

CLIENT ALERT

Maryland Continues National Trend by Passing Paid Sick Leave Law

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While the U.S. Congress continues to stall on taking action on a federal paid sick leave act, the trend of state legislatures enacting mandated paid leave continues. Recently, the Maryland General Assembly voted to override Governor Larry Hogan's veto of House Bill 1, known as the Maryland Healthy Working Families Act ("HWFA" or "Act"). With passage of the HWFA, Maryland becomes the ninth state—joining Arizona, California, Connecticut, Massachusetts, Oregon, Rhode Island, Vermont, and Washington—to enact a state paid sick leave law. The HWFA requires employers with 15 or more workers ("large employers") to provide **paid** sick leave to employees who work at least 12 hours per week. Employers with 14 or fewer employees ("small employers") are required to provide **unpaid** leave for employees who work at least 12 hours per week. The Act is currently scheduled to take effect February 11, 2018; however, the Maryland General Assembly may delay the HWFA's implementation to April 12, 2018, in order to provide the state time to draft regulations and employers additional time to comply with the Act's requirements. Additional highlights of the HWFA follow below.

Employer Obligations & Notice Requirement

The HWFA provides that an employer's "number of employees" is determined by looking at the average monthly number of employees employed in the previous year. The Act does not specify whether the 15-employee threshold only counts employees who work in Maryland; however, the HWFA provides that each employee shall be included in the calculation "without regard to whether the employee is a full-time, part-time, temporary, or seasonal employee or would be eligible for earned and safe leave benefits" under the Act.

Thus, it is likely that the Act will be interpreted to require employers with 15 or more employees to comply with the paid leave provisions, even if the employers have fewer than 15 employees working in Maryland.

Under the HWFA, large employers must provide covered employees with up to 40 hours of paid sick and safe leave per year. This leave must be paid at the same wage rate as the employee normally earns. Special rules apply to restaurant tipped employees. Small employers must give covered employees up to 40 hours of unpaid earned sick and safe leave per year.

The Act provides that employers must notify their employees that they are entitled to earned sick and safe leave through specified notice. The Maryland Commissioner of Labor and Industry is charged with creating and making available a poster and a model notice. Employers must also provide employees with a statement of their available sick and safe leave balance accrued to date at the end of each pay period.

Employers are not required to compensate employees for earned, unused leave, under the Act, upon separation of employment; however, employers are required to reinstate leave to employees rehired with 37 weeks of separation.

Employers must also keep records of earned hours and use of those hours for three years.

Covered Leave

Employees may use sick and safe leave:

- To care for the employee's own physical or mental condition, or to obtain preventative care;
- To care for a covered family member with a physical or mental condition, or to obtain preventative care for that family member;
- For maternity or paternity leave; or
- For certain work absences relating to domestic violence, sexual assault, or stalking carried out against the employee or the employee's covered family member.

Covered family members include an employee's spouse, parents, children, grandparents, grandchildren, and siblings.

Leave Accrual

Covered employees will begin to accrue sick and safe leave on the later of their date of hire, or the HWFA's effective date. Covered employees accrue at least one hour of sick and safe leave for every 30 hours worked. Employers are not required to allow an employee to earn more than 40 hours per year. Employers also need not allow an employee to accrue more than 64 hours at any time. The Act does not require an employer to allow an employee to use more than 64 hours of sick and safe leave in a year. Finally, up to 40 hours of unused earned leave must be allowed to carry over from year to year (unless the employer awards the full year's allocation to the employee at the beginning of the year).

The Act provides for exceptions to accrual, including during a: (1) two-week pay period in which the employee worked less than 24 hours total; (2) one-week pay period if the employee worked less than a combined total of 24 hours in the current and immediately preceding pay period; or (3) pay period in which the employee is paid twice a month, regardless of the number of weeks in a pay period, and the employee worked fewer than 26 hours in the pay period.

Moreover, under the HWFA, employers are not required to allow a covered employee to use earned leave during the first 106 calendar days of employment.

Certification & Documentation

The Act allows employers to require an employee to provide documentation under certain conditions, including if: (1) the leave was used for more than two consecutive shifts; or (2) the employee used the leave between the 107th and 120th calendar days (both inclusive) of his or her employment, and the employee agreed to provide documentation under terms agreed upon by the employer and employee upon hire. Failure or refusal by the employee to provide the required documentation, under certain conditions, may allow an employer to deny an employee's subsequent request to take sick and safe leave for the same reason.

If the absence is **foreseeable**, an employer can require the employee to provide reasonable advance notice of not more than seven days before leave begins. If the absence is **unforeseeable**, an employer can require the employee to provide notice as soon as practicable. An employee's failure to provide the required notice may allow the employer to deny leave if the absence would also cause a disruption.

Exceptions

Covered Employees

The law does not apply to certain classes of workers, including:

- Independent contractors;
- Certain licensed real estate professionals;
- Workers under the age of 18;
- Certain agricultural workers;
- Certain temporary staffing company employees;
- Workers who regularly work fewer than 12 hours a week;
- Construction workers covered by a collective bargaining agreement that clearly and unambiguously waives the law's requirements; and
- Certain as-needed service providers in a health or human services industry.

Existing Paid Leave Policies

Employers are not required to modify existing paid leave policies if: (1) employees can accrue and use paid leave under terms and conditions that are at least equivalent to the provisions of the HWFA; or (2) the paid leave policy does not reduce employee compensation for an absence due to sick or safe leave. "Existing Paid leave" includes vacation days, sick days, short-term disability benefits, floating holidays, parental leave, and other PTO.

Noncompliance

An employee may file a complaint with the Commissioner of Labor and Industry if he or she believes the employer has failed to comply with HWFA requirements. If an employee files a complaint, the Commissioner must conduct an investigation. If the issue cannot be resolved through mediation, and the Commissioner determines that a violation has occurred, the Commissioner shall issue an order that: (1) directs the payment of the full monetary value of unpaid earned leave and any actual economic damages; (2) at the Commissioner's discretion, directs the payment of an additional amount up to three times the value of the employee's hourly wage for each violation; and (3) at the Commissioner's discretion, assesses a civil penalty of up to \$1,000, for each employee with respect to whom there is a violation. The HWFA creates a private right of action for employees if an employer fails to comply with the Commissioner's order.

Preemption

The law does not preempt or affect other laws that give more generous leave benefits that were enacted before January 1, 2017. Therefore, employers with employees working in Montgomery County must comply with both the HWFA and Montgomery County's earned sick and safe leave act. However, any local Maryland sick and safe leave ordinances enacted on or after January 1, 2017 (including Prince George County's earned sick and safe leave act, enacted on December 12, 2017) will be subject to preemption.

Next Steps

Navigating state leave laws is becoming more and more difficult for employers that have employees in different states. Employers with Maryland employees should consult with counsel to analyze current sick or paid leave policies to ensure they are in compliance with the new law, as well as how this law interacts with state and federal Family Medical Leave laws. There may also be important taxation issues that should be vetted. Employers considering the federal tax credit for providing paid family and medical leave for employees (see our client briefing [Benefit and Compensation Provisions in the Tax Cuts and Jobs Act](#)) are reminded that the credit does not apply with respect to paid leave that is mandated under state or local law, such as the HWFA.

Once available, employers should post the Maryland Department of Labor, Licensing and Regulation model notice. If the Department fails to issue a timely notice, employers should consult with counsel to prepare a notice. Employers should also add employees' leave accrual balances to pay stubs or receipts. Finally, employers should make preparations to keep records of accrued leave and use for at least three years.

Small businesses should expect some help in complying with the new law from a new state agency. On January 15, Governor Hogan issued an executive order creating the Office of Small Business Regulatory Assistance. Governor Hogan created this office specifically to help small businesses comply with the new law.

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