC said.

While on maternity leave, Berry provided several status updates to DHS. Berry requested a permanent reasonable accommodation reassignment to a position that did not require mobile blood drive staffing. The EEOC charged that on February 24, 2017, Berry informed DHS of her planned return to work on February 28, 2017. DHS abruptly terminated Berry effective February 27, 2017 stating a decision "to have [Berry's] position backfilled effective immediately."

In addition to the $38,000 in monetary relief, Berry will receive a favorable letter of recommendation. DHS is subject to a five-year consent decree enjoining DHS from violating the ADA, including refusal to provide reasonable accommodations. The owner of DHS will distribute a memorandum to all employees emphasizing a commitment to ADA compliance, along with a copy of the company's revised reasonable accommodations policy. It will also provide ADA training to all managers, supervisors and human resources employees. DHS will also report to the EEOC for five years on how it handles any complaints of disability discrimination and post a notice regarding the settlement.

[EEOC Press Release 12-22-17]

Two Employers agree to pay settlements and submit to EEOC oversight due to pregnancy discrimination claims.

Trinity Hospital of Minot ND and **Ichiban Japanese Restaurant, LLC,** in Jackson, MI, will pay thousands of dollars to affected employees and commit to EEOC oversight to resolve pregnancy discrimination lawsuits filed by the EEOC.

According to the EEOC's lawsuit, Trinity refused to provide light-duty work to a pregnant nurse who had lifting restrictions because of a pregnancy-related health condition. Instead, it fired her, although it provided light-duty positions to nurses injured on the job. Trinity will pay the employee

$95,000.

An employee who worked at the Ichiban restaurant as a server and bartender was fired because she was pregnant. Ichiban will pay $30,000 to the employee who filed a complaint with the EEOC, and $2,500 each to two other women who the EEOC also determined had been harmed by Ichiban's personnel practices when they became pregnant while working for the company.

In addition, each company has agreed to EEOC oversight for three years (that means reporting every pregnancy and disability claim and how they are handling it) and to revise their policies, provide training to HR and management personnel, and other nonmonetary terms.

EEOC Press Release 12-20-17; EEOC Press Release 12-15-17

AccentCare to pay $25,000 to settle EEOC disability discrimination suit for failure to accommodate. AccentCare, Inc., a home healthcare company headquartered in Dallas, has agreed to pay $25,000 and provide other significant relief to settle a disability discrimination lawsuit brought by EEOC. The agency charged in its suit that AccentCare discriminated against an employee with bipolar disorder.

According to the EEOC's suit, an AccentCare IT analyst informed the company that she has bipolar disorder and requested leave in order to see her health care provider. The EEOC further said that upon learning of the employee's disability and receiving her request for leave, AccentCare fired her within one day, without giving proper consideration to her request.

Under the terms of the consent decree settling the case, AccentCare, Inc. will pay $25,000 in monetary relief to the former IT analyst. AccentCare also agreed to post a notice about the settlement, and to provide training for employees on the ADA to include instruction on the specific provisions of the reasonable accommodation process. The training will include an instruction advising managers and supervisors of the potential consequences for violations of the ADA. Additionally, AccentCare has agreed to document complaints of disability discrimination and report to the EEOC.

EEOC Press Release 12-1-17

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Court Opinions

Mental Health Exams and ADA "Regarded As" Liability

This is the second entry in a series of 3 articles on mental examinations and the Americans with Disabilities Act posted on our blog, Matrix Radar: Adventures in Absence Management and Accommodations. You can review all 3 articles starting here.

This case study poses the question; can an employer require a worker to undergo a psychological exam without creating an ADA "regarded as disabled" claim for the employee – and liability for the employer?

The facts. Evangelene Monroe had been a job scheduler for her employer Consumers Energy (CE) for 13 years when she started exhibiting aberrant behavior. Her supervisor noted that Monroe was losing focus and concentration at work, that she had become increasingly secretive, and was not interacting with her co-workers during staff meetings as in the past. Monroe's work performance was suffering significantly.

Monroe filed a complaint with CE's Compliance Department, in which she reported that she was being tracked and surveilled by coworkers by various means: interception of personal text messages, listening devices on her phone and in her work cubicle, camera surveillance at work and at home, a GPS tracking device on her car, and eavesdropping via the key fob for her vehicle. Her complaint was investigated by Kathleen Delaney, CE's director of Human Resources, who did not find any merit to Monroe's allegations. Due to the nature of Monroe's charges, Delaney arranged to have Monroe scheduled for an IME to determine if she was able to perform the essential functions of her job.

Dr. Dutes performed a neuropsychology evaluation and reported that Monroe showed a high degree of interpersonal sensitivity and a tendency toward paranoid thinking. He recommended 12 sessions of psychological counseling and then a reevaluation of her ability to return to work. Monroe refused the counseling and in January 2014 she went out on paid sick leave for several months. She then worked part time elsewhere and collected some unemployment.

In late 2014 Delaney contacted Monroe about returning to work but told Monroe she would still have to undergo the counseling. Monroe insisted that she was better, which was confirmed by another neuropsychological exam in April 2015. Nonetheless, Dr. Dutes still recommended 8-12 counseling sessions. Monroe still objected and filed a charge with the EEOC. She was not satisfied with the EEOC investigator because, according to Monroe, the investigator told Monroe she needed to undergo the counseling. Monroe finally agreed to the counseling and returned to work at CE full time in

December 2015. No surprise, Monroe filed suit against CE in January 2016.

Regarded as disabled? The ADA extends its nondiscrimination protections to include an individual who does not have an impairment but is regarded as having one. In her lawsuit Monroe did not claim that she had a qualifying mental impairment under the ADA. Rather, Monroe alleged that by requiring her to undergo the neuropsychological exams, CE showed that it "regarded" her as disabled. She further alleged that the exams constituted an adverse employment action by CE.

To establish this claim, Monroe had to show that she had been discriminated against because CE *perceived* that she had a mental impairment. The court explained that a person is "regarded as" being disabled under the ADA if: (1) an employer mistakenly believes that a person has a physical impairment . . . or (2) an employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, the employer's actions are based on a misperception about the individual.

The employer's Catch-22. So Monroe's charge was that CE regarded her as disabled by virtue of its requirement for her to participate in mental health evaluations. Wow, that would really be a Catch-22 for employers, wouldn't it? The employer has the no-win choice of (1) allowing the employee to continue to work with possible consequences of poor performance or safety risks to the employee or his co-workers or the employer's property; or (2) requiring the employee to undergo a mental exam at the cost of establishing a claim of regarded-as discrimination against itself. A third possibility is equally untenable: terminating the employee on the basis of the employer's unsubstantiated concerns about the employee's mental condition and risking a true regarded-as claim.

The court saves the day. Fortunately for employers, the court ruled that an "employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled." Relying on an earlier case from the 6th Circuit the court explained that an employer has the right to determine the cause of an employee's aberrant behavior and doing so is not enough to suggest that the employee is regarded as mentally disabled. An employer-requested psychological evaluation is in full compliance with the ADA if "restricted to discovering whether the employee can continue to fulfill the essential functions of the job"; in other words, if it is job related and consistent with business necessity.

You can review the court's opinion here: Monroe v. Consumers Energy (E.D.Mich., S.D. 2017)

PINGS FOR EMPLOYERS

- CE had numerous examples of Monroe's strange behavior, not just a couple of isolated incidents. Moreover, Monroe's supervisor noted that her behavior and job performance had *changed* over time. That observation of change can be an important factor in supporting the need for a mental health exam.
- In requiring the neuropsychological exams, CE focused on whether Monroe could perform her

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job functions. This supported that the exam was job-related and consistent with business necessity. This is permissible even though the exam might reveal an ADA-qualifying mental impairment.

- This employer was diligent in staying in touch with the employee and trying to bring her back to work. In fact, Monroe did return to work full time due to CE's efforts. Although Monroe sued anyway, CE had done the right thing. This did not play a part in the court's written decision, but CE certainly gets Brownie points for good employment practices.

MATRIX CAN HELP! Matrix's start-to-finish ADA Advantage management services can help you deal with tough issues like whether you have grounds to require an employee to undergo a mental health examination. You always retain the final decision, but we aid in the assessment and manage the intake, interactive process, recordkeeping, follow-up, and more. Our expert team of ADA Specialist is at the ready with practical advice and expert guidance. To learn more, ping us at ping@matrixcos.com.

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.