What next? A primer on HB 1 compliance from Shawe Rosenthal

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Editor's note: The Department of Labor, Licensing and Regulation has posted initial guidance.

On January 12, 2018, the Maryland General Assembly overrode Governor Hogan's veto of 2017's mandatory paid leave law, House Bill 1. Therefore, Maryland employers are now required to provide paid leave to employees. As of now, per state legislative guidelines, this law will take effect on February 11, 2018, though the Maryland Chamber plans to request an extension.

What Should Maryland Employers Do?

Maryland employers should plan to review any existing sick leave or PTO policies to ensure that they comply with the very technical requirements of this new law. Or if an employer does not yet provide such leave, it should develop the appropriate sick leave policies and procedures in advance of the law's effective date.

Although the DLLR will be issuing regulations and model documents to assist employers in complying with the law, it is unclear if these will be released prior to the current effective date of February 11, 2018.

The following is a summary of the new law's detailed requirements and obligations:

Purpose of Leave:

The employee may use leave for the following reasons:
• To care for or treat the employee's own mental or physical illness, injury, or condition.
• To obtain preventive medical care for the employee or family member.
• To care for a family member's mental or physical illness, injury, or condition.
• For maternity or paternity leave.
• For absences due to domestic violence, sexual assault, or stalking during the employee's relocation or to obtain for the employee or family member:
o Medical or mental health attention;
o Services from a victim services organization; or
o Legal services

Which Employers Are Covered:

All Maryland employers are covered by this Act, although those with under 15 employees will need to provide only unpaid time off for leave purposes. The number of employees is calculated by using the average monthly number of all employees (including full-time, part-time, temporary, and seasonal) employed during the immediately preceding 12 months.

Notably, the definition of "employer" includes "a person that acts directly or indirectly in the interest of another employer with an employee." Based on similar definitions in other laws, this means that owners and managers can be sued individually under the Act.

Which Employees Are Covered:

All employees are covered except for the following:
• Those who regularly work less than 12 hours a week for an employer.
• Construction industry employees who are covered by a collective bargaining agreement that expressly waives the right to leave under this Act. (Such employees do not include janitors, cleaners, security officers, concierges, doorpersons, handypersons, or building superintendents – who are entitled to the benefits of the Act).
• Those working on an as-needed basis in the health or human services industry, as long as they (1) can reject the shift offered by the employer, (2) are not guaranteed work by the employer, and (3) are not employed by a temporary staffing agency.
In addition, the following persons are not considered "employees" and are therefore not entitled to leave under the Act:
• Independent contractors, under the test set forth in Maryland unemployment insurance law (i.e. the "ABC" test).
• Licensed real estate salespersons or brokers, or those affiliated with a licensed broker by written agreement, who are paid solely on commission, and who qualify as independent contractors for federal tax purposes (which is a different test than under state law).
• Those under the age of 18 before the beginning of the year.
• Agricultural employees processing crops or working for a farmer in the production, harvesting or marketing of product.
• Temporary staffing agency employees, if the agency does not have day-to-day control over their work assignments and supervision.
• Employment agency employees providing part-time or temporary services to another person.

Which Family Members Are Covered:

The law applies a broad definition of various family members, including the following:
• Spouse.
• Child, including biological, foster, adopted, or step, as well as one for whom the employee has legal or physical custody or guardianship, or stands in loco parentis (i.e. acts as the parent, regardless of the legal relationship).
• Parent, including biological, foster, adopted, or step for the employee or the employee's spouse, as well as one who was the legal guardian of or stood in loco parentis to the employee or employee's spouse.
• Grandparent, including biological, foster, adopted, or step, of the employee.
• Grandchild, including biological, foster, adopted, or step, of the employee.
• Sibling, including biological, foster, adopted, or step, of the employee.

Accrual and Carryover of Leave:

Leave accrues at a rate of at least 1 hour for every 30 hours worked. Exempt employees are assumed to work 40 hours in a workweek, unless they are regularly scheduled for fewer hours, in which case their regularly scheduled hours are used. Tipped employees receiving paid leave must be compensated at the minimum wage rate, which will be $9.25 at the time that the law becomes effective.

The employer may choose the 12-month period that constitutes a "year" for purposes of this Act. The amount of leave that may be earned per year is capped at 40 hours (five 8-hour days). The total amount of leave that may be accrued (including carryover, as explained below) may be capped at 64 hours (eight 8-hour days). The total amount of leave that may be used by an employee may be capped at 64 hours per year.

No accrual of leave is required: (1) during a two-week pay period in which the employee worked fewer than 24 hours; (2) during a one-week pay period in which the employee worked fewer than 24 hours in the current and immediately preceding pay period; or (2) during a semi-monthly pay period in which the employee worked fewer than 26 hours.

An employer may make available to the employee the full annual allotment of leave at the beginning of the year. If it does not do so, it must permit carryover of the balance of any unused leave to the next year, up to a maximum of 40 hours.

Accrual commences upon hire, but an employer may prohibit the use of leave during the initial 106 calendar days of employment.

Borrowing and Termination:

An employer may, but is not required to, permit an employee to "borrow" leave that has not yet been accrued. If the employee terminates employment before the borrowed leave has been accrued (and therefore paid back), the employer may deduct the advanced amount of leave from the employee's final paycheck only where there is a written, signed authorization by the employee to allow the employer to do so.

Accrued unused paid leave need not be paid out upon termination.

If an employee is rehired within 37 weeks, the employer must reinstate the bank of unused leave unless it was paid out upon termination.

If an employer acquires another company and retains employees from that company, the employees retain the leave accrued under the prior company.

Notice and Use of Leave:

If the need for leave is foreseeable, the employee can be required to provide up to seven days of notice. If it is not foreseeable, the employee must provide notice of the need for such leave as soon as practicable and must comply with the employer's notice requirements for absences, as long as those requirements do not interfere with the ability to use leave.

The employer may deny the use of leave if the employee fails to provide the required notice and the absence will cause a disruption.

There is also a specific provision for private employers providing services to developmentally disabled or mentally ill individuals: leave may be denied if the need for leave is foreseeable, the employer is unable to find a suitable replacement for the employee despite reasonable efforts, and the absence will cause a disruption in service to at least one disabled or mentally ill individual.

The employer cannot require the employee to look for or find a replacement worker. The employer and employee may mutually agree for the employee to work additional hours or trade shifts during the current or following pay period to make up hours in lieu of taking leave. (We note, however, that if the hours are made up in the following week and this results in the employee working more than 40 hours in that week, overtime payment will be required). The employer is not required to consent to a request to work additional hours or trade shifts if it would result in the payment of overtime to the employee.

There is a specific provision for tipped employees working in restaurants. If such an employee would prefer to work additional hours or trade shifts in the current or following pay period, and this would require the employer

to find coverage, then the employer may offer the employee the choice of receiving leave (at the minimum wage rate) or working the equivalent number of additional hours in the same or following pay period. If the employer decides not to offer the choice to the employee, then leave must be paid.

The employee may use leave in the smallest increments used by the employer's payroll system to account for absences or work time, except that the employee may be required to take leave in an increment not exceeding four hours.

Verification:

An employer can request verification of the appropriate use of leave if an employee uses more than two consecutive scheduled shifts of leave. Verification may also be required if the employee uses leave between the 107th through 120th calendar days after beginning employment, on terms that the employee agreed to at the time of hire.

If the employee fails to provide the verification, subsequent requests to take leave for the same reason may be denied.

Employer's Notice and Recordkeeping Requirements:

Each time wages are paid, the employer must provide a written statement of available leave. This requirement may be satisfied through an electronic system where the employee can access their leave balances.

An employer must also provide notice to employees that they are entitled to leave. This notice must include the following:
• A statement of how leave is accrued.
• The permitted uses of leave.
• A statement (1) that the employer must not take adverse action because an employee exercises rights under this Act, and (2) that the employee may not, in bad faith, make a complaint, bring an action, or testify in an action.
• Information about the employee's right to report alleged violations to the Commissioner of the Maryland Department of Licensing and Labor Regulation (DLLR) or to bring a civil action against the employer.
The DLLR will be creating a poster and model notice, as well as a model policy. We will alert you when the model documents are available.

Employers must also keep for at least three years records of the leave accrued and used by each employee. Failure to keep these records creates a rebuttable presumption that the employer has violated the Act. These records must be available for inspection by the DLLR.

Prohibited Actions and Enforcement:

Employers may not take adverse action (defined as discharge, demotion, threatening discharge or demotion, or any other retaliatory action that results in a change to the employee's terms and conditions of employment) against employees for exercising in good faith their rights under the Act. Nor may they interfere with, restrain or deny the employees' exercise of rights. In addition, employers may not count leave against an employee under an absence policy. Employers may, however, prohibit the improper use or a pattern of abuse of leave.

An employee can file a written complaint of violation with the commissioner of the DLLR. The DLLR will investigate within 90 days and attempt to resolve any issue informally through mediation. If the commissioner finds a violation and is unable to reach informal resolution, the commissioner will issue an order that describes the violation and directs payment for the leave and economic damages. The commissioner may also (but is not

required to) 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 $1000 for each employee for whom the employer is noncompliant.

If the employer does not comply with the commissioner's order within 30 days, the commissioner may bring an action against the employer on behalf of the employee and may also bring an action to seek enforcement of any civil penalty order. In addition, the employee may bring a civil action in court to enforce the commissioner's order within three years after the date of the order. If the employee's court action is successful, the court may (but is not required to) award three times the value of the unpaid leave, punitive damages, attorneys' fees and costs, and may order injunctive relief or other relief as deemed appropriate.

An Employer's Existing Policy:

An employer may continue with a paid leave policy that (1) meets the minimum accrual and usage requirements of this law, or (2) does not reduce compensation for an absence due to sick or safe leave. The paid leave may include vacation, sick, short-term disability benefits, floating holidays, parental leave, or any other paid time off that may be used for leave purposes.

County Laws:

Notably, for employers that are already required to comply with Montgomery County's Earned Sick and Safe Leave Act, the state law expressly does not preempt any local law that was passed prior to January 1, 2017, which Montgomery County's law was. Thus, employers in Montgomery County must comply with the requirements of both the state and local laws – and there are differences as to which family members are covered, the purposes for using leave, and verification procedures, among other things.

Of note, Prince George's County recently passed its own Earned Sick and Safe Leave Act. However, because it was passed after January 1, 2017, it is preempted by the new state law.

Unionized workers:

The Maryland Healthy Working Families Act contains a provision that provides relief for some employers with existing collective bargaining agreements (CBAs), for the term of the agreement. Specifically, the law states "That this Act. . . may not be applied or interpreted to have any effect on or application to any bona fide collective bargaining agreement entered into before June 1, 2017, for the duration of the contract term, excluding any extensions, options to extend, or renewals of the term of the original agreement."

As originally intended, the language would have exempted all current CBAs upon the passage of the bill last General Assembly session. Due to Governor Hogan's veto of the bill and the delay until the recent veto override by the General Assembly, there is now a gap – so that companies that entered into a CBA on or after June 1, 2017 are required to come into compliance with the law upon its effective date of February 11, 2018.

Unionized employers with pre-June 1, 2017 CBAs should be aware that compliance will be required immediately upon expiration of the current contract, regardless of any extensions or renewals of the contract.

In addition, we would like to note that the law contains an exception specific to construction industry employees who are covered by a bona fide CBA in which the requirements of the law are expressly waived in clear and unambiguous terms. (By the terms of the law, "construction employees" do not include janitors, cleaners, security officers, concierges, doorpersons, handypersons, or building superintendents – who are entitled to the benefits of the law). This waiver exception is not available to any other unionized employers, who will be required eventually to comply with the law – whether now or at the end of their contract term.

If you have any questions about this information or would like to speak with a Shawe Rosenthal attorney, please contact shawe@shawe.com or 410-752-1040. If you would like to subscribe to Shawe Rosenthal's e-communications, please contact Liam Preis at lp@shawe.com.

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