

Employee Relations LAW JOURNAL

Maryland Legislature Overrides Veto to Enact Paid Family and Medical Leave Program

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In this article, the authors discuss the new Maryland law creating paid family and medical leave benefits.

The Maryland Legislature has voted to overrule Governor Larry Hogan's veto and has enacted the Time to Care Act of 2022 (Senate Bill 275)¹ (the "Act"), which establishes the Maryland Family and Medical Leave Insurance Program (the "Program"). The Act creates a right to paid family and medical leave benefits for up to 12 or 24 weeks, depending on the type of leave, beginning on January 1, 2025.

The Program marks Maryland as the 10th state (plus the District of Columbia) to enact a paid family and medical leave law. Not only will the Program offer paid leave benefits, it will expand the scope of who is eligible for leave benefits by covering certain employees who are ineligible for leave under the federal Family and Medical Leave Act ("FMLA"). Contributions to the Program, which will be funded by both employers and employees, will begin on October 1, 2023.

REASONS FOR AND AMOUNT OF LEAVE

The Program provides paid leave for five different reasons:

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- To care for a newborn child or a child newly placed for adoption, foster care, or kinship care within the first year or the birth, adoption, or placement;
- To care for a family member² with a serious health condition;³
- To attend to the employee's own serious health condition that prevents the employee from performing the functions of the employee's position;
- To care for a military servicemember with a serious health condition resulting from military service who is the employee's next of kin; or
- For a qualifying exigency due to the deployment of a family member for military service.

An employee is ordinarily entitled to a total of 12 weeks of job-protected leave in any one-year period;⁴ however, an employee can receive an additional 12 weeks, for a total of up to 24 weeks in any one-year period, if the employee is eligible to take both parental leave and leave for the employee's own serious health condition.

Leave may be taken all at once or intermittently, although an employee may not take intermittent leave in increments of less than four hours.

COVERED EMPLOYER

The Program will include virtually all employers, as the Act applies to all private and public employers with at least one employee in the state.⁵ Although the Act covers almost all employers, only those with 15 or more employees are required to pay into the payroll tax. The Act does not specify whether out-of-state employees count towards the threshold.

COVERED EMPLOYEE

An employee is covered under the Program if they have worked at least 680 hours⁶ over the 12-month period immediately preceding the date on which leave is to begin.⁷

PAY DURING LEAVE

Employees will be eligible for benefits under the Program depending on their "average weekly wage" ("AWW"), defined as total wages

over the last 680 hours worked, divided by the number of weeks worked.

- If the employee's AWW is 65 percent or less than the state's average weekly wage ("SAWW"), the employee will receive benefits that are equal to 90 percent of the individual's AWW.
- If the employee's AWW is greater than 65 percent of the SAWW, the employee will be entitled to the sum of:
 - 90 percent of the employee's AWW up to 65 percent of the SAWW, plus
 - 50 percent of the employee's AWW that exceeds 65 percent of the SAWW.

If an employee takes partially paid leave, the employee will be entitled to the lesser of (i) the amount required to make up the difference between wages paid while taking partially paid leave and the full wages normally paid, and (ii) if the employee's AWW is greater than the 65 percent of the SAWW, then (a) 90 percent of the employee's AWW up to 65 percent of the SAWW, and (b) 50 percent of the employee's AWW that exceeds 65 percent of the SAWW.

The weekly benefit amount will be at least \$50, and the maximum amount will be \$1,000 for calendar year 2025. For each year thereafter, the maximum weekly benefit will be established by the Secretary of the Department of Labor ("Secretary") based on increases in the Consumer Price Index.⁸ Employees will also be entitled to continued health benefits in the same manner as required under the federal FMLA.

FUNDING

Beginning October 1, 2023, employers with 15 or more employees⁹ and all employees (including those of employers with less than 15 employees and self-employed individuals) will be required to contribute to a fund from which benefits will be administered via payroll taxes.

Employees who make an hourly wage of less than \$15 an hour will not be required to contribute, as the State will cover their required contribution. The total contribution amount will be shared by employers and employees with a cost split of anywhere between 25 percent to 75 percent. The total initial contribution amount and the applicable split between employers and employees will be determined by June 1, 2023.

On June 1, 2025, and every two years thereafter, the Secretary will set the total contribution rate and the percentage of the total contribution to be paid by employers and employees beginning on January 1 of the

following year for the following 24 months based on a biannual study and recommendation process.

REQUIRED NOTICE

Employers are required to provide all employees with written notice of their rights and duties under the Act upon hire and annually thereafter. Employers must also notify an employee of the employee's eligibility for paid leave benefits under the Program within five business days of when (i) an employee requests leave under the Program, or (ii) the employer knows that an employee's leave may be for a qualifying reason under the Program. The Act directs the Maryland Department of Labor ("Department") to develop standard notices to satisfy these notice requirements.

Employees will be required to provide certification for a claim for benefits. Employers may also require employees to provide at least 30 days' advance notice of the intent to take a leave under the Act when such leave is foreseeable. If the leave is unforeseeable, the employee must provide notice as soon as practicable.

INTERACTION WITH OTHER LEAVE LAWS

All leave that qualifies under the Program will run concurrently with eligible leave under the FMLA. Significantly, a covered employee must exhaust all employer-provided leave not required by law before taking leave under the Program.

COLLECTIVE BARGAINING AGREEMENTS

An employee's right to benefits under the Program may not be diminished by a collective bargaining agreement. The Act does not have any effect on any collective bargaining agreements entered into before the effective date of the Act.

JOB PROTECTION

Leave under the Program is job-protected, and an employee who received paid leave benefits under the Program or takes leave for which benefits may be paid under the Program must be reinstated to an equivalent position. An employer may only terminate someone who is on leave under the Program for cause or otherwise deny reinstatement if:

- The denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
- The employer notifies the employee of the intent to deny reinstatement at the time the employer determines the economic injury would occur; and
- If the leave has already begun, the employee elects not to return to employment after receiving notice of their employer's intention to deny reinstatement.

PRIVATE PLANS

Employers may satisfy the requirements of the Act through a private plan consisting of employer-provided benefits, insurance, or a combination of both so long as the private plan (i) is offered to all of the employer's eligible employees, and (ii) meets or exceeds the requirements of the Act. Employers must file any such private plan with the Department. Employers and employees covered under a private plan are not required to make the contributions detailed above.

RETALIATION

The Act makes it unlawful to discharge, demote, discriminate, or take adverse action against an employee because the employee has:

- Filed for, applied for, or received benefits or taken leave under the Program;
- Inquired about the rights and responsibilities under the Act;
- Communicated an intent to file a claim, complaint, or appeal under the Act; or
- Testified or plans to testify or otherwise assist in a proceeding under the Act.

PENALTIES

Although there is no direct private cause of action, the Act permits employees to file a written complaint with the Department if they believe the employer has violated the Act. The Department then has

90 days to investigate and attempt to resolve the issue informally through mediation. If the Department determines that the employer violated the Act and mediation fails, the Secretary will issue an order, which may provide lost benefits and wages, reinstatement, and a civil penalty of up to \$1,000 per employee affected by the violation. Employers will have 30 days to comply with the Secretary's order. After 30 days, the employee or the Attorney General of Maryland may bring a civil action seeking enforcement of the order, plus three times the value of the employee's lost wages, punitive damages, and reasonable attorneys' fees and other costs. Employees must bring any enforcement action within three years from the date the order was issued.

Employers that fail to make the required contributions under the Act may be subject to:

- Payment of the contributions due plus interest;
- An additional amount of up to two times the contributions due as a penalty; and
- An audit to investigate compliance with the Act.

Employers may also be subject to civil penalties of up to \$1,000 for willfully making a false statement or failing to report a material fact regarding a claim for benefits by an employee.

WHAT MARYLAND EMPLOYERS SHOULD DO NOW

- Review family and medical leave policies and modify them as needed to incorporate the new paid leave provisions.
- Ensure that your human resources personnel and payroll personnel or payroll service provider takes the appropriate actions to prepare to administer paid leave benefits, including implementing the employee payroll tax once the amount of the contributions is determined.
- If you have 15 or more employees, ensure that appropriate action is taken to implement the employer payroll tax once the amount of the contributions is determined.
- Monitor for the release of regulations, procedures, and forms in connection with the implementation of the Program.

NOTES

1. <https://aboutblaw.com/2sY>.

2. A “family member” is defined as a child (including a biological, adopted, foster, or stepchild; a child for whom the employee has physical custody or guardianship; or a child for whom the employee stands in loco parentis); a parent of the employee or the employee’s spouse (including a biological, adoptive, foster, or stepparent; legal guardian or ward; or person who acted as a parent or stood in loco parentis); a spouse; a grandchild (including a biological, adopted, foster, or step-grandchild); a grandparent (including a biological, adopted, foster, or step-grandparent); or a sibling (including a biological, adopted, foster, or stepsibling).

3. A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves (i) inpatient care; (ii) continued treatment by a licensed health care provider; or (iii) continued treatment or supervision at home by a licensed health care provider or other competent individual under the supervision of a licensed health care provider.

4. The one-year period begins on the first day of the calendar week in which the covered individual files an application for benefits.

5. The only exception is for a sole owner of a sole proprietorship, limited liability company, C corporation, or S corporation where the owner is the only individual employed by the entity.

6. The Act also does not specify whether the 680 hours must be worked with the current employer, or for any covered employer in the preceding 12-month period.

7. A “self-employed individual,” defined as an individual who is the sole owner and employee of a sole proprietorship, LLC, C corporation, or S corporation, may also elect to participate in the program.

8. Increases to the weekly maximum amount may be temporarily suspended by the State Board of Public Works based on unemployment figures released by the U.S. Bureau of Labor Statistics.

9. Again, the Act does not specify whether out-of-state employees count towards the threshold.

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