

# PUBLICATION

---

## Will Maryland Employers Be Required to Provide Mandatory Paid Sick Leave?

Authors: Donna M. Glover

June 09, 2017

**State and local jurisdictions across the country continue to enact mandatory paid sick leave laws that create administrative and compliance challenges for employers. At least seven states, the District of Columbia and approximately 17 localities have mandated that employers doing business in those jurisdictions provide paid sick leave to their employees. Maryland may be next.**

On April 5, Maryland's General Assembly passed the Maryland Healthy Working Families Act (the Act), versions of which have been considered in previous legislative sessions. On May 25, however, Governor Larry Hogan vetoed the Act, which sets up a potential veto override clash when the next session opens in January 2018 or perhaps during a special session prior to the opening of next year's session. Governor Hogan stated, "Rather than working with us in good faith they instead passed a terrible, poorly written, and deeply flawed bill which was worse than the one that even liberal Democrats had rejected for four straight years in a row."

Notably, the Governor signed three Executive Orders (E.O.) relating to sick leave. Those are:

1. An E.O. that establishes "a fact-finding" study of the effects of paid sick leave on small businesses in the state, which is something the Governor said the legislature failed to consider.
2. An E.O. that requires state agencies to offer paid sick leave to contractual employees.
3. An E.O. that requires that state agencies give preferential treatment in bidding for State contracts to companies that offer paid sick leave to employees.

So, Maryland employers may be subject to a sick leave law next year, but for now the Act is dead. For those of you wondering why the Governor and the legislature have been battling over sick leave, please read on to learn about the Act's provisions and administrative complications as they currently stand. Of note, employers doing business in Montgomery County, Maryland would be required to comply with the Act, as well as with Montgomery County's Earned Sick and Safe Leave Act. Although the Act, as written, prohibits other Maryland local jurisdictions from enacting similar laws, it does *not* preempt the Montgomery County law.

### Covered Employers

The Act covers all Maryland employers. Employers with 15 or more employees would be required to provide employees with up to 40 hours of *paid* sick and safe leave annually. Employers with 14 or fewer employees would be required to provide employees with at least up to 40 hours of *unpaid* sick and safe leave annually.

### Covered Employees – Generally

The Act, however, does not apply to all employees who work in Maryland. Specifically, the Act excludes employees who:

- work less than 12 hours a week;
- are independent contractors under Maryland law;
- are employed in the agricultural sector on an agricultural operation;

- are under 18 years of age before the beginning of a "year," which is defined as any regular and consecutive 12-month period determined by the employer;
- are employed by a temporary service agency to provide temporary staffing services to another person if the agency does not have day-to-day control over their work and supervision;
- are workers directly employed by an employment agency to provide part-time or temporary services to another person; or
- are called to work by an employer on an "as-needed" basis in the health or human services industry provided that: (1) the employee can reject or accept the shift offered by the employer; (2) the employee is not guaranteed to be called to work by the employer; and (3) the employee is employed on the employer's payroll and not through a temporary staffing agency.

### **Covered Employees – Construction Industry**

Additionally, special rules apply to employees working in the construction industry. The Act does not define "construction industry"; however it may be reasonable for employers to rely on the definition of "construction services" established under Maryland's Workplace Fraud Act. The Workplace Fraud Act generally requires construction (and landscaping) services employers that contract with an individual as an independent contractor or "exempt person" to provide the individual with the Maryland Commissioner of Labor and Industry's "Notice to Independent Contractors and Exempt Persons." Notice to Independent Contractors and Exempt Persons" provided by the Maryland Commissioner of Labor and Industry. In addition, a similar notice must be posted in a conspicuous place at every job site and also at the place of business of the person or business for which the individual performs services. Both notices must be provided in both English and Spanish. Under the Workplace Fraud Act, "construction services" includes the following services in connection with real property: building; reconstructing; improving; enlarging; painting; altering; maintaining; and repairing.

Generally, the Act does not cover certain employees who work for construction industry employers if they are covered by a collective bargaining agreement (CBA) that *expressly* waives the Act's requirements.

Notwithstanding the express waiver of rights that an employer may be able to negotiate in a CBA, employees who work in the following positions in the construction industry *are* covered by the Act:

- Janitor;
- Building cleaner;
- Building security officer;
- Concierge;
- Door person
- Handyperson or
- Building superintendent

### **Accrual and Carryover Provisions of the Act**

Covered employees must accrue one hour of sick and safe leave for every 30 hours worked, and up to 40 hours of sick and safe leave in the defined year beginning on their first day of employment. Employers may, however, restrict use of accrued sick and safe leave until after the employee worked 106 calendar days. For purposes of accrual, exempt employees must accrue sick and safe leave on the basis of a 40-hour workweek unless an exempt employee's normal workweek is less than 40 hours. In that case, the number of hours in a normal workweek must be used.

Employees must be allowed to carryover sick and safe leave from year to year up to 40 hours; however, employers may limit use of sick and safe leave to no more than 64 hours in a year. Employers may also limit the total accrual of sick and safe leave to 64 hours at any time.

Additionally, employers would not be required to accrue sick and safe leave for employees under the following scenarios:

- a two-week pay period in which the employee worked fewer than 24 hours total;
- a one-week pay period if the employee worked fewer than a total of 24 hours in the current and immediately preceding pay period; or
- a pay period in which the employee is paid twice a month and the employee worked fewer than 26 hours in the pay period.

Finally, employers who choose to grant the full amount of sick and safe leave at the beginning of the defined year are not subject to the Act's carryover provisions.

### **Use of Sick and Safe Leave**

Employees must be allowed to use sick and safe leave for the following reasons:

1. to care for or treat the employee's or family member's mental or physical illness, injury, or condition;
2. to obtain preventive medical care for the employee or employee's family member;
3. for maternity or paternity leave; or
4. the absence from work is necessary due to domestic violence, sexual assault or stalking committed against the employee or the employee's family member and the leave is being used by the employee to obtain for the employee or the employee's family member medical or mental health attention that is related to the domestic violence, sexual assault or stalking; services from a victim services organization related to the domestic violence, sexual assault or stalking; legal services or proceedings related to or resulting from the domestic violence, sexual assault or stalking; or during the time that the employee has temporarily relocated due to the domestic violence, sexual assault or stalking.

The Act's definition of "family member" is broad as it encompasses the following individuals: biological, adopted, foster or stepchildren, parents, grandparents, grandchildren and siblings; a child for whom the employee has legal or physical custody or guardianship; a child for whom the employee stands in loco parentis regardless of the child's age; the legal guardian of the employee; an individual who acted as a parent or stood in loco parentis to the employee or the employee's spouse when the employee or the employee's spouse was a minor; and the spouse of the employee.

Employers must allow an employee to use sick and safe leave in the smallest increment that is used to track hours worked and employers may not mandate use in increments of more than four hours.

### **Payment and Reinstatement of Sick and Safe Leave**

Sick and safe leave must be paid to employees at the same wage rate as the employee normally earns, except for tipped employees who must be paid the prevailing minimum wage rate (state or county rates, as applicable) and not the Maryland sub-minimum wage rate that may be paid to tipped workers.

The Act does not require payment of unused sick and safe leave at the time of termination; however, employers are required to reinstate any sick and safe leave balance if an employee is rehired within 37 weeks from the date of his or her termination.

Additionally, an employer who acquires, by sale or otherwise, another employer, must allow all employees of the original employer who remain employed by the successor employer to retain all unused, earned sick and safe leave accrued during employment with the original employer.

## Employee Notice Requirements

If an employee's need to use sick and safe leave is foreseeable, an employer may require an employee to provide reasonable advance notice of not more than seven days before the date on which the earned sick and safe leave would begin. If the need to use sick and safe leave is not foreseeable, an employee must provide notice to an employer as soon as practicable; and generally comply with the employer's notice or procedural requirements for requesting or reporting other types of leave, if those requirements do not interfere with the employee's ability to use sick and safe leave.

An employer may deny a request for the following reasons:

- if an employee fails to provide the required notice and the employee's absence will cause a disruption to the employer;
- the employer is a private employer licensed to provide services to developmentally disabled or mentally ill individuals;
- the need to use sick and safe leave is foreseeable;
- after exercising reasonable efforts, the employer is unable to provide a suitable replacement employee; and
- the employee's absence will cause a disruption of service to at least one individual with a developmental disability or mental illness.

Employers, however, may not require employees to search for or locate a replacement worker to work in the employee's stead during the time the employee is taking sick and safe leave.

Special shift-swap rules apply to tipped workers. Generally, if an employee contacts his or her employer to arrange for coverage of a shift, then an employer may offer the employee the choice of being paid minimum wage for the sick and safe leave absence, or working an equivalent shift of the same number of hours in the same or following pay period. If the employer chooses not to make that offer, they must pay the tipped employee the prevailing minimum wage for the use of sick and safe leave.

## Employer Notice Requirements

Employers must notify employees of their sick and safe leave balance each time they are paid. Employers may satisfy this notice requirement via an online system through which an employee may obtain their leave balance.

Employers also must notify employees of their rights under the Act, including a statement of how leave is accrued, the reasons for which employees may take leave, the Act's prohibition on retaliating against an employee for accessing their leave rights and employees' right to file a complaint with the Maryland Department of Labor, Licensing and Regulation (DLLR), which enforces the Act. The DLLR is responsible for providing a model notice to employers and for developing a model sick and safe leave policy for employers to include in their employee handbooks.

## Documentation to Support the Need for Leave

Employers may not require employees to provide documentation to support their need for leave unless the leave was used for three or more consecutive work days, or the employee used leave during the period between the first 107 and 120 calendar days of employment and the employee agreed to provide documentation when the employee was hired.

As such, an employer would be able to ask a general question about a new employee's need to use sick and safe leave between the first 107 and 120 calendar days of employment so that the employer may obtain a mutual, written agreement to provide documentation to support a need for leave. Employers, however, should

tread carefully to avoid making impermissible medical inquires that would violate the Americans with Disabilities Act or similar state laws.

## **Employers Doing Business in Montgomery County and Other Maryland Localities Will Be Required to Comply with Two Sick Leave Laws**

The Act differs significantly from the Montgomery County Sick and Safe Leave law; as such, employers doing business in Montgomery County and in other localities in Maryland should be prepared to comply with two different paid sick leave laws.

A few of the key differences are:

- Montgomery County's law provides more paid leave for employees – up to 56 hours of paid sick and safe leave as compared to the Act's up to 40 hours of paid sick and safe leave. Employers with less than five employees working in the County must provide unpaid sick and safe leave of up to 32 hours and paid leave up to 24 hours.
- Montgomery County's law applies to all private businesses and individuals who employ one or more persons to work within the county.
- All employees are covered under Montgomery County's law, except for those who: (1) do not have a regular work schedule with the employer; contact the employer for work assignments and are scheduled within 48 hours after contact; have no obligation to work for the employer unless they initiate contact; and are not employed by a temporary placement agency; (2) regularly work eight or fewer hours each week; and (3) independent contractors.
- Accrual must start on the first day of employment, but employers may restrict use until after the first 90 days of employment as compared to the Act's 106-day restriction.
- Employees may carryover up to 56 hours of sick and safe leave as compared to the Act's 40-hour carryover limit.
- Employees may use up to 80 hours of sick and safe leave as compared to the Act's 64-hour limitation on use of leave.
- No "carve out" exists for construction employers doing business in Montgomery County.

## **Enforcement and Penalties**

Employees who believe their rights have been violated may file a complaint with the DLLR, which will launch an investigation of the complaint within 90 days its receipt. The DLLR will first attempt to resolve the dispute via informal mediation. If mediation fails, and the DLLR believes that the employer violated the Act, it will issue an order directing the employer to pay within 30 days: (1) the sick and safe leave to which the employee was entitled; (2) actual economic damages; (3) at the DLLR's discretion, up to three times the value of the employee's hourly wage for each violation; and (4) also at the DLLR's discretion, it may assess a civil fine of up to \$1,000 for each employee for whom the employer is not in compliance with the Act.

If an employer fails to comply with a DLLR order, the DLLR may ask the Attorney General to bring an action on behalf of the employee. Additionally, an employee may bring a civil action to enforce the order within three years after the date on which the DLLR's order is issued. In such a case, and at the discretion of the courts, the employee would be entitled to three times the value of the employee's unpaid sick and safe leave, punitive damages, reasonable attorneys' fees and costs, injunctive relief and any other relief the court deems appropriate.

## **Employers Should Consider Their Options**

Even in light of the uncertainty regarding the possible override vote, employers should take the time now to review their existing leave policies to identify necessary changes so as to comply with Act's provisions should it take effect. For example, employers are not obligated to establish a separate sick and safe leave policy; rather,

they may modify an existing leave policy to comply with the Act. Employers should also consider potential changes to administrative and recordkeeping systems that may be required should the Act become effective. Finally, when and if the Act becomes a law, employers should train supervisors and managers about their obligations to comply with the Act's no retaliation and other provisions protecting employees.