HB 985

Department of Legislative Services

Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

House Bill 985 (Delegate Kelly)
Economic Matters

Labor and Employment - Family and Medical Leave Insurance Program - Establishment

---

This bill establishes a Family and Medical Leave Insurance (FAMLI) program administered by the Division of Unemployment Insurance (DUI). The program generally provides up to 12 weeks of benefits, ranging from $50 to $700 in weekly benefits, to an employee who is taking paid or unpaid leave from employment due to caring for specified family members, the employee's own serious health condition, or a qualifying exigency arising out of a family member's military deployment. The weekly benefit is 66% of the highest total amount of wages earned by the covered employee in one week during the base period, subject to the $700 cap. The bill establishes the FAMLI Fund, which consists of employer and employee contributions based on an employee's wages to be used to pay benefits and for public education on the program.

The bill takes effect June 1, 2015, and applies only prospectively and may not be interpreted to have any effect on or application to any collective bargaining agreement entered into before its effective date.

Fiscal Summary

State Effect: Special fund revenues increase significantly beginning in FY 2016 from the FAMLI Fund receiving employer and employee contributions on employees' wages. General fund revenues initially decrease in FY 2016 due to increased payroll expenses generating less tax revenue, then may increase beginning in FY 2018 as a result of taxing FAMLI benefits. Expenditures increase (all funds) significantly beginning in FY 2016 as a result of the State paying the employer's portion of the FAMLI contribution rate on State employees' wages (federal fund revenues increase to offset the federal share). General fund expenditures increase significantly beginning in FY 2016 for the Department of Labor, Licensing, and Regulation (DLLR) to develop, administer, and enforce the FAMLI program. The Comptroller's Office incurs one time start-up costs. Beginning in FY 2017, special fund expenditures increase significantly to pay covered employees' benefits; expenditures (all funds) may also increase to provide coverage for State employees taking FAMLI leave.

Local Effect: Local government expenditures increase significantly as a result of local jurisdictions paying the employer's portion of the FAMLI contribution rate on wages beginning in FY 2016 and from local government employees taking FAMLI leave beginning in FY 2017. Local income tax revenues initially decrease in FY 2016 due to increased payroll expenses generating less tax revenue, then may increase beginning in FY 2018 as a result of taxing FAMLI benefits. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary: A covered employee is an employee who has earned at least $1,800 in wages during the first four of the last five completed calendar quarters immediately preceding the start of an application year or, if an employee does not meet that qualification, the four most recently completed calendar quarters immediately preceding the start of an application year.

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 notify the Secretary of Labor, Licensing, and Regulation in writing of the individual's withdrawal from the program within 30 days before the participation period expires. A self-employed individual participating in the program must pay only the employee portion of the required wage contribution.

Administration

The Secretary of Labor, Licensing, and Regulation may delegate powers to an employee of DLLR that are necessary to administer the program. A DLLR employee may not disclose information pertaining to an individual who has applied for or received FAMLI benefits, except in specified circumstances. The Secretary must:

- adopt regulations to implement the bill by October 1, 2015, 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 to educate the public about available benefits; 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, Licensing, and Regulation 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, 2015. An agreement by an employee to waive the employee's FAMLI rights is void.

FAMLI Fund

The bill establishes the FAMLI Fund, which is a special fund administered by the Secretary of Labor, Licensing, and Regulation. It consists of employer and employee 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. The State Treasurer is the custodian of the FAMLI Fund, and the bill specifies how the Treasurer must manage the fund. An employer or employee does not have any prior claim or right to money that the employer or employee pays into the fund.

Contributions

Beginning on ***January 1, 2016***, each employee and employer must pay to the Secretary of Labor, Licensing, and Regulation contributions on wages, which are established in regulation. Both the employer and the employee must pay 50% of the contribution rate, and the contribution rate established in regulations must be sufficient to fund the FAMLI benefits.

Benefits

Beginning on ***January 1, 2017***, to be eligible for benefits, a covered employee must be taking paid or unpaid leave from employment (1) to care for a newborn child or a child newly placed for adoption or foster care with the employee; (2) to care for a family member with a serious health condition; (3) because the employee has a serious health condition and is unable to perform the functions of the employee's position; (4) to care for a next-of-kin service member; or (5) because the employee has a qualifying exigency arising out of the employee's family member's deployment, as defined by the bill.

A "family member" includes:

- a child;
- a parent;
- a parent-in-law;
- a grandparent or step-grandparent of an employee or the employee's spouse or domestic partner;
- a grandchild or step-grandchild of an employee or the employee's spouse or domestic partner;
- a spouse;
- a domestic partner;
- a sibling;
- the spouse or domestic partner of a sibling; and
- any other individual related by blood or affinity whose close association with the employee is equivalent to a family relationship.

A covered employee may not receive more than 12 weeks of benefits in an application year, except under specified circumstances. A covered employee may take eligible leave on an intermittent leave schedule under specified conditions. Unless the intermittent leave schedule is medically necessary, an employer is not required to allow an intermittent leave schedule for more than 24 consecutive weeks.

A covered employee may not be paid benefits for the first 5 consecutive calendar days after the covered employee becomes eligible for benefits, unless the covered employee has used at least 10 days of paid or unpaid leave during the application year or has already undergone the waiting period in the same application year. A covered employee may not be paid benefits for less than one day or eight consecutive hours of leave taken in one workweek.

The weekly benefit payable to a covered employee ranges from a minimum of $50 to a maximum of $700, based on 66% of the highest total amount of wages earned by the covered employee in one week during the base period. DUI must pay benefits to a covered employee within two weeks after the claim is filed and make subsequent payments every two 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 employee is receiving FAMLI benefits or is taking leave that fulfills the required waiting period, the employer must continue any employment benefits in the same manner as required under FMLA for the time that the covered employee is absent from work and receiving FAMLI benefits.

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.

DUI may seek repayment of benefits from an individual who received benefits in error or as 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 repayment would be against equity and good conscience.

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

Current Law:

Federal Family and Medical Leave Act of 1993

FMLA 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 Flexible Leave Act

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

A firm with 15 to 49 employees is 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. An eligible employee does not include an independent contractor or an individual who is employed at a work site at which the employer employs fewer than 15 employees if the total number of employees employed by that employer within 75 miles of the work site is also fewer than 15. An eligible employee has to provide the employer with 30-day prior notice of parental leave. However, prior notice is not required if the employee takes leave because of a premature birth, unexpected adoption, or unexpected foster placement.

Unemployment Insurance

Unemployment insurance provides temporary, partial wage replacement benefits to persons 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 the 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.

Background: Three states, California, New Jersey and Rhode Island, provide paid family and medical leave to employees. The programs are funded through employee-paid payroll taxes and are administered by their disability programs. Washington passed a paid family leave law in 2007, which was to take effect in October 2009, but subsequent legislation has indefinitely postponed its implementation.

The California Paid Family Leave Insurance Program provides up to six weeks of paid leave to care for a seriously ill child, spouse, parent, parent-in-law, grandparent, grandchild, sibling, or registered domestic partner, or to bond with a new child. The benefit amount is approximately 55% of an employee's weekly wage, ranging from a minimum of $50 to a maximum of $1,104. In fiscal 2013, 215,830 claims were filed and the program paid $554.1 million in benefits.

The New Jersey Family Leave Insurance Program provides six weeks of benefits to bond with a new child or to care for a family member. For claims beginning January 1, 2014, the weekly benefit rate is two-thirds of an employee's weekly wage, up to $595. As of January 1, 2014, the maximum yearly deduction for Family Leave Insurance is $31.50 and is based on a taxable wage base of $31,500.

The Rhode Island Temporary Disability Insurance/Temporary Caregiver Insurance Program provides 4 weeks of paid leave for the birth, adoption or fostering of a new child or to care for a family member with a serious health condition and up to 30 weeks of paid leave for a worker's own disability. Benefits range from a minimum of $84 and a maximum of $770 per week, based on earnings. The current withholding rate as of January 1, 2015, is 1.2% of an employee's first $64,200 in earnings. Rhode Island paid out $7.1 million in temporary caregiver benefits in 2014 (the program's first year) and $162.6 million in temporary disability benefits.

State Revenues:

FAMLI Fund Revenues

Special fund revenues increase significantly beginning in fiscal 2016 as a result of DUI collecting employer and employee contributions from employees' wages. The contribution rate is to be set in regulations and must be sufficient to cover benefits paid. Thus, it is unknown by how much special fund revenues increase. *For purposes of illustration*, if the contribution rate is set at 1%, based on wages and salaries reported on State tax returns in 2011, State special fund revenues increase by $1.4 billion. Additionally, FAMLI Fund revenues increase from interest earned on money in the fund and from any repayments of benefits paid in error.

Income Tax Revenues

State income tax revenues increase beginning in fiscal 2018 by approximately 4.75% of benefits paid out in tax year 2017 that the Internal Revenue Service deems taxable. This may be partially offset by decreased tax revenues since employers can deduct the payroll tax from their taxable income. The Department of Legislative Services (DLS) assumes benefits paid as a result of the employee's serious health condition would be nontaxable while all other benefits would be taxable. Additionally, since the bill only specifies provisions relating to withholding federal income taxes from benefits, DLS assumes State and local income tax revenues from benefits are received in the following year when an individual files his or her tax return.

Federal Fund Revenues

Federal fund revenues may increase beginning in fiscal 2016 to offset the employers' contribution on wages for certain State employees like senior citizen aides.

State Expenditures:

Administration

DLLR currently collects payroll taxes for unemployment insurance; however, those funds cannot be used for any purpose other than unemployment insurance. Thus, to implement the FAMLI program, DUI must create a new program without utilizing existing resources and staff. DUI must develop a tax structure, payment structure, complaint and investigative structure, and require the imposition of both an employer and employee contribution.

Employers include all employers in the State, not just the employers covered under the Maryland unemployment insurance program and covered employees include all employees earning at least $1,800 annually. Thus, the scope of the bill is much greater than employees and employers included in unemployment insurance. The U.S. Department of Labor reports that 13% of all employees took FMLA leave in 2011, about double the proportion of employees who submitted initial unemployment insurance claims, so the scope of the program may be quite large. DUI advises it would incur $10.3 million in implementation costs and an additional $57.9 million for annual ongoing operations. This estimate includes $34.9 million for salaries and fringe benefits for approximately 600 employees.

DLS concurs that implementing the FAMLI program requires a significant increase in resources for DUI. Assuming a one-month implementation delay, DLLR employees are needed to set up the program beginning in fiscal 2016, and more DLLR employees will be needed to process and investigate claims and for assistant Attorneys General to enforce civil actions once covered employees start claiming benefits in fiscal 2017.

DLLR estimated the cost of implementing the bill based on the costs it incurs to administer unemployment insurance because administering unemployment insurance is similar to administering the FAMLI program. However, DLS assumes fewer than 600 employees may be needed because there will likely be fewer FAMLI claims than unemployment insurance claims. California and Rhode Island both receive about one-third as many FAMLI claims as unemployment insurance claims. If the ratio of FAMLI claims to unemployment insurance claims in the State is similar to California and Rhode Island, DUI may be able to implement FAMLI with fewer resources. However, based on Rhode Island's experience implementing its Temporary Disability Insurance/Temporary Caregiver Insurance Program, DLS estimates that DUI requires *at least* 300 employees to implement the FAMLI program. DLS notes that none of the other three states administers its programs through its unemployment insurance program.

The Central Payroll Bureau (CPB) must create new programs, processes, and procedures to calculate the State's portion of the FAMLI contribution for State employees. Expenditures increase by $114,400 for CPB to calculate and send the employer and employee portions to the Secretary of Labor, Licensing, and Regulation. The Comptroller's Office notes it would have difficulties implementing the FAMLI contributions by January 1, 2016. Thus, CPB may require additional resources to enable a January 1, 2016 implementation date for required contributions to the fund.

The Treasurer's Office reports it can create and manage the FAMLI account with existing resources.

Employer Contributions

Expenditures (all funds) increase significantly as a result of employers paying 50% of the FAMLI contribution rate on employees' wages beginning on January 1, 2016. The contribution rate is to be set in regulations, and it must be sufficient to cover benefits paid. Thus, it is unknown by how much expenditures increase. *For purposes of illustration*, if the contribution rate is set at 1%, State expenditures increase by almost $40 million annually to provide the employer's half of contributions.

FAMLI Fund Expenses

DUI must make benefit payments to eligible covered employees beginning on January 1, 2017. It is unknown how much in benefits will be paid to covered employees because it depends on the number of employees claiming FAMLI benefits, the wages of those employees, and the number of days that employees take leave. However, the rate of FAMLI contributions must be sufficient to cover the benefits payable. *For purposes of illustration*, if the amount of FAMLI benefits is proportionate to the amount of benefits paid out to employees in Rhode Island, DLS estimates the FAMLI fund paying employees approximately $1.02 billion annually beginning on January 1, 2017. Additionally, special fund expenditures increase beginning in fiscal 2016 to pay for a FAMLI public education program.

Leave

The Department of Budget and Management reports that the bill conflicts with 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. The University System of Maryland reports Contingent Category I employees, which consists of temporary adjunct faculty and student employees, do not receive any leave benefits. Many of these employees have annual earnings of at least $1,800 and, thus, could be covered employees eligible to take leave.

Local Revenues: Local income tax revenues increase beginning in fiscal 2018 by approximately 3% of the amount of taxable benefits paid out in tax year 2017. This may be potentially offset by decreased tax revenue since employers can deduct the payroll tax from their taxable income.

Local Expenditures: Local jurisdictions incur significant costs as a result of employers paying 50% of the FAMLI contribution rate. Since the contribution rate will be established in regulations, it is unknown how much local jurisdictions will have to contribute, but it could be significant. For instance, if the FAMLI payroll tax is set at 1% of wages, Montgomery County's expenditures increase by more than $5 million annually to pay the county's 50% portion on over $1 billion of personnel expenditures and Takoma Park expenditures increase by $50,000 to pay the city's 50% portion on employees' wages.

Additionally, to the extent that employees take more leave, the FAMLI program may overburden other employees and create additional personnel expenses for overtime costs for local jurisdictions.

Small Business Effect: The bill has a significant impact on small businesses. Based on U.S. Census data, DLS estimates private-sector employers, a portion of which are small businesses, could contribute over $500 million annually for the employer's portion of contributions if the contribution rate is set at 1%.

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 FAMLI, more employees may take leave and take leave for longer periods of time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Montgomery County; Baltimore City; City of Takoma Park; Office of the Attorney General; Department of Budget and Management; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Maryland Association of Counties; Maryland Municipal League; Maryland Department of Transportation; Maryland State Treasurer's Office; University System of Maryland; U.S. Department of Labor; California Employment Development Department; New Jersey Department of Labor; Rhode Island Department of Labor and Training; National Conference of State Legislatures; Department of Legislative Services

Fiscal Note History: First Reader - March 8, 2015
md/mcr

Analysis by: Heather N. Ruby

Direct Inquiries to:
(410) 946-5510
(301) 970-5510