On Your Radar

Draw on Our Expertise

April, 2018

Each month in this newsletter – and more frequently on our Matrix Radar blog – we provide updates on introduced, pending, and passed legislation. As usual, we have a lot to report this month. If you need additional information about any of the bills or passed legislation discussed in this newsletter or any other Matrix publication, please contact us at ping@matrixcos.com. We'll be happy to share information that just won't fit in these newsletters!

Legislative Updates

Legislation - Enacted and Pending | Legislation of Interest

Arizona and Austin, Texas have enacted new legislation and several states have legislation in process. What does this mean to you? Read more.

Spotlight | Pregnancy Accommodation Laws

Workplace protections for pregnant employees are the subject of many state and federal laws (both enacted and proposed), as well as a focus for the EEOC. Need more information on any of them? Read more.

Federal & State Agencies

EEOC | Pregnancy Discrimination Remains a Priority for the EEOC

The Equal Employment Opportunity Commission administers the ADA, Title VII, the Pregnancy Discrimination Act, and more. Each month we see pregnancy-related EEOC lawsuits. Here's another example. Read more.

Court Opinions

Case of Interest | Employee Could Not Show her Caregiving Responsibilities were a Determining Factor in Termination of Employment

Employer prevails after employee is unable to demonstrate termination was for cause and unrelated to her care of a family member. Read more.

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GET TO KNOW

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READ OUR BLOG

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

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Legislative Updates

State and Federal Legislation

Legislation – Enacted and Pending: Legislation of Interest

Arizona – Military Leave. AZ H2421 was signed by Gov. Doug Ducey on April 3, 2018. The act amends Arizona law to require employers to grant leaves of absence to members of the National Guard of any state or the US Armed Forces for purposes of active duty, or to attend camps, maneuvers, formations or armory drills. The law also provides USERRA-like reemployment protections to employees who are called to active duty or training by the national guard (of any state) or US armed forces or reserves. The law does not provide a private cause of action; rather the county attorney is vested with prosecutorial power to pursue violations, punishable as a class 1 misdemeanor. The bill will become effective on July 20, 2018.

> *NOTE: USERRA refers to the Uniformed Services Employment and Reemployment Rights Act. For more information about this very different leave law, see our post on Matrix Radar, USERRA - A Leave Law Like No Other.*

Austin, Texas – Paid Sick Leave. The Austin City Council passed a paid sick leave ordinance under which employers with 6 or more employees must provide 1 hour of leave for every 30 hours worked from and after October 1, 2018 (employers with less than 5 employees do not have to comply until October 1, 2020). "Medium or Larger employers" – those with 15 or more employees – may impose a cap of 64 hours of leave per year. To be eligible, the employee need only work 80 hours per calendar year. The time may be used as soon as it is accrued, though employers can impose a 60-day waiting period for those employees who are not employed for a full calendar year. The purposes for which Austin sick leave can be taken include the employee's or a family member's health condition, doctor's appointments, and circumstances related to domestic violence, sexual assault, or stalking such as for relocation, obtaining victim services, or attending legal proceedings.

PENDING LEGISLATION OF INTEREST

Paid Sick Leave. A paid sick leave bill, providing for employees to earn 1 hour of sick leave for every 30 hours worked) is making its way through the New Jersey state assembly (NJ A1827).

Likewise, companion Hawaii paid sick leave bills (HI H 1727, HI S 2359) are showing signs of likely success. These bills provide for accrual of one hour of paid sick leave for every 40 hours worked.

Paid Family and Medical Leave Bills. In our February/March edition of On Your Radar we summarized the many pending state paid family and medical leave bills that had been introduced at that time. You can review that information here. Since then the following states have also introduced (or revived from 2017) paid leave bills:

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- Illinois (IL H2376): 12 weeks of paid family and medical and medical leave; funded by employee payroll deductions.

- Ohio (OH S261): 12 weeks of paid family and medical and medical leave; funded by employee payroll deductions.

- Utah (UT HB278): State tax credits for businesses that offer employees paid family and medical leave.

Spotlight

Spotlight – Pregnancy Accommodation Laws

Workplace protections for pregnant employees are the subject of many existing state and federal laws, newly proposed bills, and EEOC focus. As of this writing, there are 20 states that have specific laws requiring employers to provide reasonable accommodations to employees (or applicants) related to their pregnancy, and often, childbirth or breastfeeding: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Rhode Island, Utah, Vermont, and Washington.

Employers in these states need to familiarize themselves with the specifics of each state's legal requirements; however, here is a summary of some of the common themes. If you want more information on any of these laws, send your request to ping@matrixcos.com.

No documentation required for certain types of accommodation requests

Some state laws provide for certain accommodations to be given to pregnant employees without the need for any documentation. For example, in Massachusetts, an employer cannot require documentation for employee requests for: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds.

Last summer, we blogged on Matrix Radar about the Massachusetts Pregnant Workers' Fairness Act; to read our more in-depth blog post, please click here.

Minnesota has a similar provision in its law, which also states that the employee need not demonstrate that these accommodation requests are based on the advice of her physician or a certified doula.

Washington has a similar provision as well, but extends the available accommodations which must be granted without documentation to also include modifying a no food or drink policy, providing seating or allowing the employee to sit more frequently if her job requires her to stand or limits on lifting over 17 pounds.

NOTE: *Matrix can assist with pregnancy accommodations (and others) for our clients who subscribe to our ADA Advantage accommodation services.*

Notice to employees

For pregnancy rights, many of the state laws go beyond the traditional posting requirements that are common to employment discrimination laws (usually in a handbook and/or in employee break rooms or other common areas). For example, Connecticut, Delaware, Washington, D.C., Massachusetts, Nevada, and Rhode Island all also require that the notice of rights be provided to new employees and also within 10 days of an employee providing notice of her pregnancy.

Pregnancy disability leave rights

Several states have laws requiring employers to provide leaves of absence for disabilities associated with pregnancy. California requires employers to grant qualifying employees up to four months' of pregnancy disability leave. Louisiana law requires a reasonable leave of absence (defined as up to four months). Similarly, Hawaii provides for employers to grant a "reasonable leave of absence" for the employees disabled by pregnancy, childbirth, or related conditions. Conversely, almost every state pregnancy law contains a provision prohibiting "forced leaves of absence" – that is, requiring a pregnant employee to take a leave of absence when there is an alternate reasonable accommodation that would enable her to work.

Proposed pregnancy protections

A bill has been introduced in the Kentucky legislature (KY H320) which would amend the state's pregnancy discrimination laws to require employers to provide reasonable accommodations to employees affected by pregnancy, childbirth or related conditions. The Kentucky act also proposes to amend the definition of "undue hardship" to include a consideration of the duration for which the restrictions are sought and whether other employees have received similar accommodations.

The Missouri legislature has proposed the "Pregnant Worker's Fairness Act," (MO S2174) which, among other things, characterizes as "an unlawful employment practice" the refusal of an employer, absent a showing of undue hardship, to grant reasonable accommodations to an employee or applicant for known limitations related to pregnancy, childbirth, or related medical conditions, when the employee's physician has certified such limitations and that the accommodation(s) would address such limitations.

A similar bill in Indiana (IN H1344) failed shortly after its introduction in the legislature.

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Federal and State Agencies

EEOC – Pregnancy Discrimination Remains a Strategic Priority for the Equal Employment Opportunity Commission

A Matrix we monitor lawsuits filed or settled by the federal Equal Employment Opportunity Commission. The EEOC administers the ADA, Title VII (which includes protections against discrimination on the basis of sex), the Pregnancy Discrimination Act, and more. Every month we see pregnancy-related EEOC lawsuits. Here are a couple of examples from the past month.

The EEOC filed a lawsuit in Michigan accusing Simplicity Ground Services, a vendor to the Detroit airport, of violating the Pregnancy Discrimination Act by requiring employees to take unpaid leave instead of accommodating their lifting restrictions, as they did for non-pregnant employees with similar restrictions. The Complaint also accuses Simplicity of demanding that the employee sign a revised job description that added a 70-pound lifting requirement and escorting her from the premises when she declined to do so. The EEOC alleges that Simplicity also forced other pregnant employees to take unpaid leave because they were pregnant and refused to accommodate their pregnancy-related lifting restrictions with light-duty work. Non-pregnant employees with similar restrictions, however, were routinely granted light duty. EEOC Press Release 03-27-2018.

A sports bar in a suburb of Dallas, Texas, settled a pregnancy discrimination lawsuit filed by the EEOC on behalf of a pregnant bartender who declined to wear the "hot pants uniform" and was informed by the general manager that her decision to wear Capri pants instead of the "hot pants uniform" would not be approved of by the owner. In addition to paying $24,000, the sports bar entered into a 3-year consent decree under which the bar is required to report all complaints of discrimination to the EEOC and provide yearly training on pregnancy and other forms of discrimination. EEOC Press Release 03-27-2018b.

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Court Opinions

Case of Interest – Employee Could Not Show her Caregiving Responsibility for Her Mother was a Determining Factor in the Decision to End her Employment

NOTE: *This case addresses a subject that many employers are not well aware of: the broad scope of workplace protections for employees who are caregivers for a family member. Although this case results in a decision in favor of the employer, caregiver responsibilities present many possible traps for the unwary employer. For more information on caregiver workplace rights:*

- *See our Matrix Radar blog post [What Employers Need to Know about Caregiver Protections under the ADA, FMLA, Title VII… and in California](#).*
- *Join Marti Cardi, Matrix's Vice President of Product Compliance, at the DMEC Annual Conference in Austin in August 2018. Marti will be presenting on this topic together with a national employer that has implemented cutting edge polices favoring leaves of absence and other job benefits for employees who also fill a caregiver role in their private lives.*

Now, on to our case:

Angela Macropoulos was an attorney for Met Life. Her responsibility to care for her mother was well-known to her employer and she was permitted to telecommute a couple of days a week and was afforded substantial flexibility in her schedule. After MetLife fired her for poor performance, tardiness unrelated to her caregiving responsibilities, and insubordination, she sued accusing the company of associational discrimination under the Americans with Disabilities Act – that is, terminating her employment because of her association with a disabled person (her mother).

In granting summary judgment to MetLife, the court acknowledged that poor performance, tardiness and insubordination are all legitimate reasons to end someone's employment. Because of this, the law required Macropoulos to show that those reasons were a pretext for discrimination. To do so, she presented evidence of comments made by her supervisors and others at MetLife such as the requirement that she commit to a set schedule, as other telecommuters did in accordance with company policy, and to take FMLA if she needed time away from work to care for her mother. The court disagreed with Macropoulos that these statements showed pretext; rather, the court noted they reflect the reality that if you are an at-will employee, you are at risk to be terminated from employment if you do not follow company policy and that the purpose of FMLA is to allow eligible employees time away from work to care for a family member with a serious health condition.

Next, Macropoulos tried to claim that she was treated differently from other telecommuting

attorneys. The court concluded she was unable to show that she was "similarly situated" in all respects because unlike those comparators, she was frequently late, used profanity, had difficulty with the timeliness of her work, and was often unreachable when she was scheduled to work remotely. While some of the comparators were occasionally late and used profanity, none engaged in similar, substantial misconduct.

Macropoulos then attributed her failure to meet deadlines to MetLife's failure to provide her with the tools she needed to complete her assignments on time. The court concluded that, even if that were true, this alone would not be enough to conflate the employer's perception of her poor performance with discrimination.

Macropoulos also asserted that MetLife interfered with her right to take FMLA. Interestingly, the court rejected the notion that because Macropoulos had employment law expertise that MetLife had no obligation to help her determine whether or not an FMLA leave would be appropriate. Ultimately, this did not matter because the facts showed Macropoulos never asked for leave – she asked for accommodations to telecommute and workplace flexibility. Because her requests for workplace flexibility and telecommuting were not sufficient to put MetLife on notice that she wanted to take FMLA, MetLife prevailed on her claim of FMLA interference as well.

Macropoulos v. Metropolitan Life Insurance Company (S.D.NY March 26, 2018)

Pings for employers:

- While MetLife prevailed, there are a few lessons here**.** Notably, if an employee tells you that she needs tools to accomplish her work on time, as an employer you are clearly missing an opportunity if you do not delve into the specifics of what the employee needs. While the ADA does not require an employer to provide accommodation to someone with caregiving responsibilities, it does protect employees from adverse employment actions based on their association with a disabled person.

- What MetLife did well, though, was to adhere to its policies. Having a telecommuting agreement which, among other things, sets forth the company's expectations for the employee's availability and work schedule is critical. While telecommuting is certainly a reasonable accommodation (and MetLife did not suggest otherwise because it, like so many employers today, acknowledged that many work functions can be performed without physical presence in an office), the employer still needs to manage a remote employee and hold her to legitimate expectations for work performance.

- Another thing MetLife might have done is to initiate the discussion with Macropoulos about FMLA. Although she was not asking for FMLA, opening the discussion would have illustrated to Macropoulos that the company wanted to work with her. The process may have enabled

the company to understand, through a certification from her mother's healthcare provider, the extent of her caregiving responsibilities.

MATRIX CAN HELP! We provide a full spectrum of leave and accommodation administration services, including those that can help with providing leave for employees with caregiving responsibilities. For help with management of the FMLA, ADA, your disability plans, company leave policies, workers' compensation, USERRA, and more, contact 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.