

January 2018

GUIDANCE FOR EMPLOYERS ON THE NEW MARYLAND HEALTHY WORKING FAMILIES ACT (EARNED SICK AND SAFE LEAVE)

On January 12, 2018, the Maryland General Assembly voted to override Governor Hogan's veto of the "Maryland Healthy Working Families Act." As a result, almost all Maryland employers will be required to provide "Earned Sick and Safe Leave" to their employees. The law is scheduled to go into effect on February 11, 2018, unless the General Assembly chooses to delay its implementation, possibly by 90 days.

Which private sector employers must provide sick and safe leave?

This new earned sick and safe leave law applies to **virtually all private sector employers in Maryland regardless of size**. Employers with 15 or more employees will be required to provide employees with **paid leave**. Employers with fewer than 15 employees will be required to provide **unpaid leave**.

For purposes of determining whether an employer is required to provide paid or unpaid leave, the threshold number of employees is based on the average monthly number of all employees. This includes owners and their family members who work in the business, full-time workers, part-time workers, temporary workers, and seasonal workers who were employed during the immediately preceding 12 months.

How much leave is required to be offered?

Employers must allow employees to earn sick and safe leave at a rate of at least **one hour for every 30 hours worked, up to 40 hours a year**. Employees may carry over unused earned sick and safe leave from year-to-year, although **employers are permitted to cap the carryover amount at 64 hours**. The total amount of sick and safe leave that an employee may actually use in any given year (including any carryover time) may also be capped by the employer at 64 hours. **Employers may avoid the requirement of carrying over unused time from year to year** by awarding the full amount of earned sick and safe leave to employees at the beginning of each year.

Employers may use vacation, parental leave, short-term disability leave, sick days, floating holidays and paid time off ("PTO") plans to meet their obligations, as long as those programs

comply with the requirements of the new law. In most cases, that will require some amendment to existing rules.

For what purposes can the leave be used?

Employees may use leave for the following reasons:

- Care or treatment of the employee's or a family member's mental or physical illness, injury, or conditions
- Preventive medical care for the employee or family member
- Maternity or paternity leave
- Absences that are necessary to address medical, mental health and legal issues due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member

A "family member" is defined extremely loosely to include:

- The employee's natural, adoptive, foster and step-children
- A child for whom the employee has custody or guardianship
- A child for whom the employee acts as a parent, regardless of the child's age;
- A biological parent, adoptive parent, foster parent, or step-parent of the employee or employee's spouse
- An individual who acted as a parent for the employee or the employee's spouse when the employee or employee's spouse was a minor
- A spouse
- A natural, adopted, foster or step- parent
- A natural, adopted, foster or step- grandchild
- A natural, adopted, foster or step- sibling

The definition excludes aunts, uncles, nieces, nephews and cousins, unless there is, or was in the past, some parenting relationship between those relations and either the employee or the employee's spouse.

How does the leave accrue?

For existing employees, earned sick and safe leave begins to accrue on the first day of the year, beginning January 1, 2018. For new hires, sick and safe leave accrual begins as soon as the

employee begins work. However, the law goes into effect at an as-yet undetermined date later this year, and it is not retroactive. That creates some confusion as to how the leave accrual will work in 2018.

Employers can allow employees to accrue all the leave at the beginning of the year, or can require that employees accrue the leave payroll-by-payroll. Employers can impose a requirement that employees not use any earned sick and safe leave for up to the first 106 calendar days that the employee works for the employer.

Employers are not required to accrue sick and safe leave for an employee during any two-week pay period in which the employee worked less than 24 hours; during any one-week pay period in which the employee worked fewer than a combined total of 24 hours in the current and the immediately preceding pay period; or during any twice-a-month pay period in which the employee worked less than 26 hours.

Full-time exempt employees are assumed to be working 40 hours per week for purposes of accruing and using sick and safe leave. For exempt employees who work less than 40 hours in a normal workweek, the number of hours in a normal workweek should be used.

Although many employers have “anniversary year” leave plans that contain provisions for accruing and using leave time based on the anniversary of the employee’s start date, the law does not make any provision for counting sick and safe leave based on an “anniversary year” basis.

How is leave used?

Employers may require employees to take earned sick and safe leave in an increment of up to 4 hours. In the absence of such a requirement, employees may take the leave in the smallest increment used by the employer’s payroll system to account for absences or use of time.

Which employees are not covered?

The following employees are **NOT covered** under the law:

- Employees who regularly work less than 12 hours a week for the employer
- Certain employees who are employed in the construction industry and are covered by collective bargaining agreements
- Certain per diem employees in the health or human services industry
- Independent contractors
- Licensed real estate salesperson or brokers
- Employees under the age of 18 before the beginning of the year

- Temporary staffing agency employees

What are the employee's obligations?

If the need to use earned sick and safe leave is foreseeable, the employer may require the employee to provide reasonable advance notice of not more than seven days before the leave will begin.

If the need to use the leave is not foreseeable, the employee must provide notice to the employer as soon as is practicable, and must comply with the employer's reasonable notice or callout rules applicable to other types of leave.

An employer may deny a request to take earned sick and safe leave if the employee fails to provide the required notice **and** if the employee's absence will cause a disruption.

An employer may not require that an employee requesting earned sick and safe leave find a replacement to work that employee's shift.

Employees may be required to provide verification for leave used before 120 calendar days of employment, or if the employee used the leave for more than two consecutive scheduled shifts. If the employee fails or refuses to provide verification as required by the employer, the employer may deny a subsequent request for leave for the same reason.

Can an employee make up lost time from work by trading shifts or working additional time, instead of using earned sick and safe leave?

Yes, in most cases, provided that the arrangement is by mutual consent of the employee and the employer, and the time is made up **either in the same pay period or the following pay period**. Lost time from work for sick and safe leave cannot be made up in any other subsequent pay period, in lieu of using the earned leave time. Special rules about making up time by covering of a different shift apply to tipped restaurant employees.

Do employees have to be paid for accrued sick and safe leave upon termination?

No. However, in accordance with the Maryland Wage Payment and Collection Law, employers should have a written policy communicating the forfeiture rules for this and other forms of accrued but unused leave, and should give that policy to employees at the inception of their employment. Also, a special rule applies to employees whose company is acquired by another company, and who remain employed after the acquisition. Those employees must be allowed to retain their accrued sick and safe leave.

Employers may allow employees to use unearned sick and safe leave before it accrues. In that case, any overdrawn leave time taken by the employee may be deducted from the employee's final wages, provided that the employee has agreed to such deduction in writing.

May employers discipline employees who abuse sick and safe leave?

Yes, if the employee has a policy prohibiting abuse. Employers may also have a policy prohibiting employees from taking unearned sick and safe leave.

Employers are prohibited from taking any adverse action against an employee who exercises rights under the new law.

At what rate must the employee be paid for sick and safe leave?

When paid leave is required, the employee must be paid at the same wage rate that the employee normally earns. For tipped employees, the employee must be paid the applicable minimum wage. The law is silent as to commissioned employees who do not earn a regular wage.

What are the consequences for employers that do not comply?

An employer that fails to keep accurate records for three years, or refuses to allow the Department of Labor, Licensing and Regulation (DLLR) to inspect records kept under this law will be presumed to have violated this law.

An employee may file a written complaint of a violation of this law with the DLLR. If the DLLR finds a violation, and is unable to reach informal resolution, the agency may issue an order that describes the violation, and directs payment for the leave and economic damages. The DLLR may also direct the payment of up to three times the value of the employee's hourly wage, and may also assess a civil penalty of up to \$1,000 for each employee for whom the employer is noncompliant.

If the employer does not comply with the DLLR order within 30 days, the agency may bring suit in court. In addition, the employee may bring suit in court to enforce the DLLR order. If the employee's court action is successful, the court may award three times the value of the unpaid leave, punitive damages, attorneys' fees and costs, and may order injunctive relief or other relief as appropriate.

What should employers do now?

Maryland employers should take steps now to prepare for the new law, in case the February 11, 2018 effective date is not extended.

- Review your existing sick leave, paid time off and absence policies, and prepare amendments to ensure that they are in compliance with the new law.
- Make sure all employees are earning sick and safe leave or the equivalent paid leave time, either in a lump sum at the beginning of the calendar year, or payroll-by-payroll.

- Review payroll, recordkeeping and administrative procedures to ensure that sick and safe leave accrual and usage (or other leave that is at least equivalent) is being tracked.
- Prepare to issue notice to employees about the new law, and to post the required poster in the workplace (when the DLLR issues the poster, which it has not yet done).
- Employers who accrue paid leave time on an anniversary year basis should consider converting to a calendar year basis to simplify compliance with the new law.
- Employers who accrue paid leave time on a payroll-by-payroll basis should consider whether to switch to an accrual system that provides for a lump-sum accrual at the beginning of the calendar year, in order to avoid the requirement to carryover unused sick and safe leave from year to year.

How does the new law impact employers in Montgomery County?

Please note that employers who have employees in Montgomery County must comply with the requirements of **both** the state and local sick and safe leave laws. There are some variations, such as in the number of sick and safe leave hours allowed, the accrual rules, and the reasons for which the leave can be used. You will need to review your policies in light of both laws.

How does the new law impact employers with more than 50 employees, who are covered under the Family and Medical Leave Act (FMLA)?

Employers with 50 or more employees **must comply with both the FMLA and the new law**, although there is some overlap. To the extent that employees are granted paid sick and safe leave under the new law for reasons that also qualify for leave under the FMLA, such leave should be counted toward the employer's obligations under both laws.

How does the new law impact employers with 15-49 employees, who are covered under the Maryland Parental Leave Act?

Employers must comply with **both** laws. There is some overlap between the two laws. The new law provides paid parental leave for some employees, while the Maryland Parental Leave Act provides only unpaid leave, but contemplates a potentially longer leave period of up to six weeks. Employers should count any overlapping leave time toward their obligations under both laws.

This guidance is for informational purposes only, and does not constitute legal advice. Legal advice can only be rendered based on the individual circumstances of your situation. If you wish to obtain legal advice, contact us at 410.415.0082 or jjanofsky@mdcounsel.com.