HB 341

Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 341 (Delegate Kelly, *et al.*)
Economic Matters

Labor and Employment – Family and Medical Leave Insurance Program – Establishment
(Time to Care Act of 2019)

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 to an employee who is taking partially 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, which is based on an employee's average weekly wage, ranges from $50 to a $1,000 cap that is indexed to inflation. The bill establishes the FAMLI Fund, which consists of employer and employee contributions based on an employee's wages to be used to pay for benefits, a public education program, and *initial* implementation costs. **The bill takes effect June 1, 2019.**

Fiscal Summary

State Effect: Special fund revenues to the FAMLI Fund increase significantly beginning in FY 2020. State income tax revenues (general fund and special fund) decrease beginning in FY 2020. Expenditures increase (all funds) significantly beginning in FY 2020 as a result of the State paying the employer's portion of the FAMLI contribution rate on State employees' wages and from developing, administering, and enforcing the FAMLI program. Expenditures (all funds, but especially special funds) increase further beginning in FY 2022 once FAMLI benefits are provided.

Local Effect: Local government expenditures increase significantly beginning in FY 2020. Local income tax revenues decrease beginning in FY 2020; that decrease is partially offset beginning in FY 2022 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: Employers who employ at least one employee must participate in the program. A "covered employee" is an employee who has worked at least 680 hours over a 12-month period.

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 withdraw from the program as specified in the bill. A self-employed individual participating in the program must pay the employee portion of the required wage contribution.

The bill applies only prospectively and may not be interpreted to have any effect on or application to any collective bargaining agreement entered into before its June 1, 2019 effective date.

Administration

The Secretary of Labor, Licensing, and Regulation may delegate powers to an employee of the Department of Labor, Licensing, and Regulation (DLLR) that are necessary to administer the program. Generally, a DLLR employee may not disclose information pertaining to an individual who has applied for or received FAMLI benefits. It is the General Assembly's intent that, to the extent permissible under federal law, existing employees and resources of DUI be used to carry out the FAMLI program. The Secretary must:

- adopt regulations to implement the bill by October 1, 2019, 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;
- develop incentives or provide assistance to small businesses to help them comply with the bill; 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, 2019. An agreement by an employee to waive the employee’s FAMLI rights is void.

Family and Medical Leave Insurance Fund

The bill establishes the FAMLI Fund, which is a special, nonlapsing fund administered by the Secretary of Labor, Licensing, and Regulation. The State Treasurer must hold the fund separately, and the Comptroller must account for the fund. The fund consists of employee and employer 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, small business incentives, and any other costs associated with the *initial* implementation of 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 employee does not have any prior claim or right to money that the employee pays into the fund.

Contributions

Beginning on January 1, 2020, each employee and employer must pay to the Secretary of Labor, Licensing, and Regulation contributions on wages, which are established in regulation. The contribution rates established in regulations must be sufficient to fund the FAMLI benefits.

Benefits

Beginning on July 1, 2021, to be eligible for benefits, a covered employee must be taking partially 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 during the first year after the birth, adoption, or placement; (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. The bill specifies who is included as a family member.

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 less than one day or eight consecutive hours of leave taken in one work week.

All weekly benefits paid under the program are subject to the minimum and maximum levels specified below. For employees taking *unpaid* leave, the weekly benefit is 90% of the average weekly wage if the employee's average weekly wage is 50% or less than the State average weekly wage. If the employee's average weekly wage is greater than 50% of the State average weekly wage, the weekly benefit is 90% of the employee's average weekly wage up to 50% of the State average weekly wage and 50% of the employee's average weekly wage above the 50% State average weekly wage threshold.

For employees taking *partially paid* leave, the weekly benefit amount is the lesser of (1) the amount required to make up the difference between the wages paid to the employee while the employee is taking partially paid leave and the full wages normally paid to the employee or (2) if the employee's average weekly wage is greater than 50% of the State average weekly wage, 90% of the employee's average weekly wage up to 50% of the State average weekly wage and 50% of the employee's average weekly wage above the 50% State average weekly wage threshold.

The weekly benefit payable to a covered employee ranges from a minimum of $50 to a maximum of $1,000 for the 12-month period beginning July 1, 2021 (in fiscal 2022). Beginning July 1, 2022, the maximum weekly benefit must generally be increased by the annual percent growth in the Consumer Price Index, and the bill specifies the procedures to adjust the maximum weekly benefit. 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, the employer must continue any employment benefits in the same manner as required under the Maryland Parental Leave Act for the time that the covered employee is absent from work and receiving FAMLI benefits. Additionally, the employer must restore the employee to an equivalent position of employment in the same manner as required under the Maryland Parental Leave Act.

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

The 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

In Maryland, 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

In Maryland, firms with 15 to 49 employees are 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 individuals 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 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.

Parental Leave for State Employees in the Executive Branch

Chapter 752 of 2018 provides up to 60 days of paid parental leave to an employee in the Executive Branch of State government who is the primary caregiver responsible for the care and nurturing of a child to care for the child immediately following either the child's birth or the adoption of a child who is younger than age six. An employee entitled to parental leave may use available accrued annual leave and personal leave. If that leave is less than 60 days, the State agency that employs the employee must provide the employee with additional paid leave to attain 60 days of parental leave.

Federal Paid Family and Medical Leave Tax Credit

The federal Tax Cuts and Jobs Act of 2017 created a tax credit for employers who voluntarily offer paid family and medical leave to employees. Eligible employers are entitled to claim a credit for paid family and medical leave equal to 12.5% of wages paid to qualifying employees during any period in which such employees are on leave under FMLA, provided that the rate of payment is 50% of the wages normally paid to the employee. Only paid family and medical leave provided to employees whose prior-year compensation was at or below a certain amount qualify for the credit. Generally, for tax year 2018, the employee's 2017 compensation from the employer must have been $72,000 or less. The credit is only available for wages paid in tax years 2018 and 2019.

Background: The average weekly wage of workers covered by Maryland Unemployment Insurance for fiscal 2018 was $1,116.

Task Force to Study Family and Medical Leave Insurance

Chapters 677 and 678 of 2016 established the Task Force to Study Family and Medical Leave Insurance. The task force's primary purposes were to, in consultation with appropriate State and local agencies and community organizations, study existing family and medical leave programs in other states and the District of Columbia, review specified family and medical leave program implementation studies and reports, and receive public testimony from relevant stakeholders. The task force issued its report in December 2017.

Family and Medical Leave Insurance Programs in Other States

Several states have enacted legislation to create state paid family and medical leave insurance programs. California, New Jersey, and Rhode Island currently operate family and medical leave insurance programs. Several states have enacted programs, but they are not yet fully implemented and paying benefits. The New York program began phased implementation in 2018 and plans to be fully implemented in January 2021. The District of Columbia and Washington have family and medical leave insurance laws that took effect in 2017, with benefit payments starting in 2020. Massachusetts' family leave program was signed into law in June 2018; its benefit payments will begin in January 2021.

Access to Paid Family Leave

According to the U.S. Bureau of Labor Statistics, nationally, in 2018, 16% of workers in private-industry businesses had access to paid family leave. Family leave is granted to an employee to care for a family member and includes paid maternity and paternity leave. Low-wage workers or those who worked in small businesses were less likely to receive paid family leave.

State Revenues:

Family and Medical Leave Insurance Fund Revenues

Special fund revenues increase significantly beginning in fiscal 2020 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 illustrative purposes only, if the contribution rate is set at 0.4% (the applicable rate in Washington), based on the Board of Revenue Estimates' projection for wages and salaries, State special fund revenues increase by approximately $380.9 million in fiscal 2020, which reflects contributions beginning January 1, 2020, and by $868.3 million in fiscal 2024 if there is no wage contribution ceiling cap. If the premium withholdings are capped, special fund revenues increase by less. Based on an analysis by the Institute for Women's Policy Research, the Maryland FAMLI task force report estimates that a FAMLI program modeled after Washington's program would cost an estimated $541.3 million. Thus, presumably, special fund revenues would have to increase by at least $541.3 million on an annual basis.

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 initially decrease in fiscal 2020 due to increased payroll expenses generating less tax revenue. However, the revenue decrease is offset partially beginning in fiscal 2022 as a result of taxing the taxable FAMLI benefits. 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 (*e.g.*, family leave) would be taxable.

Federal Fund Revenues

Federal fund revenues may increase beginning in fiscal 2020 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. DUI is 100% federally funded under provisions of the Social Security Act. The Social Security Act provides that the federal funds can only be used to administer the unemployment insurance program, and if any funds are used for purposes other than administering the unemployment insurance program, the funds must be repaid to the federal government. DLLR advises that DUI is precluded from using any of its funds to administer any other state or federal program.

Thus, to implement the FAMLI program, DUI must create a new program without utilizing existing staff. DUI must develop a tax structure, payment structure, complaint and investigative structure, and require the imposition of an employee contribution. The program's scope is likely greater than that of unemployment insurance. First, the number of covered employees – those who work at least 680 hours over a 12-month period – is much greater than employees included in unemployment insurance. Also, 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.

Based on DUI's costs for updating its DUI tax and benefits program and information from other states with family leave programs, DUI estimates it would incur $80 million in contractual services over four years to develop a framework necessary to implement the bill. However, DLS notes that the framework must be completed in approximately two years, before benefits are paid in fiscal 2022, so additional resources may be needed to ensure a system is in place prior to benefits paid. Additionally, DUI estimates

$27.2 million of salaries and benefits for approximately 400 employees and $2.6 million of other operating expenses once the program is fully operational and paying out benefits. Staffing can be phased in; some of these start-up costs can be offset with revenues from the employee contributions, but ongoing expenses cannot be offset under the terms of the bill.

DLS concurs that implementing the FAMLI program requires a significant increase in personnel resources for DUI. The Montana Budget and Policy Center estimates that total administrative costs of establishing a FAMLI program would account for 6.67% of total program costs in the first three years of the program and then decrease to 4% per year thereafter. If Maryland's FAMLI program provides benefits worth at least $541.3 million and administrative costs are a similar percentage as projected by Montana, FAMLI administrative expenditures increase by at least $36.1 million annually for fiscal 2020 through 2022 and by at least $21.7 million annually thereafter. Most of these expenditures would have to be covered with general funds.

Assuming a one-month implementation delay, DLLR employees are needed to set up the program beginning in fiscal 2020, and more DLLR employees will be needed to process and investigate claims. Additional legal staff will be necessary for assistant Attorneys General to enforce civil actions and for the Judiciary to handle increased caseloads once covered employees start claiming benefits in fiscal 2022.

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. General fund expenditures increase by $162,000 for CPB to calculate and send the 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, 2020. Thus, CPB may require additional resources to enable a January 1, 2020 implementation date for required contributions to the fund.

Employer Contributions

Expenditures (all funds) increase significantly as a result of employers paying an unspecified portion of the FAMLI contribution rate on State employees' wages beginning on January 1, 2020. 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.

DLS estimates payroll for State employees to total $5.9 billion in fiscal 2020. *For illustrative purposes only*, if the contribution rate is set at 0.4% and the employer pays 37% of the contribution (the share in Washington), State expenditures (all funds, nonbudgeted, and higher education) increase by approximately $4.2 million in fiscal 2020 (which accounts for the January 1 start date) and by at least $8.5 million annually thereafter to provide the employer wage contribution.

FAMLI Fund Expenses

DUI must make benefit payments to eligible covered employees beginning on July 1, 2021. 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 illustrative purposes only, if the amount of FAMLI benefits are similar to those projected for Washington, DLS estimates the FAMLI Fund paying employees at least $541.3 million annually beginning on July 1, 2021.

FAMLI funds also increase to provide incentives and assistance to small businesses to help them comply with the program requirements. Additionally, as noted above, general fund expenditures increase beginning in fiscal 2020 to pay for administering the FAMLI program.

Leave

The bill expands 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.

Local Revenues: Local income tax revenues initially decrease in fiscal 2020 due to increased payroll expenses generating less tax revenue. However, the revenue decrease is offset partially beginning in fiscal 2022 as a result of taxing the taxable FAMLI benefits paid at a rate of approximately 3%.

Local Expenditures: Local jurisdictions incur significant costs as a result of employers paying a portion 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. Additionally, local jurisdictions may incur programming costs to their payroll systems. For example, the City of Havre de Grace estimates programming costs of $5,000 to add a new withholding requirement.

Furthermore, to the extent that local government employees take more leave, the FAMLI program may overburden other employees and create additional personnel expenses for overtime costs for local jurisdictions, especially for law enforcement and other agencies that provide 24/7 coverage.

Small Business Effect: The bill has a significant impact on small businesses, which must pay for the employer's portion of contributions and establish a mechanism to add the contributions to their payroll systems. However, small businesses may benefit from receiving incentives or assistance from DLLR.

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: SB 500 (Senator Hayes, *et al.*) - Finance.

Information Source(s): Anne Arundel, Baltimore, Montgomery, and Somerset counties; Maryland Association of Counties; City of Havre de Grace; Maryland Municipal League; Judiciary (Administrative Office of the Courts); Comptroller's Office; University System of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; U.S. Department of Labor; Congressional Research Service; Washington State Employment Security Department; U.S. Bureau of Labor Statistics; Montana Department of Legislative Services

Fiscal Note History: First Reader - February 11, 2019
mag/mcr

Analysis by: Heather N. Ruby

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