

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 211 (Senator Hayes)
 Finance

**Labor and Employment - Family and Medical Leave Insurance Program -
 Establishment (Time to Care Act of 2021)**

This bill establishes the Family and Medical Leave Insurance (FAMLI) program and FAMLI Fund to provide up to 12 weeks of benefits to a covered individual taking leave from employment due to specified personal and family circumstances. The weekly benefit is based on the individual’s average weekly wage, subject to a cap. The FAMLI Fund consists of employer and employee contributions and pays for benefits, a public education program, and implementation and administrative costs. **The bill takes effect June 1, 2021.**

Fiscal Summary

State Effect: In FY 2022, FAMLI Fund revenues increase by \$717.1 million, the State’s contribution (all funds) is \$9.2 million, and general/special fund expenditures also increase by \$20.4 million for administrative costs. Future years reflect annualization, termination of one-time costs, inflation, and, beginning in FY 2024, FAMLI benefits being provided.

(\$ in millions)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
SF Revenue	\$717.1	\$1,463.0	\$1,526.0	\$1,591.5	\$1,655.1
FF Revenue	\$0.8	\$1.6	\$1.6	\$1.7	\$1.7
GF/SF Rev.	(-)	(-)	(-)	(-)	(-)
GF/SF Exp.	\$20.4	\$12.2	\$713.7	\$727.6	\$742.3
GF/SF/FF/HE Exp.	\$9.2	\$19.0	\$19.6	\$20.3	\$20.9
Net Effect	\$688.4	\$1,433.3	\$794.3	\$845.3	\$893.6

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Beginning in FY 2022, local government expenditures increase significantly for employer contributions and local income tax revenues decrease; that decrease is partially offset beginning in FY 2024 as a result of taxing FAMLI benefits. **The bill imposes a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary: FAML I is administered by the Division of Unemployment Insurance (DUI) within the Maryland Department of Labor (MDL). The program generally provides up to 12 weeks of benefits to a covered individual who is taking leave from employment due to caring for specified family members, the individual's own serious health condition, or a qualifying exigency arising out of a family member's military deployment. The weekly benefit, which is based on an individual's average weekly wage, ranges from \$50 to a \$1,000 cap that is indexed to inflation.

Contributions to the fund, which are shared equally between employers and employees, are also based on employee wages. All employers who employ at least one employee must participate in the program. A "covered employee" is an employee who has worked at least 680 hours over a 12-month period immediately preceding the date on which leave is to begin.

A self-employed individual may elect to participate in the program for an initial period of at least three years. After the initial period, a self-employed individual may renew participation in the program annually or withdraw from the program as specified in the bill. A self-employed individual participating in the program must pay the full required wage contribution.

The bill applies only prospectively and may not be interpreted to have any effect on or application to any collective bargaining agreement entered into before its June 1, 2021 effective date.

Administration

The Secretary of Labor may delegate powers to an employee of MDL that are necessary to administer the program. Generally, an MDL employee may not disclose information pertaining to an individual who has applied for or received FAML I benefits. It is the General Assembly's intent that, to the extent permissible under federal law, existing employees and resources of DUI be used to carry out the FAML I program. The Secretary must:

- adopt regulations to implement the bill by October 1, 2021, that are consistent with the federal Family and Medical Leave Act (FMLA) and any relevant State 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 bill;
- carry out a public education program;

- establish standards in regulation for certifying benefit claims;
- establish a system for appeals by covered individuals who are denied benefits;
- implement procedures to ensure specified information is confidential; and
- report by September 1 of each year to the Governor and General Assembly on the preceding year's administration and operation.

The bill specifies how the Secretary of Labor may enforce the FAMLI program, which includes issuing subpoenas and bringing a civil action in the county where the violation allegedly occurred. The bill describes the process relating to subpoenas and prosecution. The Secretary and the State may be represented by the Attorney General or specified qualified attorneys in a civil action to enforce the bill.

The bill does not diminish an employer's obligation to comply with a collective bargaining agreement or an employer policy that allows an employee to take leave for longer than the employee would be able to receive FAMLI benefits. An employee's rights to FAMLI benefits may not be diminished by a collective bargaining agreement or an employer policy in effect on or after June 1, 2021. An agreement to waive the employee's FAMLI rights is void.

Family and Medical Leave Insurance Fund

The bill establishes the FAMLI Fund, which is a special, nonlapsing fund administered by the Secretary of Labor. The State Treasurer must hold the fund separately, and the Comptroller must account for the fund. The fund consists of employee, employer, and self-employed individual contributions; money paid to the fund for reimbursing the Secretary for erroneously paid benefits; interest earned in the fund; and money from any other source. Funds must be used to pay FAMLI benefits and may be used to pay for public education on the FAMLI program, and any other costs associated with the initial implementation and ongoing administration of the FAMLI program. The State Treasurer is the custodian of the FAMLI Fund, and the bill specifies how the Treasurer must manage the fund. An employee does not have any prior claim or right to money that the employee pays into the fund.

Contributions

Beginning on January 1, 2022, each employee, employer, and participating self-employed individual must pay to the Secretary of Labor contributions on wages, which are established in regulation. The total contribution rate established in regulations must be sufficient to fund the FAMLI benefits and be shared equally by employers (50%) and employees (50%). A self-employed individual participating in the program must pay the

total contribution rate. The total contribution rate may not exceed 0.75% of an employee's wages and must be applied to all wages up to and including the Social Security wage base.

An employer may not willfully fail or refuse to pay contributions to the fund or take deductions from an employee's wages to pay any portion of the employer contributions.

Benefits

Beginning on July 1, 2023, to be eligible for benefits, a covered individual who is taking leave from employment may submit a claim for benefits to (1) 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; (2) care for a family member with a serious health condition; (3) attend to a serious health condition that results in the individual being unable to perform the functions of the individual's position; (4) care for a next-of-kin service member; or (5) attend to a qualifying exigency arising out of the individual's family member's deployment, as defined by the bill. The bill specifies who is included as a family member.

A covered individual may not receive more than 12 weeks of benefits in an application year, except under specified circumstances. A covered individual may take eligible leave on an intermittent leave schedule under specified conditions. If leave is taken on an intermittent leave schedule, an employer may not reduce the total amount of leave to which the covered individual is entitled beyond the amount of leave actually taken.

Leave taken under the bill must run concurrently with leave taken under FMLA. An individual receiving unemployment insurance or workers' compensation benefits is not eligible to receive FAMLI benefits, though an individual receiving compensation for a permanent partial disability may be eligible for FAMLI benefits.

An employer may allow a covered individual to use paid leave under an employer policy in addition to the benefits available under the bill to replace the covered individual's wages up to 100% of the covered individual's weekly wage during the period of leave for which FAMLI benefits are received. However, the employer may require an individual to use FAMLI benefits concurrently with family or medical leave benefits provided under an employer policy.

All weekly benefits paid under the program are dependent on how the individual's average weekly wage compares to the State average weekly wage and subject to minimum and maximum levels. Specifically, for an individual taking leave, the weekly benefit is 90% of the individual's average weekly wage if that wage is 65% or less than the State average weekly wage. If, however, the individual's average weekly wage is greater than 65% of the

State average weekly wage, the weekly benefit is 90% of the portion of the individual's wage up to that threshold plus 50% of the portion of the wage above that threshold.

For an individual taking *partially paid* leave, the weekly benefit amount is the lesser of (1) the amount required to make up the difference between the wages paid to the individual while the individual is taking partially paid leave and the full wages normally paid to the individual or (2) if the individual's average weekly wage is greater than 65% of the State average weekly wage, 90% of the portion of the individual's wage up to that threshold plus 50% of the portion of the wage above that threshold.

The weekly benefit payable to a covered individual ranges from a minimum of \$50 to a maximum of \$1,000 for the 12-month period beginning July 1, 2023 (in fiscal 2024). Beginning July 1, 2024, the maximum weekly benefit must generally be increased by the annual percent growth in the Consumer Price Index, and the bill specifies the procedures to adjust the maximum weekly benefit. DUI must notify the employer of a covered individual within 5 business days after the covered individual files a claim for benefits and notify the covered individual within 10 business days after a claim is submitted regarding the approval or denial of the claim. DUI must pay benefits to a covered individual within 5 days after the claim is approved and make subsequent payments every 2 weeks until the benefit period ends. DUI must notify an individual filing a new claim for benefits of specified tax information, and if an individual elects to have federal income tax deducted and withheld, DUI must do so in a manner required by the Internal Revenue Service.

If a covered individual is receiving FAMILI benefits or is taking leave, the employer must continue any employment benefits in the same manner as required under the Maryland Parental Leave Act for the time that the covered individual is absent from work or receiving FAMILI benefits. Additionally, the employer must restore the individual to an equivalent position of employment.

Private Employer Plan

An employer may satisfy the bill'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 to a covered employee. A private employer plan must be filed with DUI for approval. An employer that provides covered employees with a private employer plan and those covered employees are exempt from the bill's required contributions.

Notice to Employees

An employer must provide written notice to each employee of the employee's rights and duties under the bill at the time of hire and annually thereafter. When an employee requests leave under the bill or when an employer knows that an employee's leave may be for a FAMLI reason, the employer must notify the employee of the employee's eligibility to take leave for which FAMLI benefits may be paid within five business days. The notices required under the bill must be provided in accordance with regulations adopted by the Secretary.

Prohibited Acts and Penalties

An individual is disqualified from receiving benefits for one year if the individual willfully makes a false statement or misrepresentation regarding a material fact or willfully fails to report a material fact to obtain benefits. An employer is subject to a civil penalty of up to \$1,000 for each occurrence if the employer willfully makes or causes to be made a false statement or willfully fails to report a material fact regarding an employee's claim for benefits.

DUI may seek repayment of benefits from an individual who received benefits in error or as a result of willful misrepresentation or if a claim for benefits is rejected after the benefits were paid. The Secretary may waive the repayment of benefits if the error was not due to a false statement or misrepresentation, or if repayment would be against equity and good conscience.

A person may not discharge, demote, discriminate, or take adverse action against a covered individual for specified actions.

If an employer fails to pay contributions due to the fund, the Secretary may assess the amount of contributions and interest due, make an additional assessment of up to two times the contributions withheld as a penalty, and order an audit of the employer for the immediately following fiscal year to investigate and determine compliance with the bill and other labor laws.

An employee alleging a violation of the bill may file a complaint with the Secretary to recover lost wages and damages and may also seek appropriate relief. The bill does not deprive a private right or cause of action to any employee for specified violations. An employee may bring an action against an employer for specified violations to recover lost wages and damages and may seek injunctive and other appropriate equitable relief. If an employee is entitled to judgement, the court must allow against the employer reasonable attorney's fees and other costs.

Current Law: A variety of federal and State laws require employers to provide a range of paid and unpaid leave benefits; some of the major programs are described below. Paid leave benefits are distinct from the FAMILI benefits made available under the bill. FAMILI benefits are similarly structured to unemployment insurance benefits – weekly cash payments based on an employees’ earnings, as opposed to continued payment of existing wages.

Federal Family and Medical Leave Act of 1993

The FMLA Act of 1993 requires covered employers to provide eligible employees with up to 12 work weeks of unpaid leave during any 12-month period under the following conditions:

- the birth and care of an employee’s newborn child;
- the adoption or placement of a child with an employee for foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;
- medical leave when the employee is unable to work due to a serious health condition; or
- any qualifying circumstance arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”

Generally, an FMLA-covered employer is an entity engaged in commerce that employs at least 50 employees. Public agencies and public or private elementary or secondary schools are considered to be covered employers regardless of the number of individuals they employ.

An eligible employee is an individual employed by a covered employer who has been employed for at least 12 months; however, these may be nonconsecutive months. Among other criteria, the individual must have been employed for at least 1,250 hours of service during the 12-month period.

Maryland Healthy Working Families Act

Generally, the Maryland Healthy Working Families Act 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.

The Act does not apply to in specified circumstances, such as employees who regularly work less than 12 hours a week, specified independent contractors, and individuals younger than age 18.

Maryland Flexible Leave Act

In Maryland, a private-sector employer who provides paid leave to its employees must allow an employee to use earned paid leave to care for immediate family members, including a child, spouse, or parent, with an illness. An employer is prohibited from taking action against an employee who exercises the rights granted or against an employee who files a complaint, testifies against, or assists in an action brought against the employer for a violation of these provisions.

An employer is considered a person that employs 15 or more individuals and is engaged in a business, industry, profession, trade, or other enterprise in the State, including a person who acts directly or indirectly in the interest of another employer. State and local governments are not included.

Employees who earn more than one type of paid leave from their employers may elect the type and amount of paid leave to be used in caring for their immediate family members.

Maryland Parental Leave Act

In Maryland, firms with 15 to 49 employees are required to provide employees with unpaid parental leave benefits. An eligible employee may take unpaid parental leave up to a total of six weeks in a 12-month period for the birth, adoption, or foster placement of a child. During parental leave, the employer must maintain existing coverage for a group health plan and, in specified circumstances, may recover the premium if the employee fails to return to work. State and local governments are not included. To be eligible for the unpaid parental leave, an employee must have worked for the employer for at least one year and for 1,250 hours in the previous 12 months.

Parental Leave for State Employees in the Executive Branch

Chapter 752 of 2018 provides up to 60 days of paid parental leave to an employee in the Executive Branch of State government who is the primary caregiver responsible for the care and nurturing of a child to care for the child immediately following either the child's birth or the adoption of a child who is younger than age six. An employee entitled to parental leave may use available accrued annual leave and personal leave. If that leave is less than 60 days, the State agency that employs the employee must provide the employee with additional paid leave to attain 60 days of parental leave.

Unemployment Insurance

Unemployment insurance provides temporary, partial wage replacement benefits to individuals who are unemployed through no fault of their own and who are willing to work, able to work, and actively seeking employment. Both the federal and state governments have responsibilities for unemployment insurance programs. Funding for the program is provided by employers through unemployment insurance taxes paid to both the federal government for administrative and other expenses and to the states for deposit in their unemployment insurance trust funds. Using federal tax revenues, the unemployment insurance program is administered pursuant to state law by state employees. Each state law prescribes the tax structure, qualifying requirements, benefit levels, and disqualification provisions. These laws must, however, conform to broad federal guidelines.

State Revenues:

Family and Medical Leave Insurance Fund Revenues

The contribution rate may not exceed 0.75% of an employee's wages up to and including the Social Security wage base (\$142,800 in 2021). Special fund revenues increase by approximately \$717.1 million in fiscal 2022, which reflects contributions beginning January 1, 2022, and by \$1.7 billion by fiscal 2026, as a result of DUI collecting employer and employee contributions from employees' wages. This estimate assumes the maximum contribution rate and is based on the Board of Revenue Estimates' projection of wage and salary growth and Social Security Administration data of taxable earnings in Maryland. It also assumes that no self-employed individuals opt to participate in the plan.

Additionally, FAML I Fund revenues increase to the extent that self-employed individuals elect to participate in the program and from interest earned on money in the fund and from any repayments of benefits paid in error. However, FAML I Fund revenues are less to the extent that employers elect to participate in private employer plans or if DUI sets a contribution rate that is below the maximum allowed.

Income Tax Revenues

State income tax revenues initially decrease in fiscal 2022 due to increased payroll expenses generating less tax revenue. However, the revenue decrease is offset partially beginning in fiscal 2024 as a result of taxing FAML I benefits. The Department of Legislative Services (DLS) assumes that benefits paid as a result of the employee's serious health condition are nontaxable while all other benefits (*e.g.*, family leave) are taxable.

Federal Fund Revenues

Based on previous estimates, federal fund revenues may increase by \$0.8 million in fiscal 2022 and by at least \$1.6 million annually thereafter to offset the employers' contribution on wages for certain State employees like senior citizen aides.

State Expenditures:

Administration

MDL currently collects payroll taxes for unemployment insurance; however, those funds cannot be used for any purpose other than unemployment insurance. DUI is 100% federally funded under provisions of the Social Security Act, which requires that the federal funds be used only to administer the unemployment insurance program. If any funds are used for purposes other than administering the unemployment insurance program, the funds must be repaid to the federal government. Although the bill expresses legislative intent that DUI use existing staff and resources to administer the FAML I program, MDL advises that DUI is precluded from using any of its funds or existing systems to administer any other state or federal program.

Thus, to implement the FAML I program, DUI must create a new program using general funds until special funding becomes available. DUI must develop a tax structure, payment structure, complaint and investigative structure, and require the imposition of an employee contribution. FAML I covers more employees and employers than unemployment insurance; thus, MDL believes FAML I will be analogous to the unemployment insurance program (which has about 400 employees and an annual budget of more than \$50 million prior to the historic increase in claim volume due to COVID-19). However, based on the number of claims in states with FAML I programs, there will likely be fewer claims under the FAML I program. Therefore, DLS assumes – and the estimate below reflects – that DUI can implement a FAML I program for less than the cost of implementing unemployment insurance.

Assuming a one-month implementation delay, MDL employees are needed to set up the program beginning in fiscal 2022, and more MDL employees will be needed in fiscal 2024

to process and investigate claims. Additional legal staff will be necessary for assistant Attorneys General to enforce civil actions and for the Judiciary to handle increased caseloads once covered employees start claiming benefits in fiscal 2024. Additionally, the Treasurer’s Office may need additional resources to manage the FAML I fund.

Based on previous estimates, off-the-shelf software can be acquired for approximately \$3.5 million, plus additional software customization costs of \$2.7 million annually. DLS estimates \$7.4 million in salaries and benefits for approximately 80 employees and \$6.6 million for other operating expenses in fiscal 2022. Thus, special fund expenditures for MDL increase by \$20.2 million in fiscal 2022. Once the program is fully operational and paying out benefits, DLS estimates 110 additional employees are needed. Ongoing costs will be offset with revenues from the employee contributions; however, general fund expenditures increase in fiscal 2022 for program expenses incurred before contributions commence on January 1, 2022, after which special funds cover all costs of administration.

The Central Payroll Bureau (CPB) must create new programs, processes, and procedures to calculate the State’s portion of the FAML I contribution for State employees. General fund expenditures increase by \$162,000 for CPB to calculate and send the employee portions to the Secretary of Labor.

Positions	80.0
Salaries and Fringe Benefits	\$7,382,414
Information Technology Costs	6,200,000
Other Operating Expenses	6,609,600
MDL FY 2022 Expenditures	\$20,192,014
Comptroller FY 2022 Expenditures	\$162,000
Total FY 2022 Administrative Expenditures	\$20,354,014

Future year expenditures reflect full salaries with annual increases and employee turnover, additional staff beginning in fiscal 2024 once benefits start, and ongoing operating expenses.

DLS assumes that the FAML I program is able to be established and operational consistent with the timelines established in the bill. Although other states have had longer implementation schedules and at least one has had to delay contributions, Maryland’s program can benefit from their experience.

Employer Contributions for State Employees

The contribution rate is to be set in regulations with a maximum rate is 0.75% of an employee’s wages up to and including the Social Security wage base, and the employer pays half of the contributions beginning on January 1, 2022. Thus, assuming the maximum

rate, expenditures (all funds and higher education) increase by \$9.2 million in fiscal 2022 (which accounts for the January 1 start date), and by at least \$19.0 million annually thereafter to provide the employer wage contribution. To the extent that the contribution rate is less than the maximum, State expenditures are less.

FAMLI Fund Expenses

DUI must make benefit payments to eligible covered employees beginning on July 1, 2023. Based on previous estimates, DLS assumes the FAMLI Fund pays employees at least \$690 million annually beginning on July 1, 2023. The actual amount could vary significantly because it depends on the number of employers opting to have private plans, the number of employees claiming FAMLI benefits, the wages of those employees, and the number of days that employees take leave.

Leave

The bill expands current leave benefits established under the State Personnel Management System (SPMS) and exceeds the conditions, benefits, and eligibility requirements established under SPMS and FMLA. As a result of the expanded applicability and circumstances to use FAMLI leave for employees, expenditures may increase significantly to provide coverage for those employees.

Local Revenues: Local income tax revenues initially decrease in fiscal 2022 due to increased payroll expenses generating less tax revenue. However, the revenue decrease is offset partially beginning in fiscal 2024 as a result of taxing FAMLI benefits paid at a rate of approximately 3%.

Local Expenditures: Local jurisdictions incur significant costs as a result of employers paying half of the FAMLI contribution rate. For example, based on previous estimates for a similar bill, employer contributions for Baltimore City and Harford County increase by approximately \$3.0 million and \$450,000, respectively, on an annual basis. Employer contributions for Montgomery County increase by more than \$7.5 million on an annual basis. Additionally, local jurisdictions may incur programming costs to their payroll systems.

Furthermore, to the extent that local government employees take more leave, the FAMLI program may overburden other employees and create additional personnel expenses for overtime costs for local jurisdictions, especially for law enforcement and other agencies that provide 24/7 coverage.

Small Business Effect: The bill has a significant impact on small businesses, which must pay for the employer's portion of contributions and establish a mechanism to add the

contributions to their payroll systems. Based on the 2021 Social Security wage base of \$142,800, employers contribute a maximum of \$536 per employee.

The U.S. Department of Labor found that 40% of employees who took FMLA leave returned to work due to their inability to afford leave. By establishing FAMLII, more employees may take leave and take leave for longer periods of time.

However, the District of Columbia's Office of the Budget Director undertook a review of more than 170 peer-reviewed studies and government reports on FAMLII's impact on the health and well-being of individuals, households, the labor market, and businesses. It found that, while the effects of providing FAMLII may vary across different firms and employees, most managers surveyed reported that public FAMLII programs had either negligible or positive effects on their business.

Additional Information

Prior Introductions: SB 539 of 2020, a similar bill, received a hearing from the Senate Finance Committee, but no further action was taken. HB 839, its cross file, received a hearing from the House Economic Matters Committee, but no further action was taken.

Designated Cross File: HB 375 (Delegate Valderrama) - Economic Matters.

Information Source(s): Maryland Department of Labor; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Maryland Department of Transportation; Maryland Association of Counties; Maryland Municipal League; Department of Legislative Services

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