

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 135
Finance

(The President)(By Request - Administration)

Paid Leave Compromise Act of 2018

This emergency Administration bill requires an employer with 50 or more employees to provide each employee with paid time off that can be used for any reason beginning January 1, 2018. Beginning January 1, 2019, an employer with 40 or more employees must provide each employee with paid time off, and beginning January 1, 2020, an employer with 25 or more employees must do so. The paid leave must accrue at the rate of at least 1 hour of paid leave, at the same rate as the employee normally earns, 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 paid time off in a year, use more than 64 hours of paid time off in a year, accrue more than 64 hours of paid time off at any time, or use paid time off during the first 120 calendar days worked. An employer may apply to the Department of Labor, Licensing, and Regulation (DLLR) for a hardship waiver from the requirements of the bill.

Fiscal Summary

State Effect: Expenditures increase (all funds), likely minimally, to provide part-time employees throughout State government with paid leave, and general funds increase for DLLR to implement and enforce the bill beginning in FY 2018. Higher education expenditures increase significantly beginning in FY 2018. General fund revenues may increase minimally as a result of the bill's monetary penalty provision. **This bill establishes an entitlement program beginning in FY 2018.**

Local Effect: Local government expenditures may increase for certain local jurisdictions to allow part-time employees to earn paid leave. Minimal increase in revenues due to the bill's penalty provisions for those cases heard in the circuit courts. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: The Administration has determined that this bill has a meaningful impact on small business (attached). The Department of Legislative Services (DLS) concurs with this assessment as discussed below.

Analysis

Bill Summary:

Eligibility

An “employer” includes the State or local governments and a person who acts directly or indirectly in the interest of another employer with an employee. The bill does not apply to employees who are employed for less than 120 days during a 12-month period, specified independent contractors, specified associate real estate brokers and real estate salespersons, individuals younger than age 18 before the beginning of the year, workers in a specified agricultural sector, specified employees of a temporary services or employment agency, employees in the construction industry, specified railroad employees, or employees covered in a collective bargaining agreement.

Use and Accrual of Leave

Paid leave begins to accrue the later of January 1 of the year in which the employer becomes subject to the bill or the date that an employee begins employment with the employer.

An employer is not required to compensate an employee for unused paid time off when the employee leaves the employer’s employment. The bill does not require an employer to modify an existing equivalent (or more generous) paid leave policy or affect specified workers’ compensation benefits. An employer with an existing paid leave policy that provides an amount of paid leave meeting the total annual accrual requirements and allows an employee to use the paid leave for any reason is exempt from all other requirements of the bill. An employer may not be required to pay a tipped employee more than the applicable minimum wage for paid leave.

The bill includes processes and conditions under which an employee may accrue and use paid time off. The bill specifies the circumstances under which an employer may deny a request to take paid time off related to the disruption of the employer’s business or provision of services to an individual with a developmental disability or mental illness. An employer is not required to carry over unused paid time off if the leave is awarded at the beginning of each year.

If a unit of State or local government’s paid time off accrual and use requirements meet or exceed the bill’s requirements, employees in the unit’s personnel system are subject to the unit’s laws, regulations, policies, and procedures for accruing and using paid time off. State employees who are entitled to paid time off under the bill and are not covered by the unit’s paid time off requirements are subject to the bill’s enforcement provisions.

The bill preempts the authority of a local jurisdiction to enact a law that regulates paid time off provided by an employer (other than that jurisdiction).

Waiver

An employer may apply to DLLR for a hardship waiver from the requirements of the bill. DLLR must grant a waiver for an employer that can provide specific and demonstrated evidence that a significant hardship will result from the employer's compliance with the bill. The waiver is good for two years, and an employer may apply for renewal of the waiver.

Requirements for the Commissioner of Labor and Industry

The commissioner may adopt implementing regulations and investigate violations upon receiving a written complaint by an employee. The commissioner must, to the extent practicable, keep the complainant's identity confidential unless the employee waives confidentiality. The commissioner must provide technical assistance to an employer requesting assistance in implementing paid time off.

Notice and Model Policy to Employees

Unless a waiver is granted, an employer must notify its employees that they are entitled to paid time off by providing a specified notice to employees. The Commissioner of Labor and Industry must create and make available a free poster and a model notice that may be used by employers. The notice must be posted on DLLR's website in a downloadable format.

Enforcement Provisions

An employer must keep relevant records for at least three years, and the commissioner may inspect an employer's records regarding paid time off. The commissioner may waive a civil penalty if the penalty was assessed for a violation that was due to an error caused by a third-party payroll service provider with whom the employer in good faith contracted for services.

If an employee believes that an employer has violated a provision of the bill, the employee may file a written complaint with the commissioner. The commissioner must attempt to resolve the issue informally or determine whether the employer has violated the bill's provisions. If the commissioner determines that an employer has violated a provision of the bill, the commissioner must issue an order compelling compliance. The bill specifies the maximum civil penalties that the commissioner, in the commissioner's discretion, may assess on an employer that violates the bill's provisions as well as the factors that must be

considered when assessing a penalty. These actions are subject to the notice and hearings requirements of the Administrative Procedure Act.

If an employer does not comply with an order issued for a first violation, the commissioner may bring an action to enforce the order and any civil penalty in the circuit court in the county where the employer is located. If an employer does not comply with an order issued for a subsequent violation against the same employee within three years of the previous complaint that led to a determination, the Attorney General or the employee may bring an action to enforce the order in the circuit court in the county where the employer is located. If the employee prevails in an action, the employee may be entitled to actual damages and reasonable attorney's fees and court costs.

A person may not interfere with the exercise of, or the attempt to exercise, any right given under the bill. An employer may not take adverse action or discriminate against an employee because the employee exercised in good faith the rights granted by the bill. Additionally, an employer may not interfere with, restrain, or deny an employee exercising rights provided under the bill or apply a specified absence control policy that could lead to adverse action. An employee who mistakenly, but in good faith, alleges a violation under the bill is protected. An employee may not, in bad faith, file a complaint with the commissioner alleging a violation, bring an action, or testify in an action regarding paid time off. An employee who violates these provisions is guilty of a misdemeanor and on conviction is subject to a maximum \$1,000 fine.

Current Law: The Maryland Healthy Working Families Act passed the General Assembly during the 2017 session but was vetoed by the Governor. During the 2018 session, the General Assembly overrode the Governor's veto; thus, the Act took effect as Chapter 1 of 2018 on February 11, 2018.

Under Chapter 1, an "employer" includes the State or local governments and a person who acts directly or indirectly in the interest of another employer with an employee. Chapter 1 of 2018 does not apply to employees who regularly work less than 12 hours a week, specified independent contractors, specified associate real estate brokers and real estate salespersons, individuals younger than age 18 before the beginning of the year, workers in a specified agricultural sector, construction workers (not including specified employees) covered in a collective bargaining agreement in which the Act's requirements are clearly waived, specified employees who work on an as-needed basis in a health or human services industry, or specified employees of a temporary services or employment agency.

Leave Accrual Rates

Chapter 1 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.

Earned sick and safe leave begins to accrue the later of February 11, 2018, or the date that an employee begins employment with the employer.

An employer is not required to allow an employee to accrue earned sick and safe leave during (1) a two-week pay period in which the employee worked fewer than 24 hours total; (2) a one-week pay period if the employee worked fewer than a total of 24 hours in the current and immediately preceding pay period; or (3) a pay period in which the employee is paid twice a month and the employee worked fewer than 26 hours in the pay period.

An employer must allow an employee to use earned sick and safe leave:

- to care for or treat the employee’s mental or physical illness, injury, or condition;
- to obtain preventive medical care for the employee or employee’s family member;
- to care for a family member with a mental or physical illness, injury, or condition;
- for maternity or paternity leave; and
- for specified circumstances due to domestic violence, sexual assault, or stalking committed against the employee or the employee’s family member.

An employer is not required to compensate an employee for unused earned sick and safe leave when the employee leaves the employer’s employment. An employer that rehires an employee within 37 weeks after leaving employment is required to reinstate any unused earned sick and safe leave that had accrued at the time of separation unless the employer voluntarily paid out the unused earned sick and safe leave. An employer is not required to modify an existing paid leave policy if (1) the terms and conditions are at least equivalent to those under the law or (2) the paid leave policy does not reduce employee compensation for an absence due to sick or safe leave. An employer is not prevented from establishing a policy that allows employees to voluntarily exchange assigned work hours. An employer is not prohibited from adopting and enforcing a policy that prohibits the improper use of earned sick and safe leave. An employer may deny a request to take earned sick and safe

leave under specified circumstances related to the disruption of the employer's business or provision of services to an individual with a developmental disability or mental illness.

Required Recordkeeping

An employer must keep relevant records for at least three years, and the Commissioner of Labor and Industry may inspect an employer's records regarding earned sick and safe leave. There is a rebuttable presumption that an employer has violated the earned sick and safe leave provisions if the employer fails to either keep records or allow the commissioner to inspect records. The commissioner may waive a civil penalty if the penalty was assessed for a violation that was due to an error caused by a third-party payroll service provider with whom the employer in good faith contracted for services.

Enforcement Provisions

If an employee believes that an employer has violated the Maryland Healthy Working Families Act, the employee may file a written complaint with the commissioner. The commissioner must conduct an investigation and attempt to resolve the issue informally through mediation within 90 days of the written complaint. If the commissioner is unable to resolve the issue through mediation and determines that an employer has violated a provision of the law, the commissioner must issue an order, subject to the hearing and notice requirements of the Administrative Procedure Act. The order must describe the violation and direct the payment of the full monetary value of any unpaid earned sick and safe leave and any actual economic damages. The order may, in the commissioner's discretion, direct the payment of an additional amount of up to three times the value of the employee's hourly wage for each violation and assess a civil penalty of up to \$1,000 for each employee for whom the employer is not in compliance. If an employer does not comply with an order within 30 days of the issuance of the order, the commissioner may ask the Attorney General to bring an action – either on behalf of the employee (with the employee's written consent) or to enforce the order for the civil penalty – in the county where the employer is located.

In addition, within three years of the order, an employee may bring a civil action to enforce the order in the county where the employer is located. If an employee prevails in such an action to enforce an order, the court may award three times the value of the employee's unpaid earned sick and safe leave, punitive damages in an amount determined by the court, reasonable legal fees, injunctive relief if appropriate, and any other appropriate relief.

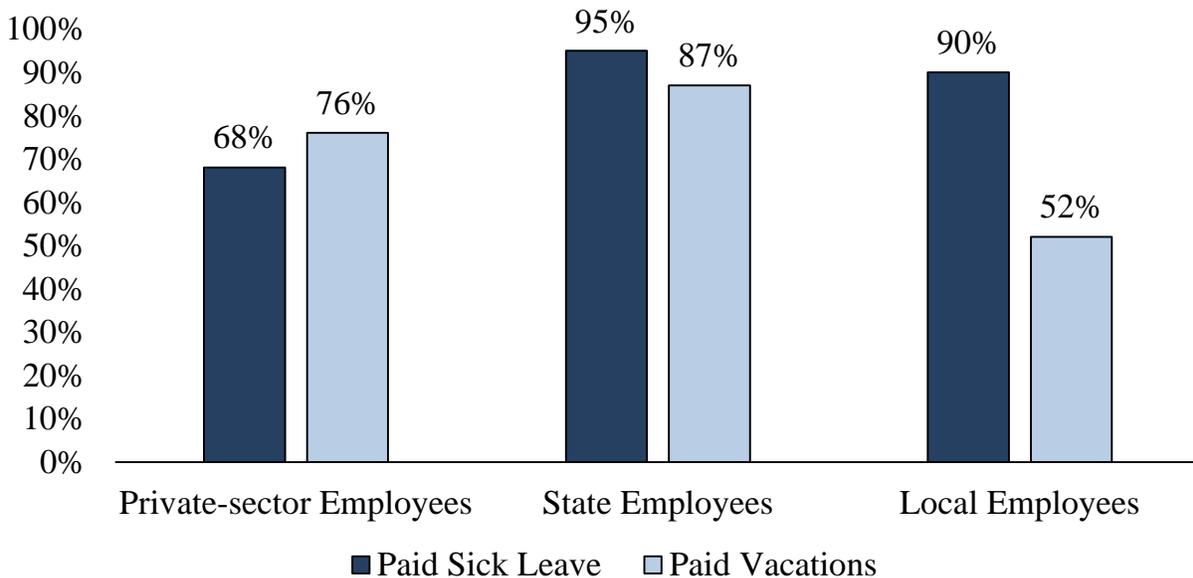
A person may not interfere with the exercise of, or the attempt to exercise, any right given under the Maryland Healthy Working Families Act. An employer may not take adverse action or discriminate against an employee because the employee exercised in good faith the rights granted by the Act. Additionally, an employer may not interfere with, restrain,

or deny an employee exercising rights provided under the Maryland Healthy Working Families Act or apply a specified absence control policy that could lead to adverse action. An employee who mistakenly, but in good faith, alleges a violation under the Act is protected. An employee may not, in bad faith, file a complaint with the commissioner alleging a violation, bring an action, or testify in an action regarding earned sick and safe leave. An employee who violates these provisions is guilty of a misdemeanor and on conviction is subject to a maximum \$1,000 fine.

Background: The U.S. Bureau of Labor Statistics reports private-industry employer costs for paid leave averaged \$2.32 per hour worked or 6.9% of total compensation in 2017. According to the U.S. Bureau of Labor Statistics, as shown in **Exhibit 1**, nationally in 2017, 68% of workers in private-industry businesses had paid sick leave and 76% of workers in private-industry businesses had paid vacations. Most State and local government workers had access to paid sick leave, but only 52% of local government workers had access to paid vacation. Of private-industry workers with paid vacations, 35% of workers had a consolidated leave plan, meaning that workers had a single amount of time off to use for multiple purposes, such as vacation, illness, or personal business. Consolidated plans were less common in state and local governments; of state and local government workers with access to paid vacation, only 9% of state employees and 17% of local government employees had consolidated leave plans.

Private-industry businesses provided on average 10 days of paid vacation days to an employee with one year of service in 2017. Private-sector employers with fewer than 100 workers on average offered 9 days of paid vacation, while employers with at least 100 workers provided on average 12 days of paid vacation to employees after one year of service.

Exhibit 1
Percent of Workers with Access to Paid Leave
2017



Source: U.S. Bureau of Labor Statistics; Department of Legislative Services

State Revenues: General fund revenues increase – likely minimally – as a result of the bill’s monetary penalty provisions.

State Expenditures: For State employees, the bill’s paid time off terms and conditions for accruing and using leave are generally equivalent to those in the Maryland Healthy Working Families Act. Under the Maryland Healthy Working Families Act, an employer is not required to modify an existing paid leave policy if the terms and conditions are at least equivalent. Thus, the only fiscal impacts from the bill generally stem from allowing State employees to take leave for any reason and from providing paid time off to employees who regularly work less than 12 hours a week.

The Department of Budget and Management estimates that providing paid time off to approximately 200 part-time employees within the State Personnel Management System who currently receive no leave benefits increases expenditures minimally. Other agencies with an independent personnel system may likewise experience a minimal or negligible increase in expenditures. For example, the Maryland Department of Transportation estimates special fund expenditures increase by approximately \$2,700 to provide two part-time employees 40 hours of paid time off. St. Mary’s College of Maryland

estimates expenditures increase initially by approximately \$5,050 on an annual basis to provide part-time student employees paid time off. However, higher education expenditures may increase significantly, potentially by more than \$1.0 million, for the University System of Maryland to provide paid time off to student employees. The prorated impact in fiscal 2018 is smaller, due to the bill taking effect toward the end of the fiscal year.

Additionally, the bill has an operational impact on State agencies by allowing State employees to take paid time off without prior notice, which could create staffing issues.

DLLR must already enforce the Maryland Healthy Working Families Act. Since many of the requirements of the bill are similar to those of the Maryland Healthy Working Families Act, DLS assumes DLLR staff who are enforcing the Act can also enforce the bill. However, general fund expenditures may increase minimally for additional staff within DLLR to meet some of the bill's requirements, such as granting waivers to businesses.

Local Revenues: Revenues may increase minimally under the bill's monetary penalty provisions for those cases heard in the circuit courts.

Local Expenditures: Most local jurisdictions incur minimal or no fiscal impact for providing employees paid time off as provided in the bill since local jurisdictions must already comply with the Maryland Healthy Working Families Act. However, expenditures for some local jurisdictions may increase to provide paid time off to part-time employees.

Small Business Effect: Small businesses with 50 employees generally must provide paid time off to qualified employees when the bill is enacted. Those with at least 40 employees must do so beginning January 1, 2019, and those with at least 25 employees must do so beginning January 1, 2020. Employers that employ low-wage earners (average wage in the lowest quartile) are likely to be affected more than those employers that employ high-wage earners (average wage in the highest quartile), because only half of low-wage workers receive paid vacation compared with 91% of high-wage workers in 2017.

Additional Comments: As noted above, Chapter 1 of 2018 took effect in February 2018, making Title 3, Subtitle 13 of the Labor and Employment Article the Maryland Healthy Working Families Act. However, the bill was drafted prior to Chapter 1 being enacted, and it is drafted in Title 3, Subtitle 13 of the Labor and Employment Article. An amendment is needed to reflect that the Maryland Healthy Working Families Act is current law and located in the same subtitle. This analysis assumes employers are required to satisfy the requirements of both the Maryland Healthy Working Families Act and of the bill. Where they overlap, no fiscal effect is assumed.

Additional Information

Prior Introductions: None.

Cross File: HB 98 (The Speaker)(By Request - Administration) - Economic Matters.

Information Source(s): Anne Arundel, Baltimore, Charles, and Montgomery counties; Maryland Association of Counties; cities of Frederick and Havre de Grace; Maryland Municipal League; Judiciary (Administrative Office of the Courts); University System of Maryland; Morgan State University; St. Mary's College of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; U.S. Department of Labor; Department of Legislative Services

Fiscal Note History: First Reader - March 5, 2018
md/mcr

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Paid Leave Compromise Act of 2018

BILL NUMBER: SB 135/HB 98

PREPARED BY: Chris Carroll

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS