Legislative Update

January 2014

Additional information will be forthcoming related to any required change in Matrix's process, practice, written or verbal employee communications as a result of these new laws.

California - New Law May Have Long-Term Implications for Employers

As Senate Bill (S.B.) 770 has now been enacted, the California 2002 Paid Family Leave law has been expanded to include care for seriously ill grandparents, grandchildren, siblings or parents-in-law. The original parameters of the bill provided up to six weeks of disability insurance benefits to workers to bond with a new child, or to care for an extremely ill child, parent, spouse or domestic partner. The new legislation will go into effect on July 1, 2014.

The law will not have a direct financial impact on employers, as the Paid Family Leave program in most instances is funded by employees through mandatory payroll deductions. However, there is a high likelihood that the legislation may cause confusion in the workplace if employers do not have carefully crafted leave policies. Employees should understand that the legislation does not create a right to job-protected leave.

The expansion of California's Paid Family Leave program does not extend to the protection afforded under the federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) at the current time, although there is a political movement within the state to expand the S.B. 770 provisions into the CFRA.

Employers must decide whether to grant leave time for the reasons permitted in S.B. 770. Employers should conduct a cost-benefit analysis. The granting of leave may provide benefits with respect to recruiting, retention, or harmonious conditions in the workplace. This must be balanced against the disruptions and burdens that such leaves may cause the employer.

S.B. 770 is available at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB770

California – S.B. 400 Extends Job Protection to Victims of Stalking

California Senate Bill (S.B.) 400 has extended employment protection to victims of stalking. An earlier version of the law afforded protections to victims of domestic violence and sexual assault. The law entitles an employee who is discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has taken time off for specified purposes, to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. The law also prohibits an employer from discharging or in any manner discriminating or retaliating against an employee because of the employee's known status as a victim of domestic violence, sexual assault, or stalking, and requires the employer to provide reasonable accommodations for such a victim. The law goes into effect January 2014. Similar laws are in effect in Connecticut, Hawaii, Illinois, New York, Oregon and Rhode Island.

More information is available at: http://legiscan.com/CA/bill/SB400/2013

California – Senate Bill 288 Extends Job Protection to Victims of Crime

Previously, employers were prohibited from discharging or in any manner discriminating against an employee for taking time off to serve on a jury, an employee who is a victim of a crime for taking time off to appear in court as a witness in any judicial proceeding, or an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to obtain or attempt to obtain prescribed relief.

This bill would additionally prohibit an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of specified offenses for taking time off from work, upon the victim's request, to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue. The bill would also extend those aforementioned protections, including, but not limited to, reinstatement and reimbursement, to an employee who is a victim of specified offenses for taking time off from work to appear at such a court proceeding.

More information is available at: http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_288_bill_20131011_chaptered.pdf

Oregon – New Bereavement Leave Policy Impacts Oregon Family Leave Act (OFLA)

Effective January 1, 2014, Oregon employees covered under the Oregon Family Leave Act (OFLA) are eligible to take up to two (2) weeks of unpaid leave for the death of a family member. Under the revised Act, employees may take leave to attend a funeral or alternative ceremony, make arrangements necessitated by the death of a family member, or to grieve.

Employees may take leave for the death of a spouse, same-sex domestic partner, child (biological, adopted, foster, stepchild or otherwise), parent, parent-in-law, grandparent, grandchild, or same-sex domestic partner's parent or child. Nothing in the law requires the leave to be paid, nor does it expand the annual amount of OFLA leave currently provided.

More information available at: http://gov.oregonlive.com/bill/2013/HB2950/

Rhode Island – Temporary Caregiver Insurance Program

Beginning January 2014, the new Temporary Caregiver Insurance Program (TCI) was signed into law on July 11, 2013. TCI will provide eligible claimants up to four weeks of caregiver benefits to care for a seriously ill child, spouse, domestic partner, parent, parent-in-law or grandparent or to bond with a newborn child, new adopted child or new foster-care child.

TDI provides benefit payments to insured RI workers for weeks of unemployment caused by a temporary disability or injury. It protects workers against wage loss resulting from a non-work related illness or injury, and is funded exclusively by Rhode Island workers. Unlike other statutory programs, benefits in Rhode Island can only be provided by the State.

For More Information: http://www.dlt.ri.gov/tdi/

Connecticut – 2014 Report of Task Force Study

In 2013, Special Act 13-13 created a task force to study the feasibility of creating short-term family medical leave insurance benefits to workers who are unable to work due to (1) pregnancy or the birth of a child, (2) a non-work-related illness or injury, or (3) the need to care for a seriously ill child, spouse or parent. The task force will submit its report to the joint standing committees of the General Assembly no later than October 1, 2014.

San Francisco, CA – Family Friendly Workplace Ordinance Goes into Effect

The Ordinance amends the Administrative Code to allow San Francisco-based employees to request flexible or predictable working arrangements to assist with care giving responsibilities, subject to the employer's right to deny a request based on business reasons; to prohibit adverse employment actions based on caregiver status; to prohibit interference with rights or retaliation against employees for exercising rights under the Ordinance; to require employers to post a notice informing employees of their rights under the Ordinance; to require employers to maintain records regarding compliance with the Ordinance; to authorize enforcement by the Office of Labor Standards Enforcement, including the imposition of remedies and penalties for a violation and an appeal process for an employer to an independent hearing officer; and to authorize waiver of the provisions of the Ordinance in a collective bargaining agreement; and making environmental findings. The Ordinance is effective January 1, 2014.

For more information: http://sfgsa.org/modules/showdocument.aspx?documentid=10583

Proposed Federal Legislation

Sponsored by Rep. Rosa DeLauro (D – Conn.) and Sen. Kirsten Gillibrand (D – N.Y.), the Family and Medical Insurance Leave Act (FAMILY Act) would ensure people have some income during family or medical leave.
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The FAMILY Act would provide workers with up to 12 weeks of partial income when they take time for their own serious health condition, including pregnancy and childbirth recovery; the serious health condition of a child, parent, spouse or domestic partner; the birth or adoption of a child; and/or for particular military caregiving and leave purposes. Workers would be able to earn 66 percent of their monthly wages, up to a capped amount. The proposed Act would cover workers in all companies, no matter their size**.** Younger, part-time, lower-wage and contingent workers would be eligible for benefits. The plan will be funded by small employee and employer payroll contributions of two-tenths of one percent each (two cents per $10 in wages), or about $1.50 per week for a typical worker. The proposed plan would be administered through a new Office of Paid Family and Medical Leave within the Social Security Administration. Payroll contributions would cover both insurance benefits and administrative costs.

For more information: http://www.gillibrand.senate.gov/issues/paid-family-medical-leave or http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf

New Definition of Spouse under FMLA Expected from DOL

The November regulatory agenda of the Department of Labor indicated that the Wage and Hour Division is planning to propose a rule in March 2014 that would revise the FMLA's definition of "spouse" based upon the U.S. Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the justices struck down the Defense of Marriage Act's exclusion of state-sanctioned, same-sex marriages from the federal definition of marriage.

For more information: http://www.dol.gov/ebsa/newsroom/2013/13-1720-NAT.html or http://www.bna.com/new-definition-spouse-n17179880588/

Same Sex Marriage Update

Same sex marriages are now permitted in 18 States and the District of Columbia. Those states include California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Utah, Vermont, and Washington. The Illinois law permitting same sex marriages will take effect on June 1, 2014. In light of the decision in *Windsor,* and the dynamic legislative changes that have occurred with this issue within the past few years, employers should be monitoring for changes and developments closely. Utah has recently requested an emergency stay from the United States Supreme Court to block same sex marriages within the state while the state appeals a judicial decision to overturn the previous ban.

EEOC to Become More Active Against Disability-Based Discrimination

In the Fall 2013 regulatory agenda, the EEOC has indicated that 2014 will provide a greater focus on disability based employment discrimination.

For more information: http://op.bna.com/dlrcases.nsf/id/kmgn-9dwmvf/$File/EEOCfall2013agenda.pdf

2014 Summary of Statutory Disability Plans

State	Maximum Weekly Benefit	Contribution Amount
California	$1,075 per week	1.0% of the first $101,636 in annual earnings to a maximum of $1,016.36 per year
Hawaii	$546 per week	0.5% of the first $940.05 in weekly earnings to a maximum of $470 per week.
New Jersey	$595 per week	0.38% of the first $31,500 in annual earnings to a maximum of $119.70 per year.
New York	$170 per week	.5 of the first $120 in weekly earnings to a maximum of $0.60 per week
Puerto Rico	$113 per week	.3% of the first $9,000 in earnings to a maximum of $27.00 per year
Rhode Island	$752 per week	1.2% of the first $62,700 in earnings to a maximum of $752.40 per year

Notable Cases

Tillman v. Ohio Bell Telephone Co. 6th Cir. App. Ct. No. 11-3857 (2013)

This case demonstrates how an employer can protect itself in detecting abuse of FMLA usage. After being diagnosed with a back condition, the employee utilized FMLA leave frequently on an intermittent basis. FMLA requests were often made during weekends, holidays and vacation periods. The employee even advised the employer that he would be utilizing FMLA leave if he were assigned to evening shift.

The employer calendared the leave and noted the suspicious nature of the requests. The employer also conducted surveillance and observed the employee working in his yard and garage, driving, and running errands while on FMLA leave. These errands included visits to sporting goods and department stores. The employer also hired a medical consultant that provided an opinion that the activities of the employee were not consistent with an individual suffering from an incapacitating back condition. After interviewing the employee, the company subsequently terminated him. The employee later sued for interference and retaliation violations under the FMLA.

The court determined that the employer had a "honest belief" in FMLA fraud, and that the belief was based upon reasonable reliance of the evidence that it had obtained. This case provides specific guidance to procedures that employers can undertake to prevent or address FMLA fraud. These measures include: having a formal policy against FMLA abuse; requiring medical certification; looks for patterns of abuse and suspicious timing of leave; conduct surveillance; review correspondence with the employee (including e-mails); utilize objective medical opinions; and, get the employee's side of the story.

For more information: http://hr.cch.com/ELD/TillmanOhioBell.pdf

Brookins v. Staples Contract and Commercial Inc. D. Mass., Civil Action No. 11-11067-RWZ (2013)

Ronita Brookins was an employee of Staples in Massachusetts. She missed multiple days of work due to cancer treatments. She was advised by her employer to apply for FMLA leave. The employer provided a medical certification and advised her to return the form within 15 days to protect any further absences. The employee failed to return the form in a timely manner, and subsequently requested an extension of time to complete the certification. The employer denied the FMLA leave, and three weeks later terminated the employee due to unexcused, unprotected absences. The employee sued for FMLA interference and retaliation, as well as claims for disability discrimination and failure to accommodate under Massachusetts law.

The court determined that Brookins did not have a valid FMLA interference claim because the employee did not meet her obligations to return the medical certification within the 15 day period. The court noted that employees must use diligent good-faith efforts, and that employees are limited to the 15 day period unless such a time period is not practical under the specific circumstances. The retaliation claim failed when the court noted that Brookins had two previous leaves, and coworkers had taken FMLA leave without any negative consequences. The court dismissed the state-law based claims due to a lack of evidence.

This case reveals that employees must also comply with the requirements of the FMLA, and that employees must put forth reasonable efforts in exercising FMLA rights. It should be noted that what is deemed to be reasonable may vary with particular facts and circumstances, location or a specific judge or jury.

Department of Labor v. DNA Diagnostics Center Inc., S.D. Ohio, No. 1:2013-cv-00874

The Department of Labor has filed suit against an Ohio employer for denying an employee benefits requested under the FMLA. The worker was the temporary guardian of her seriously ill 12-year-old niece and requested leave for the health care of the child. The employer denied the leave, and later terminated the employee when she took leave to care for her niece.

The Department has previously issued an administrator interpretation providing that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship. The matter is currently pending.

Mercer v. the Arc of Prince Georges County Inc., 4th Cir., No. 13-1300

Adesina Mercer was off work on FMLA leave when co-workers discovered that her job performance prior to leave was lacking. As a benefits coordinator, she had failed to obtain and maintain benefits for 99 of 160 clients. While on FMLA leave, she received a letter from her employer notifying her of termination. She subsequently filed a lawsuit in the federal district court of Maryland, alleging interference with FMLA rights and retaliation. The 4th Circuit Court of Appeals determined that previously unknown poor performance is a sufficient basis for terminating an employee, even if the evidence is discovered during leave granted under the FMLA.

Attiogbe-Tay v. SE Rolling Hills LLC (D. Minn. 11/7/13)

The employee utilized 12 weeks of FMLA leave after knee replacement surgery. At the end of 12 weeks, the employee returned, but provided a medical note with six weeks of work restrictions. The employee requested an additional 6 weeks of leave as a reasonable accommodation under the ADA. The employer subsequently terminated the employee. The EEOC has previously indicated that a capped leave of absence is an ADA violation.

The employee filed suit, alleging that the failure to provide an additional six weeks of leave was a violation of the ADA. The court determined that the request created an undue hardship on the employer. Although these cases are quite fact specific, employers should be sure to document the nature of the hardship, including, costs to the employer, burden on the workforce, resources of the employer (financial, human resources, size, etc.), impact on the final product, customer or employee relations.

Additional information will be forthcoming related to any required change in Matrix's process, practice or written or verbal employee communications as a result of these new laws.

What You Need to Do:

Reliance Standard and Matrix are committed to keeping our clients informed and in compliance. We will provide updates on meaningful changes - and how they may affect our clients – as necessary. In the interim, for more information on how to manage productivity in the face of this and other employee leave legislation, contact your sales representative or account manager.