LEGISLATIVE POSITION:
UNFAVORABLE
Senate Bill 539-Labor and Employment-Family and Medical Leave Insurance Program-Establishment
Senate Finance Committee

Thursday, February 27, 2020

Dear Chairwoman Kelley and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce (MDCC) is the leading voice for business in Maryland. We are a statewide coalition of more than 4,500 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic growth for Maryland businesses, employees and families. Through our work, we seek to maintain a balance in the relationship between employers and employees within the State through the establishment of policies that promote fairness and ease restrictive burdens.

Senate Bill 539 would establish a Family & Medical Leave Insurance (FAMLI) Program to be administered under the supervision of the Department of Labor's Unemployment Insurance (UI) Division.

The program generally provides up to 12 weeks of benefits to an employee who is taking partially paid or unpaid leave for certain reasons, except that an additional 12 weeks for benefits appears to be provided in certain circumstances. Leave with benefits is provided for the following reasons: 1) to care for a child during the first year after the child's birth or after the placement of the child through foster care or adoption; 2) to care for a family member with a serious health condition, 3) because the employee has a health condition that results in their being unable to perform the functions of their job, 4) to care for a service member who is the employee's next of kin, or 5) because the employee has an exigency arising out of the deployment of a service member who is a family member.

The bill establishes the FAMLI Fund, which will consist of contributions from employees and employers. Beginning January 1, 2021, each employee and employer shall contribute to the fund at a rate to be set by the Maryland Department of Labor. Self-employed individuals may also participate.

There are any number of additional nuances and complexities outlined in the language, and the Chamber is **very concerned** that the implementation of this legislation will result in additional costs and administrative burden to employers, and especially small businesses. As of this writing, no fiscal note has been published for either bill.

To be clear, the Chamber and its members recognize that paid family and medical leave programs are being implemented in other states across the country and in the federal government. While we agree with the intent of the legislation in seeking to help employees balance the challenges between work and life, we do not believe that this legislation appropriately balances those goals with economic realities.
Through our MDCC Paid Family & Medical Leave (PFML) Workgroup, the Chamber has attempted to work with the advocates for this program to outline our concerns and encourage changes to the bill. Unfortunately, these changes, some of which help the bill more closely align with federal law and seek to address some of the challenges for small businesses, were not accepted. The Chamber will continue to

work with stakeholders toward a better outcome on this issue. A comprehensive list of our main concerns is outlined below.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **UNFAVORABLE REPORT** on SB 539.

The bill will have a significant, negative cost impact, particularly for small businesses and non-profits.

The bill establishes the FAMLI Fund, which will consist of contributions from employees, employers and self-employed individuals. Beginning January 1, 2021, each employee, employer and self-employed individual shall contribute to the fund. The total rate of contribution: 1) may not exceed 0.5% of an employee's wages, 2) shall be applied to all wages up to and including the Social Security wage base, 3) shall be shared equally by employers and employees, and 4) shall be sufficient to fund the benefits payable.

The cost to employers presents additional financial strain to already burdened businesses. Mandated employer contributions are an additional financial demand that small businesses and nonprofits simply cannot afford, particularly given the layering of other employer mandates (sick and safe leave, $15 minimum wage) that Maryland has implemented in the recent past. We are particularly concerned with the impact on small employers (those with fewer than 50 employees) and non-profits with limited resources (who are also facing significantly reduced charitable giving and government funding), who are struggling with these recent mandates. Other states that have implemented similar programs have recognized the impact on smaller employers and have incorporated provisions into their programs to relieve some of the pressure on these employers by exempting them from contributions or reducing their contributions. There is no such recognition in the proposed bill.

The bill does not permit an employer to require an employee to use any accrued paid leave in addition to benefits provided under this bill, thus increasing employers' A/P liability.

With no fiscal note just three days before the first scheduled hearing, employers may not have time to consider the fiscal implications.

The bill requires clarification that the program provides benefits to cover already-available leave, and not a separate leave bank.

While the bill states that it is establishing an insurance program to provide benefits for covered leave, the actual language of the bill is unclear as to whether it is also providing rights to leave itself, rather than just insurance benefits to cover unpaid leave to which an employee is otherwise entitled other under laws or employer policies.

Section 8.3-701(A) provides that "a covered individual taking leave from employment may submit a claim for benefits" for reasons that generally track the federal Family and Medical Leave Act. However, Section 8.3-701(B) also provides "A covered individual may take the leave for which the individual is eligible for benefits under subsection (A) of this section on an intermittent basis" and then goes on to provide parameters around the taking of intermittent leave, including scheduling and notice to the employer. In particular, (B)(3) states, "If leave is taken on an intermittent leave schedule, an employer may not reduce the total amount of leave to which the covered individual is entitled beyond the amount of leave actually

taken." (Emphasis added). This language clearly conveys that the program is providing not just pay benefits but actual leave rights.

Similarly, Section 8.3-702(B) provides that "If a covered individual takes leave for which the covered individual is receiving benefits under this title, the leave shall run concurrently with eligible leave that may be taken by the covered individual under the federal Family and Medical Leave Act." This language contemplates a leave bank separate from FMLA leave, which would run concurrently with FMLA leave, as opposed to providing benefits when an employee is taking FMLA leave.

In addition, Section 8.3-707 states that, "If a covered individual receives benefit under this title or takes leave from work for which benefit may be paid under this title, the employer of the covered individual shall, on the expiration of the leave, restore the covered individual to an equivalent position of employment." (Emphasis added). This same protective language appears in Section 8.3-708 with regard to the provision of employment benefits. Again, this language offers protection not only for receiving benefits, but for taking leave under the bill. It absolutely insulates the leave, regardless of whatever rights employers would otherwise have to manage leave under other laws.

Section 8.3-801(B) also states, "When an employee requests leave under this title … the employer shall notify the employee of the employee's eligibility to take leave for which benefits may be paid …" (Emphasis added). This language clearly considers the right under the bill to be leave, and not just benefits. Yet, the remainder of this section, which has to do with the required notification to employees, focuses on the receipt of program benefits, not leave.

Further, Section 8.3-904 provides that no adverse action may be taken when a covered individual has "filed for, applied for, or received benefits, or taken family or medical leave for which benefits may be paid under this title." Once again, the bill contemplates the provision of leave in addition to benefits.

Other bill provisions appropriately focus on benefits. For example, Section 8.3-702(A) provides that "a covered individual may not receive more than 12 weeks of benefits in an application year." (Emphasis added). This benefits language is carried throughout the rest of this subsection, as well as 8.3-702(C) (discussing "benefits under this title" but not leave). Similarly, the provisions on prohibited acts under Section 8.3-901 discuss false statements and other fraudulent acts only with regard to "a claim for benefits."

Yet other provisions, like Section 8.3-704(B)(1)(III) contemplate "partially paid leave" that the employee would already be taking, and how benefits under the program would interact with that leave, which supports the premise that this is a benefits, and not a leave, program.

If this is a leave (with benefits) program, it leaves in the State's hands the authority and responsibility of reviewing and approving leave requests – and then imposing on the employer that State-approved leave, which can be up to 24 weeks (almost 6 months). The employer would have no ability to review, control, verify or manage the leave process – contrary to its abilities under every other leave law that provides leave for the same reasons as this bill.

There are a number of laws that provide employees rights to such unpaid leave, beyond the federal Family and Medical Leave Act. For example, the Maryland Organ and Bone Marrow Donation law provides employees with unpaid leave for those purposes. The Maryland Parental Leave Act requires employers with 15-49 employees (who are therefore not covered by FMLA, which applies to employers with 50 or

more employees) with 6 weeks of unpaid leave. These laws, including the FMLA, do not autocratically and automatically impose leave obligations on employers, however. Rather, they contain the same requirements as FMLA for eligibility in terms of a minimum term of service (12 months) and hours worked (1,250 in the prior 12 months), thus ensuring that this valuable leave benefit is granted to employees who have shown a commitment to the employer through service. The organ donation law, like FMLA, allows an employer to terminate an employee for reasons unrelated to the leave. The parental leave law allows an employer to deny leave if it would cause "substantial and grievous economic injury to the operations of the employer." In addition, all of these laws apply to employers of at least 15 employees. Thus, these laws offer a balance between the needs of employees and those of employers – particularly smaller employers.

In addition, the federal and state disability anti-discrimination laws require employers to provide unpaid leave rights to employees as a reasonable accommodation. These laws apply to employers with 15 or more employees. Again, there is a balancing of the rights of employees with the needs of employers. The leave rights are not absolute – they must be a reasonable accommodation and may not pose an undue hardship on the employer. That is an assessment that must be made on a case-by-case basis, taking into account many factors such as the length of the leave, the employee's role for the employer, the employer's resources, the impact on operations, etc. And as above, there is the recognition that these obligations are too burdensome to impose on small (under 15 employees) employers as a matter of course.

In contrast, there are seriously reduced eligibility requirements for employees under this bill, enabling employees with relatively short service to take extended leave. Moreover, every employer – even those with a single employee – would be required to give the employee the leave of up to 24 weeks and hold the job for the employee. There is absolutely no consideration as to the impact on an employer's operations, which particularly for smaller employers would be dire. This is a plainly untenable situation.

If this is, as entitled and asserted, truly an insurance benefits program, then the program should only provide benefits for unpaid leave that the employee is already receiving, and not give employees the separate right to leave as well.

Definitions and terms in the bill are not consistent with the FMLA or other laws.

From a practical standpoint, the law most directly interrelated with this bill is the federal Family and Medical Leave Act. This bill, in fact, specifically references the FMLA. Section 8.3-403(B) requires that the implementing regulations to be developed by the Secretary of Labor "shall be consistent with regulations adopted to implement the federal Family and Medical Leave Act" (absent conflict with the bill). Section 8.3-702(B) provides that that any leave for which the employee receives benefits must run concurrently with FMLA. In addition, the reasons for which employees may receive benefits under the bill generally mimic the reasons for which an employee may take FMLA - but not entirely. We further note that these reasons are listed both in 8.3-302 and 8.3-701, but that the two lists are not actually identical in language, which could lead to confusion under the bill.

Additionally, the definitions contained in the bill language are broader than what is contained in the FMLA, and the bill lacks other, critical definitions that are contained in the FMLA, as follows:

- "Person" appears 18 times throughout the bill. It should be changed to either "employee" or "employer."
- "Covered employee" has different eligibility requirements than the primary leave laws of FMLA, Maryland organ donation leave, and Maryland parental leave.
- The definition of "family member" is far broader than under FMLA.

- The definition of "qualifying exigency" is similar, but broader than under the FMLA.
- The definition of "serious health condition" is similar, but broader than under the FMLA.
- The definition of "service member" is not entirely consistent with the FMLA.

The variations in these terms and definitions complicate an already complicated situation for employers in terms of understanding and managing an employee's need for leave under FMLA and entitlement to benefits under this bill. Different standards would apply to each, even though it seems that they are intended to work together.

A separate issue is that, as noted above, the bill specifically provides that the leave under this bill will run concurrently with FMLA leave. What the bill language ignores is the fact that there are other laws providing unpaid leave that should also run concurrently with any benefit period under the program. This includes Maryland's organ donation law, Maryland's Parental Leave Act, Maryland's Deployment Leave Act, the Americans with Disabilities Act, and Maryland's Civil Rights law. By excluding reference to these laws, as well as any others that may apply, and any additional leave rights provided by employer policy, this bill suggests that such leave rights would run in addition – not concurrently – with benefits under the program. That clearly is not the intent of the program.

The length of leave—up to 24 weeks – is unduly burdensome for employers.

The entitlement to benefits under the bill well exceeds any statutory length of leave. The FMLA provides for 12 weeks of leave for all reasons combined (26 weeks if caring for a service member is involved). Section 8.3-702 of the bill, however, provides benefits and leave of 12 weeks for the employee's own serious health condition and another 12 weeks for any other reason. Thus, this bill provides that an employee could literally take leave with pay benefits for almost half a year!

Having an employee out for that length of time presents innumerable challenges for an employer in terms of covering the employee's absence. Because the employer must hold the job open, they cannot hire another employee to fill the position on a permanent basis and it is not likely, particularly in this tight job market, that an applicant would be interested in short-term work. The use of temporary staffing services can be expensive. And in certain cases, temporary staffing workers may not have the skills or knowledgebase to perform the position in question. Using existing employees to cover the work is also problematic. Increasing the workload may mean that those employees may not get all the work done, may require overtime payments, and will impose burdens on those employees that will cause resentment and anger – both at the employer and the employee on leave.

As previously noted, the various existing leave laws take into consideration the burden of extended leaves on employers and do not automatically impose such extended leave requirements for employees. This bill, however, offers no such consideration.

There is no means to verify the validity of leave certification and address benefit abuse.

Verification and abuse of benefits are already a major challenge for employers as it relates to the implementation of the sick and safe leave mandate, as well as under the federal Family and Medical Leave Act. Under the Maryland Healthy Working Families Act, verification of the need for sick and safe leave may only be required if an employee is absent for more than two consecutive shifts or if, with agreement upon hire, the employee is absent during the 107th-120th days of employment. As many of employers can attest, they have seen an increase in unscheduled call-outs of less than three days at a time – which

cannot be verified and subjected to discipline. Similarly, an employee who has been certified by a physician as needing intermittent FMLA leave cannot generally be required to verify each absence. This bill, as written, would exacerbate those challenges. However, both laws provide employers with some recourse and ability to verify longer leaves and, in the case of FMLA, suspicious or questionable use of leave.

Although the bill provides for certification to the State of the need for medical leave for which benefits may be awarded, it contains no process by which such certification can be verified or challenged at all – either by the State or by employers. Employers are not even entitled to see the certifications obtained by the State. Accordingly, while the bill prohibits fraud in the application for benefits, there is no means by which an employer or the State can use to address suspected fraud in the use of leave or application for benefits. And given that the employee is "entitled" to an extended leave with pay benefits, there is unfortunately an incentive for some employees to engage in fraud.

We also note that there is no certification process for benefits for leave due to qualifying exigencies associated with a service member's deployment. This is both inconsistent with the FMLA and subject to abuse.

The bill does not sufficiently account for alternative options.

Section 8.3-706 states that an employer who has a private employer plan that meets or exceeds the requirements under the program is exempt from the required contributions. Many employers provide short term disability benefits to employees who cannot work because of a medical condition. Many employers provide paid parental leave benefits. Many employers provide general paid time off benefits that may be used for any reason, including those under this bill. We are not aware, however, of any employer who provides paid leave benefits that cover all of the reasons set forth by the bill for the extended period of time (up to 24 weeks) contemplated by the bill. Thus almost no employers would qualify for this exemption, even though they may provide paid leave that covers some of the listed reasons.

What the bill does is to create a disincentive for employers to provide these alternative benefits. If an employer provides paid parental leave, for example, there is a cost to the employer to provide that leave and the employer is still responsible for the contribution to the State program – which would provide benefits for the same reason. Thus, the employer is effectively paying twice to provide the same benefit to the employee. It is only logical that an employer would simply eliminate its paid parental leave benefit, thereby saving the cost of the benefit, and require the employee to apply for benefits through the State program to which it must contribute regardless.

Other states' paid family leave benefits programs are more thoughtful in addressing these alternative benefits. For example, Washington D.C. requires employers to contribute to the program but also allows an employer that provides such paid leave benefits to seek reimbursement from the program for such benefits. In this manner, the employer is only required to pay once for the benefit.

Another issue is that the bill does not require coordination of these other paid leave benefits with the program benefits. Section 8.3-703 provides that an employer "may allow" an employee to use vacation, sick leave, or other paid time off to bridge the difference between the program benefits and 100% of wages. But if an employee chooses not to use such alternative paid leave, it is possible that they could "stack" the program benefit and alternative paid leave benefit, such that once the up to 24 weeks of

program benefits are exhausted, they would still have other paid leave available to use. The potential amount of total leave is staggering, and untenable for employers.

The bill presents collective bargaining agreement challenges.

Section 8.3-203 provides that "An employee's rights to benefits under this title may not be diminished by a collective bargaining agreement entered into or renewed … on or after June 1, 2020" and further provides that any waiver is void as against public policy. This provision is contrary to the entire premise of the National Labor Relations Act, which contemplates that employers and unions may bargain over the terms and conditions of employees' employment, including paid leave benefits such as those contemplated by this bill. A union may choose to give up certain benefits in order to achieve others that it and the employees it represents value more greatly, and this choice is one that is granted to them under the NLRA. Similarly, an employer and union may wish to agree to administer or access benefits differently than this bill provides, and their rights to do so under the NLRA should be respected.

In addition, the impact of compliance with the law is problematic for employers subject to a CBA that provides for paid leave benefits. Although the quoted language above contemplates that any current CBA will continue until expiration, it does not postpone compliance with the law as to contributions and employees' rights to benefits under the program. Thus, in addition to the employer being forced to pay twice to provide similar benefits, there is no consideration for how existing CBA benefits would coordinate with the new program benefits.

Employers should not face a private right of action.

Employers in Maryland already face a multitude of reasons that they can be sued by employees. This bill adds yet another basis, in addition to providing for administrative remedies through a complaint process to the Secretary. The administrative remedies are sufficient to address any potential violations; a private right of action is not necessary.