



February 27, 2020

Senate Finance Committee
3 East
Miller Senate Office Building
Annapolis, Maryland 21401

RE: SB 539 – Family and Medical Leave Insurance Program – Establishment

Madame Chairman, Vice Chair and Honorable Committee Members,

My name is Christine V. Walters, J.D., MAS, SHRM-SCP, SPHR. I am a human resources and employment law consultant. I worked as an in-house HR practitioner for nearly ten years in the health care industry, worked as an employment law attorney in a law firm for two years, and since 2002 have worked as an independent consultant and sole proprietor, doing business as FiveL Company, *“Helping Leaders Limit their Liability by Learning the Law.”*SM

I am also a member of the Maryland Chamber of Commerce, serve on the Chamber’s Labor and Employment Committee and Human Resources Committee. I am also the former Director of the Maryland SHRM State Council, Inc. You have testimony from both of those organizations, as well. I share many of their concerns. I hope to share some that have been shared with me by one or more of my clients.

The bill fails to clarify whether it is creating a new bank of paid leave. With regard to some of the concerns that have been shared about whether this bill requires employers to provide an additional bank of leave. I think that might be clarified if a definition of “leave” was added to the bill. It is currently undefined. The bill’s preamble reads, “THE PURPOSE OF THE PROGRAM IS TO PROVIDE TEMPORARY BENEFITS TO A COVERED INDIVIDUAL WHO IS TAKING LEAVE FROM EMPLOYMENT.” I suggest the definition clarify that “leave” refers only to any time off from work to which an employee is already entitled under federal, state or local law.

I think this will narrow the definition of leave to (1) protect employers from expansive legislation, (2) avoid unintended consequences; and (3) still balance the intent of the bill to provide income protection to employees who need time off from work for currently covered reasons related to family, medical and military needs.

This bill imposes a variety of administrative challenges.

- Use of Paid Leave (allowed versus required) - The bill provides that an employer “may allow” an employee to use paid leave. It is a common practice for employers to require employees to exhaust all paid leave before being absent without pay. This provides equity among employees. Without that provision, one employee who can afford to take

- time off without pay does so, returns to work, then takes two more weeks off after that for paid vacation. That leaves coworkers who cannot afford to do that to cover in the employee's absence. This bill does not permit employers to continue that requirement. I recommend that be modified to read, "may require."
- Notice – The bill requires employers to give employees notice of their rights at three separate times: (1) at the time of hire; (2) within five days after the employee notifies the employer of the need for covered leave; and (3) annually. No other leave law in Maryland, paid or unpaid, federal or state has an annual notice requirement. Only the federal Family and Medical Leave Act requires notice within five days from the date an employee gives notice of the need for covered leave.
- Regulatory guidance – The fiscal note indicates the bill requires the Secretary to publish regulations by October 1, 2020. Maryland's Healthy Working Families Act took effect more than two years ago. The Maryland Department of Labor is still working through, what I am told was the more than 2,000 comments, to publish regulations those regulations. In the interim, employer still struggle to administer that law's sick and safe leave in the absence of those regulations. Adding the obligations imposed by SB 538 at this time is untenable.
- No opportunity to offset costs – The bill provides that it does not diminish an employer's obligation to comply with "...AN EMPLOYER POLICY THAT ALLOWS AN EMPLOYEE TO TAKE LEAVE FOR A LONGER PERIOD OF TIME THAN THE EMPLOYEE WOULD BE ABLE TO RECEIVE BENEFITS UNDER THIS TITLE." That could be interpreted to mean an employer could not reduce an existing leave benefit to help offset the cost of this tax. Assuming that is *not* the intent, I recommend this language be modified to make that clear.
- State administration – the bill does not describe who or how the employer's or employees' portion of the tax will be collected. It only indicates that the Treasurer will administer the fund in accordance with regulations the Secretary publishes. As a result, the Fiscal Note may not fully account for the time and costs imposed on employers. Will they be required to deduct this tax from each employee's wages each pay period and then send both the employer's and employees' contributions to the State? Or, will the employer be able to pay its .25% based on the aggregate employee wages quarterly?

This bill imposes a number of fiscal challenges:

The fiscal note reads the Small Business Impact will be "meaningful." Meaningful is not defined. Here are just two examples shared with me by one or more small business and non-profit clients:

- A non-profit employer projects this tax will cost them \$41,500/year. They will have to offset that cost by reducing or abolishing one or more employee benefits, such as health insurance subsidies. You have that employer's written testimony.

- A for-profit employer offers an extended leave bank into which employees may voluntarily transfer a portion of their unused, paid leave to support coworkers who are facing family and medical demands and need time off from work. That program may be reduced or abolished to reduce the accounts payable liability and offset the cost of this tax. Their program is voluntary. The tax to their employees won't be.

A study published by SHRM in 2014, "Total Financial Impact of Employee Absences Across the United States, China, Australia, Europe, India and Mexico."ⁱ found that when considering both the direct and indirect costs of paid time off, the total cost as a percentage of payroll was between 20.9% and 22.1%. This bill adds to those costs, which are likely higher today than they were six (6) years ago, particularly in light of Maryland's minimum wage and paid sick and leave enacted since then.

I suspect I could share many more stories and examples if I was to send an inquiry out to my base of more than 350 clients.

Most Maryland employers are currently required to provide paid or unpaid leave to employees for the following:

- Adoption Leave
- *Civil Air Patrol Service
- *Jury Duty
- *Organ or Bone Marrow Donation, which may *not* run concurrently with federal Family and Medical Leave
- *Parental Leave (if 15 – 49 employees)
- Reasonable Accommodation for Pregnancy-Disability, which may include paid leave
- Sick or medical leave to care for a family member under the Flexible Leave Act
- Sick and Safe Leave under Maryland's Healthy Working Families Act
- Voting Leave

**Leave may be unpaid*

Maryland employers with 50 or more employees are also required to provide:

- Family and Medical Leave (federal) up to 12 work weeks of unpaid leave for reasons similar to, but different from, the reasons covered in SB 539
- Military Deployment leave

Legislative mandates flatten the market and reduce competition. Many employers provide robust paid leave programs. They are proactive and operate above the market. Those practices are great recruiting tools, helping them compete for talent. Those employers lose that competitive edge when laws impose mandates that require all the rest of the employers to do the same.

The bill reduces Maryland's competitive edge. None of our surrounding states have a paid family and medical leave mandate. Only the District of Columbia does. When prospective employers shop the economic markets, this bill would be one more reason why employers may decide to open new businesses and take new jobs elsewhere.

This bill adds to the patchwork of existing paid leave mandates that employers must navigate. On March 22, 2012 I had the honor and privilege of testifying before the U.S. Senate Health, Education, Labor and Pension (HELP) Committee on behalf of SHRM to discuss employers' strategies for helping employees with disabilities stay-at-work and return-to-work (RTW). Then-chairman Senator Tom Harkin (D-IA) asked the panelists, "Why don't employers do more?" I replied that often it is a matter of feeling that we are walking on eggshells. There are so many laws and regulations that limit what, when and how we can engage our employees that sometimes we do nothing to avoid doing the wrong thing. I share with you now the same suggestion I shared with the Honorable Senator at that time.

Rather than drafting legislation that imposes mandates or penalties upon employers, we might consider offering employers some carrots, such as a tax incentive or safe harbor for employers that offer paid leave that meets all the elements of SB 539. This is not a precedential idea; it was embodied in the 115th U.S. Congress in the "Strong Families Act: and in the "Workflex in the 21st Century Act."

Now May Not be the Best Time

There are currently four similar bills pending before Congress. Each proposes to provide employees with paid family and/or medical leave. Having one national standard will provide consistency for employees and the employers that employ them across the country and in any state. Now is not the time to pass this bill.

Only eight states and the District of Columbia have enacted a paid family and medical leave law. Only five of those require the employer to fund a portion of the premiums. None of the eight states surrounds Maryland.ⁱⁱ Our state theme is, "Open for Business." That theme even won an award last year.ⁱⁱⁱ Let us support that theme. Now is not the time to pass this bill.

Just two months ago, the Department of Legislative Services (DLS) issued a report on paid family and medical leave insurance. The report delves deeper into the costs and issues of FAML I programs, provides an overview of other states' experiences with FAML I programs, and provides Maryland-specific considerations and costs related to establishing a FAML I program. I wonder how many proponents, opponents and those who are undecided on this bill have taken the time to read and consider the implications of that report. If it is not 100%, now is not the time to pass this bill.

I respectfully suggest this matter be referred to summer study to better understand the implications, unintended consequences and consider how to shape this important public policy in a way that balances employers' and employees' needs.

I thank you for your time and consideration. I invite you to contact me if I can provide any more information or answer any questions.

Respectfully submitted,

Christine V. Walters

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- ⁱ <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/documents/total%20financial%20impact%20of%20employee%20absences%20report%20key.pdf>
- ⁱⁱ <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf>
- ⁱⁱⁱ <https://commerce.maryland.gov/media/states-open-for-business-marketing-campaign-receives-2019-media-award>