

## **Maryland, District of Columbia Pass New Employee Leave Laws**

**August 1, 2008**

Continuing a trend of state and local jurisdictions imposing new paid leave requirements on employers, Maryland and the District of Columbia each recently passed legislation that significantly expands the right of employees to take paid leave. The District of Columbia joins San Francisco as the only jurisdictions that require employers to provide paid sick leave. Maryland joins California, Maine, Minnesota, New Jersey, and Washington State in requiring or regulating paid family leave.

### **MARYLAND FLEXIBLE LEAVE ACT**

On May 22, 2008, Maryland Governor Martin O'Malley signed the Flexible Leave Act into law. The act takes effect October 1, 2008.

#### **Which Employers and Employees Are Covered?**

The act covers employers with 15 or more employees in Maryland, and only applies to employers that already provide some form of paid leave. Unlike the federal Family and Medical Leave Act (FMLA), this law contains no eligibility requirements; therefore, all employees are covered under the law. Although the definitions are somewhat vague, we believe the act will only apply to employees working in Maryland.

#### **What Does the Law Require?**

Beginning on October 1, 2008, covered employers in Maryland must allow employees to use any form of earned paid time off to care for an immediate family member due to an illness. (Unlike employers in the District of Columbia, Maryland employers are not required to provide paid sick leave.) The law applies to any form of paid leave, including vacation, sick leave, and compensatory time. Employees who earn more than one type of accrued paid leave may choose the type and amount of leave they want to use.

Employees may use any form of paid leave to care for the illness of an "immediate family member." The law defines "immediate family member" as a child, spouse, or parent, but does not further define the terms "child" and "illness." Notably, the bill, as enacted, did not adopt the language of an earlier version that was limited to the care of minors or disabled children.

## **When Can an Employee Use Paid Family Leave?**

Employees may begin to use paid family leave as soon as the law goes into effect. The Maryland Attorney General's Office has interpreted the law as applying to any request for paid leave to be taken after October 1, 2008, regardless of when the paid leave was accrued.

## **Other Provisions of the Act**

### *Verification and Other Limitations on the Use of Family Leave*

As enacted, the law provides no mechanism for employers to verify the validity of the employee's qualifying reason. Moreover, there is no limit on how much paid leave an employee may use once it is accrued under the terms and conditions of the employer's leave policies.

### *Existing Leave Policies*

The statute explicitly states that it does not excuse an employee from any obligations that were created under the terms of a collective bargaining agreement or other employment policies. Thus, an employer may still implement and enforce call-in requirements or any other terms and conditions of leave that are not inconsistent with the law. The Maryland law has no impact on an employee's right to take 12 weeks of unpaid leave under the federal FMLA; however, paid leave taken pursuant to the Maryland law should run concurrently with FMLA leave in most circumstances.

## **WASHINGTON, D.C. ACCRUED SICK AND SAFE LEAVE ACT**

On March 4, 2008, the D.C. City Council passed the Accrued Sick and Safe Leave Act. The act was signed by Mayor Adrian Fenty on March 20, and approved by Congress on May 13. It will take effect November 13, 2008.

## **Which Employers and Employees Are Covered?**

### *Covered Employers*

All companies who have employees in the District of Columbia are covered. An employer may avoid the obligations of this law only by seeking a hardship exemption from the Mayor's Office. As with the Maryland law, we believe the District of Columbia act will only apply to employees working in the District of Columbia.

### *Covered Employees*

The law is ambiguous as to when an employee becomes eligible to take the leave created by the act. According to the act, individuals would begin accruing paid leave on their first day of employment and may begin to use the leave after 90 days of work. However, the act also adopts the definition of "employee" found in the DC Family Medical Leave Act (DCFMLA); under that definition, a person must have worked at least 1,000 hours during the 12-month period immediately preceding the request for leave. Thus, the act's definition of "employee" could be read to render the 90-day requirement superfluous. A cautious reading of the statute would require an employer to provide the mandated leave after an employee has worked for 90 days.

Independent contractors, students, healthcare workers who choose to participate in premium pay programs, and restaurant waitstaff who work for tips are specifically not covered by this act.

## **What Is the Required Paid Sick Time Benefit?**

### *Rate of Accrual*

The amount of leave employers are obligated to provide varies, depending on the size of the company:

- Employers with 100 or more employees are required to provide one hour of paid leave for every 37 hours worked, not to exceed seven days per calendar year.
- Employers with 25 to 99 employees must provide one hour of paid leave for every 43 hours worked, not to exceed five days per calendar year.
- Employers with fewer than 25 employees must provide one hour of paid leave for every 87 hours worked, not to exceed three days per year.

Fair Labor Standards Act (FLSA)-exempt employees will not accrue leave for any hours worked beyond a 40-hour workweek. The act is silent as to whether this limit applies to nonexempt employees.

### *Accrual Limitations and Forfeiture*

Unused leave carries over annually, but an employer is never obligated to provide more leave than the required statutory maximum for an employer of its size.

Employers are not required to compensate employees for accrued but unused paid sick time when their employment ends.

## **When Can Employees Use the Paid Sick Time Benefit?**

### *Qualifying Reasons*

Under the act, employees may use the paid leave for absences resulting from any of the following:

- Physical or mental illness, injury, or mental condition of the employee; the employee's spouse, domestic partner, or child; or any other family member of the employee
- Preventive medical care for the employee; for the employee's spouse, domestic partner or child; or for any other family member of the employee
- Absences related to obtaining social, legal, or medical services for the employee; for the employee's spouse, domestic partner, or child; or for any other family member of the employee who was the victim of stalking, domestic violence, or sexual abuse

### *Notice or Other Action by the Employee*

The act places certain burdens on employees seeking to use the paid leave. If the need for paid leave is foreseeable, employees must provide a written request at least 10 days in advance of the proposed leave, or as early as possible. If the need for leave is unforeseeable, employees must make an oral request for leave prior to the start of their shift.

### *Verification of Qualifying Reason*

An employer may require an employee taking paid leave for three or more consecutive days to provide certification in support of that leave. Employees requesting leave under the stalking, domestic violence, or sexual abuse provisions may be required to provide a police report, court order, or signed statement from a victim and witness advocate or domestic violence counselor.

### **Other Requirements of the Law**

#### *Posting*

Employers are required to post a notice containing pertinent information about the act and are prohibited from discriminating or retaliating against employees who use paid leave or who file a charge or institute a proceeding under the act. The mayor's office has not yet issued the notice.

#### *Existing Paid Leave and Benefit Policies*

Employers that already provide more generous paid leave policies are not required to alter or amend those policies, provided that the rate at which such leave is accrued is at least the same or greater, and is being used for the same purposes set forth in the statute.

#### *Penalties for Violation of the Act*

Willful violations of the paid sick leave law could result in a civil penalty of \$500 for the first offense, \$750 for the second offense, and \$1,000 for the third offense.

### **PRACTICAL IMPLICATIONS OF THESE NEW LAWS**

Companies that have employees in Maryland or the District of Columbia will likely want to do some or all of the following:

- Review benefit policies and programs to determine whether they satisfy the new laws.
- Evaluate the costs of adjusting benefit policies and programs to comply with these new laws in comparison to the costs of simply providing the benefits required under these statutes.
- Consider, as a matter of employee relations, whether to expand the benefits provided by the laws to employees outside the relevant jurisdictions. This is especially important for companies that have employees in the District of Columbia and in neighboring states.
- Review existing arrangements with staffing and temporary agencies to identify and evaluate the effects of the laws on existing contracts; specifically, who will bear the costs of compliance.
- Review record-keeping forms and practices for compliance, and communicate the requirements of the new laws to affected managers and supervisors.

These new laws exemplify a growing trend in state and local regulation to provide for paid sick and family leave. Over the next few years, we expect to see similar legislation introduced at both the federal and state levels.

If you would like more information concerning the Maryland Flexible Leave Act, the District of Columbia's Accrued Sick and Safe Leave Act, or any issue raised in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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