

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 686
Economic Matters

(Delegate Wilson)

Maryland Healthy Working Families Act - Adverse Actions - Absence Control
Policy

This bill allows an employer to institute an absence control policy that is not in violation of the Maryland Healthy Working Families Act if the employer provides at least 40 hours of paid leave in a year, excluding earned sick and safe leave, and the absence control policy (1) is uniformly applied to all types of leave offered by the employer; (2) is provided to an employee in writing; (3) has a progressive accountability structure; and (4) provides a warning to an employee before any possible action is taken against an employee.

Fiscal Summary

State Effect: The Department of Labor, Licensing, and Regulation (DLLR) can implement the bill with existing resources. Revenues are not materially affected.

Local Effect: Local finances are not likely materially affected.

Small Business Effect: Minimal.

Analysis

Current Law: The Maryland Healthy Working Families Act took effect as Chapter 1 of 2018 on February 11, 2018. Under Chapter 1, an “employer” includes the State or local governments and a person who acts directly or indirectly in the interest of another employer with an employee. Chapter 1 of 2018 does not apply to employees who regularly work less than 12 hours a week, specified independent contractors, specified associate real estate brokers and real estate salespersons, individuals younger than age 18 before the beginning of the year, workers in a specified agricultural sector, construction workers (not including

specified employees) covered in a collective bargaining agreement in which the Act's requirements are clearly waived, specified employees who work on an as-needed basis in a health or human services industry, or specified employees of a temporary service or employment agency.

Leave Accrual Rates

Chapter 1 requires an employer with 15 or more employees to have a sick and safe leave policy under which an employee earns at least 1 hour of *paid* sick and safe leave, at the same rate as the employee normally earns, for every 30 hours an employee works. An employer with 14 or fewer employees, based on the average monthly number of employees during the preceding year, must at least have a sick and safe leave policy that provides an employee with at least 1 hour of *unpaid* sick and safe leave for every 30 hours an employee works. An employer is not required to allow an employee to earn or carry over more than 40 hours of earned sick and safe leave in a year, use more than 64 hours of earned leave in a year, accrue more than 64 hours at any time, or use earned sick and safe leave during the first 106 calendar days the employee works for the employer. An employer is not required to carry over unused earned sick and safe leave if the leave is awarded at the beginning of each year.

An employer is not required to allow an employee to accrue earned sick and safe leave during (1) a two-week pay period in which the employee worked fewer than 24 hours total; (2) 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 (3) a pay period in which the employee is paid twice a month and the employee worked fewer than 26 hours in the pay period.

An employer must allow an employee to use earned sick and safe leave:

- to care for or treat the employee's mental or physical illness, injury, or condition;
- to obtain preventive medical care for the employee or employee's family member;
- to care for a family member with a mental or physical illness, injury, or condition;
- for maternity or paternity leave; and
- for specified circumstances due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member.

An employer is not required to compensate an employee for unused earned sick and safe leave when the employee leaves the employer's employment. An employer that rehires an employee within 37 weeks after leaving employment is required to reinstate any unused earned sick and safe leave that had accrued at the time of separation unless the employer voluntarily paid out the unused earned sick and safe leave. An employer is not required to modify an existing paid leave policy if (1) the terms and conditions are at least equivalent

to those under the law or (2) the paid leave policy does not reduce employee compensation for an absence due to sick or safe leave. An employer is not prevented from establishing a policy that allows employees to voluntarily exchange assigned work hours. An employer is not prohibited from adopting and enforcing a policy that prohibits the improper use of earned sick and safe leave. An employer may deny a request to take earned sick and safe leave under specified circumstances related to the disruption of the employer's business or provision of services to an individual with a developmental disability or mental illness.

An employer may require an employee who uses earned sick and safe leave for more than two consecutive scheduled shifts to provide verification that the leave was used appropriately. An employer may also require verification under specified circumstances when the leave is used during the period between the first 107 and 120 calendar days that employee was employed by the employer.

Required Recordkeeping

An employer must keep relevant records for at least three years, and the Commissioner of Labor and Industry may inspect an employer's records regarding earned sick and safe leave. There is a rebuttable presumption that an employer has violated the earned sick and safe leave provisions if the employer fails to either keep records or allow the commissioner to inspect records. The commissioner may waive a civil penalty if the penalty was assessed for a violation that was due to an error caused by a third-party payroll service provider with whom the employer in good faith contracted for services.

Enforcement Provisions

If an employee believes that an employer has violated the Maryland Healthy Working Families Act, the employee may file a written complaint with the commissioner. The commissioner must conduct an investigation and attempt to resolve the issue informally through mediation within 90 days of the written complaint. If the commissioner is unable to resolve the issue through mediation and determines that an employer has violated a provision of the law, the commissioner must issue an order, subject to the hearing and notice requirements of the Administrative Procedure Act. The order must describe the violation and direct the payment of the full monetary value of any unpaid earned sick and safe leave and any actual economic damages. The order may, in the commissioner's discretion, direct the payment of an additional amount of up to three times the value of the employee's hourly wage for each violation and assess a civil penalty of up to \$1,000 for each employee for whom the employer is not in compliance. If an employer does not comply with an order within 30 days of the issuance of the order, the commissioner may ask the Attorney General to bring an action – either on behalf of the employee (with the employee's written consent) or to enforce the order for the civil penalty – in the county where the employer is located.

In addition, within three years of the order, an employee may bring a civil action to enforce the order in the county where the employer is located. If an employee prevails in such an action to enforce an order, the court may award three times the value of the employee's unpaid earned sick and safe leave, punitive damages in an amount determined by the court, reasonable legal fees, injunctive relief if appropriate, and any other appropriate relief.

A person may not interfere with the exercise of, or the attempt to exercise, any right given under the Maryland Healthy Working Families Act. An employer may not take adverse action or discriminate against an employee because the employee exercised in good faith the rights granted by the Act. Additionally, an employer may not interfere with, restrain, or deny an employee exercising rights provided under the Maryland Healthy Working Families Act.

An employer may not apply an absence control policy that includes earned sick and safe leave absences as an absence that may lead to or result in an adverse action being taken against an employee.

An employee who mistakenly, but in good faith, alleges a violation under the Act is protected. An employee may not, in bad faith, file a complaint with the commissioner alleging a violation, bring an action, or testify in an action regarding earned sick and safe leave. An employee who violates these provisions is guilty of a misdemeanor and on conviction is subject to a maximum \$1,000 fine.

Background: Current law states an employer may adopt and enforce a policy that prohibits the improper use of earned sick and safe leave, including prohibiting a pattern of abuse of earned sick and safe leave. However, an employer may not apply an absence control policy that includes earned sick and safe leave absences as an absence that may lead to or result in an adverse action being taken against an employee. Thus, an employer may have and use an absence control policy, but the policy cannot be easily applied to earned sick and safe leave taken under the Maryland Healthy Working Families Act. DLLR advises that this has led to confusion for employers and employees regarding the use of an absence control policy.

The Office of Small Business Regulatory Assistance within DLLR was established to assist small businesses in complying with the Maryland Healthy Working Families Act. Any employer or employee with specific questions relating to the law can email their questions to small.business@maryland.gov.

Additional Information

Prior Introductions: None.

Cross File: SB 912 (Senator Beidle) - Rules.

Information Source(s): Maryland Municipal League; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; Department of Legislative Services

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