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New Leave Law Takes Effect Leaving Many Questions Unanswered for Maryland Employers

As a reminder to employers, the Maryland Flexible Leave Act becomes effective October 1.

Signed by Governor O'Malley on May 22, the Act requires employers that employ 15 or more individuals in the state and that provide some form of paid leave to employees to allow employees to use paid leave for the illness of the employee's immediate family. Immediate family is defined to include children, spouses, and parents. The law applies to any form of paid leave, and includes vacation, sick leave, and compensatory time. Employees who earn more than one type of paid leave may choose the type and amount of leave to be used.

The law prohibits "discharging, suspending, demoting, disciplining or otherwise discriminate[ing]" against employees who choose to take paid leave under its provisions, or against employees who file a complaint, testify against, or assist in an action brought against the employer for alleged violations of the law.

As is apparent, the Act significantly broadens leave rights available to employees. However, there are no implementing regulations, and the law leaves unanswered many questions:

- It appears that, provided the employer employs at least 15 employees, all employees with paid leave are covered under the law. Unlike the Family Medical Leave Act, which imposes qualifications such as length of service and number of hours worked, the only limitation in the law is that the leave must have been already earned by the employee. Employees are not entitled to demand paid leave from sources of leave that have not been earned by them. Moreover, the 15 employee threshold is an aggregate number, and not a minimum number per establishment. As a consequence, the law could have a deleterious impact on smaller employers, particularly those with multiple, small locations.
- The law provides that the employee "may use leave with pay for the illness of the employee's immediate family." Unfortunately, although there is some suggestion in the legislative history to the contrary, the law does not expressly state that such leave actually be for the care of the employee's immediate family. Importantly, the law does not require that a child be a minor, be dependent upon or live with the employee. Lastly, the law specifically refers to illnesses. The law does not define illnesses, such that arguments exist that conditions that are not illnesses (e.g., injuries) should not be included. It is important to note that, unlike leave under the FMLA, leave under this Act is not restricted to serious health conditions. Thus, leave under this Act may be broader than FMLA leave rights regarding care for family members. For example, an employee would not be entitled to FMLA leave to take care of a child with a cold, but would be entitled under this Act.
- The conditions, if any, an employer may impose on leave requests are unclear. The statute provides that employees must comply with the employer's policy, and the Maryland Attorney General has opined that employers may require employees to comply with its policies with respect to the type of leave elected by the employee. However, because the statute provides that employers may not discriminate against employees for exercising their rights under the law, provisions such as notice requirements may not be enforceable if they are inconsistent or conflict with the law. On the brighter side, unlike the case for leave under the FMLA, if an employer requires vacation or other paid leave be taken in full or half day increments, it would seem that such conditions could be applied to prevent usage of paid leave under the law in different, smaller increments.
- Likewise, the scope of paid leave covered by the Act – and thus available to employees – is unclear. Although the Act clearly applies to sick, vacation, and personal leave, it is unclear whether the Act might be found to apply to other forms of paid leave.

Finally, the law appears to create some inequities. First, employees are afforded greater benefits for their spouses, children, and parents than they are themselves entitled to receive. For example, an employee is not entitled under the law to use vacation leave for his or her own illness. In contrast, an employee with a sick parent may elect to use vacation leave to be with his or her sick parent. In this regard, the law arguably disadvantages employees who are unmarried or lack children and creates incentives for employees to misrepresent the basis for their leave requests so as to obtain greater leave.

As is apparent, many, many issues remain unresolved. What is clear is that employers should review their leave policies to assess the potential impact of this law on them and as appropriate or desired, modify those policies. In addition, to assure compliance, supervisors should be trained on the requirements of this new Act.

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