

PUBLICATION

Time to Care? By Veto Override, Maryland Enacts Paid Family Leave

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During a Special Session on April 9, 2022, the General Assembly of Maryland overrode Governor Hogan's veto of the Family and Medical Leave Insurance Program (FAMLI Program), also known as the Time to Care Act of 2022 (the Act). The Act provides employees with up to 12 weeks of temporary benefits during an "application year" for certain leave reasons. The General Assembly has considered various versions of the FAMLI Program for approximately the last six years.

In brief, the Act becomes effective on June 1, 2022, however, most of the substantive provisions take effect in 2023. With limited exceptions, employers with one or more employees working in Maryland are covered. The Maryland Department of Labor (MD DOL) is charged with establishing regulations to implement the Act and is responsible for its enforcement. Unlike the D.C. Universal Paid Leave Act under which employers must pay 100 percent of the contributions to a leave fund, under the FAMLI Program, employers and employees will share in making contributions to the FAMLI fund.

Covered Employers, Covered Employees, and Covered Individuals

"Employer" is defined as a "person" or "governmental entity" that employs one or more employees in Maryland. The Act does not make clear whether an employer must have a physical operation in Maryland to be covered. It also does not require that an employer be subject to Maryland unemployment insurance law to be a covered "employer." By comparison, the D.C. Universal Paid Leave Act defines covered employer to include all employers subject to the D.C. unemployment insurance tax. Therefore, as written, the Act appears to cover out-of-state employers that have one or more employees working in Maryland regardless of whether the employer also is paying into the Maryland unemployment fund. Sole owners of sole proprietorships, LLCs, C-corporations, or S-corporations are not employers under the Act provided the sole owner is the only employee.

"Covered employee" is defined as an employee who has worked 680 hours or more during the 12-month period immediately preceding the first date leave is to begin. The Act does not specify whether the employee must have 12 months of service to be covered; rather, it only provides that an employee work the requisite 680 hours. Thus, it appears that employees may be eligible for paid leave under the FAMLI Program before they become eligible for federal FMLA or the Maryland Parental Leave Act, as applicable. By way of example, a new hire working 40 hours each workweek would become eligible for paid family leave after 17 weeks of employment. Further, the Act does not address whether overtime hours must be counted, but presumably the MD DOL will address this and other statutory gaps in the regulations.

A "covered individual" is a covered employee or a self-employed individual who elects to participate in the FAMLI Program. This alert focuses on employers' obligations under the Act; therefore, it does address the Act's self-employment provisions.

Employer and Employee Contributions

The Act establishes a process for determining the initial contribution rates of employers and employees as well as a process for reassessing them, generally, every two years. Similar to the implementation of the D.C. Universal Paid Leave Act, employers and employees will be required to contribute to the fund before

employees will have access to paid leave benefits. Contributions will begin on October 1, 2023; thereafter, effective January 1, 2025, covered employees will be able to apply for FAML I benefits.

Initial Contributions: By December 1, 2022, the MD DOL must conduct a cost analysis of the program and make recommendations on the total rate of contribution and the appropriate cost-sharing formula between employers and employees for making contributions. Thus, employers have no indication yet what will be the contribution rate or the employer/employee contribution split. By comparison, the contribution rate under the D.C. Universal Paid Leave Act is a 0.62 percent payroll tax on covered workers' wages, and wages are not capped. Before amendments were adopted to the Act, in prior versions of the bill the contribution amount was not to exceed 75 percent of an employee's wages capped at the social security wage base, and the split was 50 percent employer/50 percent employee, which was later amended to 75 percent employer/25 percent employee, which was then amended to call for a "study" to determine contribution rates and splits.

Ongoing Assessment for Contributions in Later Years: Every two years thereafter, beginning in 2025, MD DOL is again required to study and make recommendations on the total rate of contributions and the appropriate cost-sharing formula between employers and employees.

Employers with *less than* 15 employees will not be required to contribute to the FAML I fund. Rather, employees will be responsible to contribute to the FAML I fund the established contribution rate; however, employers will have to contribute the tax collected to the fund on behalf of their employees.

Reasons for Leave and Paid Leave Benefits

Reasons for Leave

Beginning January 1, 2025, to be eligible for benefits, a covered individual who is taking leave from employment may submit a claim for benefits to:

- care for a newborn child or a child newly placed for adoption, foster care, or kinship care with the individual during the first year after the birth, adoption, or placement;
- care for a family member with a serious health condition;
- attend to a serious health condition that results in the individual being unable to perform the functions of the employee's position;
- care for a next-of-kin service member; or
- attend to a qualifying exigency arising out of the employee's family member's deployment.

Employees may not receive more than 12 weeks of benefits in an application year, and leave may be taken on an intermittent basis.

Under the Act, "family member" is broadly defined and includes:

- a biological child, adopted child, foster child, or stepchild of the employee
- 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
- a biological parent, an adoptive parent, a foster parent, or a stepparent of the employee or of the employee's spouse
- the legal guardian of the employee or the ward of the employee or of the employee's spouse
- an individual who acted as a parent or stood *in loco parentis* to the employee or employee's spouse when the employee or employee's spouse was a minor
- the employee's spouse
- a biological grandparent, an adopted grandparent, a foster grandparent, or a step grandparent

- a biological grandchild, an adopted grandchild, a foster grandchild, or a step grandchild
- a biological sibling, an adopted sibling, a foster sibling, or a step sibling of the employee

Paid Leave Benefits

Generally, benefits paid under the FAML I Program depend on how the employee's average weekly wage compares to the state average weekly wage, and those benefits are subject to minimum and maximum levels. The weekly benefit is 90 percent of the employee's average weekly wage if that wage is 65 percent or less than the state average weekly wage. If, however, the employee's average weekly wage is greater than 65 percent of the state average weekly wage, the weekly benefit is 90 percent of the portion of the employee's wage up to that threshold plus 50 percent of the portion of the wage above that threshold.

The weekly benefit payable to an employee ranges from a minimum of \$50 to a maximum of \$1,000 for the 12-month period beginning January 1, 2025. Beginning January 1, 2026, the maximum weekly benefit will generally be increased by the annual percentage growth in the Consumer Price Index.

Private Employer Plan

An employer may satisfy the Act's requirements through a private employer plan consisting of employer provided benefits, insurance, or a combination of both if the plan is offered to all eligible employees and at least meets the rights, protections, and benefits provided under the Act. A private employer plan must be filed with MD DOL for approval. An employer that provides covered employees with a private employer plan and those covered employees are exempt from the Act's required contributions.

Accessing Paid Leave Under the Act

The MD DOL (or a hired outside resource) will process employee claims and determine eligibility. The MD DOL must notify the employer within five business days after an employee files a claim for benefits and notify the employee and the employer within 10 business days after a claim is submitted regarding the approval or denial of the claim. The MD DOL must pay benefits to an employee within five days after the claim is approved and make subsequent payments every two weeks until the benefit period ends.

Employer Notice Requirements

An employer must provide written notice to each employee of the employee's rights and duties under the Act at the time of hire and annually thereafter. When an employee requests leave or when an employer knows that an employee's leave may be for a FAML I reason, the employer must notify the employee of the employee's eligibility to take leave under the FAML I Program. The MD DOL is required to develop standard notices for employer use.

Enforcement

Notably, an amendment to the Act struck language that would have provided employees with a private right to sue employers for violations of the Act. Among other enforcement provisions, if an employee believes that an employer has violated the Act, the employee may file a written complaint with MD DOL. The Act specifies how the MD DOL must investigate and enforce the Act, which includes mediation, issuing orders, assessing a civil penalty of up to \$1,000 for each employee for whom the employer is not in compliance, and asking the Maryland Attorney General to bring an action on behalf of the employee.

Interactions with Other Laws and Employer Policies

If paid leave taken under the FAML I Program also qualifies as protected leave under the federal Family and Medical Leave Act, the Act requires that leave taken under the FAML I Program must run concurrently with, and not in addition to, FMLA job-protected leave. Employers must continue any employment health benefits in the

same manner as required under the federal FMLA for the time that the covered individual is absent from work or receiving FAMLI benefits. Additionally, the employer generally must restore the individual to an equivalent position of employment. Normally, an employer may only terminate an employee on FAMLI leave for "cause" (not defined in the Act) and may only deny restoration of a covered employee's position in specified circumstances. Further, employers may not retaliate against an employee for accessing their rights under the Act.

Employers subject to the Maryland Parental Leave Act (PLA), that is, employers with 15 to 49 employees working in Maryland, must provide up to six weeks of unpaid job protected parental leave for certain reasons once the employee reaches one year of service and works 1,250 hours in the 12-month period before the first date of leave. The Act, however, does not address whether the PLA must run concurrently with paid FAMLI leave; perhaps the regulations will address this oversight.

Further, although the Act requires that employees exhaust employer-provided leave before accessing paid leave under the FAMLI Program, it is not clear whether short-term disability benefits, accrued or granted sick and safe time under the Maryland Healthy Working Families Act or the Montgomery County, Maryland Earned Sick and Safe Leave Law, as applicable, must be first exhausted. This, of course, raises the issue of time away from the job – for example, an employee may be eligible for employer-paid leave benefits that do not run concurrently with paid FAMLI benefits, then the employee could apply and qualify for the up to 12 weeks of paid FAMLI leave benefits. We certainly hope that the MD DOL will address these open issues in the forthcoming regulations.

Regulations Forthcoming

Under the Act, the MD DOL must:

- adopt regulations to implement the bill by June 1, 2023, that are consistent with the federal Family and Medical Leave Act (FMLA) and any relevant Maryland laws;
- establish procedures and forms for filing claims for benefits;
- use information-sharing and integration technology to facilitate the disclosure of relevant information or records needed to administer the Act;
- carry out a public education program;
- establish standards in regulations for certifying benefit claims;
- establish standards for verifying the identity of a family member for benefit claims;
- establish procedures for an employer to provide evidence of suspected fraud;
- establish a system for appeals by covered individuals who are denied benefits; and
- implement procedures to ensure specified information is kept confidential.

Considerations for Employers

Contribution rates and splits have yet to be determined, we are awaiting regulations, and it will not be until October 1, 2023 when contribution obligations begin; however, employers should begin to consider the implications of the Act on their businesses. Particularly, employers should consider whether a private plan submitted to the MD DOL is a better option from a benefits integration standpoint. Employers should begin to focus on readying their payroll systems for complying with the contribution requirements and review current employer-provided paid time off and leave benefits and related policies to consider how the FAMLI Program may interface with those benefits and policies.

Baker Donelson will continue to follow this development and provide further updates as changes occur. If you have any questions or need assistance, please contact [Donna M. Glover](#) or any member of Baker Donelson's [Labor & Employment Team](#).

