

February 11, 2021

Chairman and Delegate Dereck E. Davis
House Economic Matters Committee
Room 231, House Office Building
Annapolis, Maryland 21401

RE: HB 375 – Family and Medical Leave Insurance Program – Establishment (Time to Care Act of 2021)

Dear Mr. Chairman Davis, Vice Chair Dumais, and Honorable Committee Members,

My name is Christine V. Walters, JD, 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. I am sure you have written letters and/or testimony from both of those organizations. I share many of their concerns. I am writing to share some recommendations to address concerns that have been shared with me by one or more of my clients, mostly small business employers.

The bill fails to clarify whether it is creating a new bank of paid leave. I have heard concerns expressed by employers and those representing them that it appears on its face that this bill may require employers to provide an additional bank of leave. Section 8.3–302 reads, “THE PURPOSE OF THE PROGRAM IS TO PROVIDE TEMPORARY BENEFITS TO A COVERED INDIVIDUAL WHO IS TAKING LEAVE FROM EMPLOYMENT.” I think this can be clarified if a definition of “leave” was added to the bill. It is currently undefined. 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 or the employer’s policy. That should clarify that this bill does *not* require employer to provide additional time off from work.

This bill imposes a variety of administrative challenges.

- Use of Paid Leave (allowed versus required) – Section 8.3–703(A) of 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 take

time off without pay 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 – Section 8.3–801 of 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 or the employer knows the employee needs leave; and (3) annually. No other leave law in Maryland, paid or unpaid, has a triple notice requirement. None has a double notice requirement, including the Healthy Working Families Act. Only the federal Family and Medical Leave Act requires a second notice. Requiring notice to every employee on at least two and potentially three separation occasions is onerous. At a minimum, I would urge the deletion of the annual notice requirement. I would further ask that the requirement to provide a second notice within five days after the employee provides notice of the leave or the employer knows the employee needs leave also be removed.
- Regulatory guidance – The fiscal note indicates the bill requires the Secretary to publish regulations by October 1, 2021. Today marks the three-year anniversary of enactment of Maryland's Healthy Working Families Act. Today, we still do not have regulations published by the Secretary. This bill contains no provision delaying enforcement or imposition of the monetary penalties for non-compliance until such regulations are published. I would ask that such a provision be added.
- No opportunity to offset costs – Section 8.3–202 of the bill reads, "THIS TITLE MAY NOT BE CONSTRUED TO DIMINISH AN EMPLOYER'S OBLIGATION TO COMPLY WITH A COLLECTIVE BARGAINING AGREEMENT OR 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. I agree this provision is applicable to the administration of leave as negotiated and as referenced under a collective bargaining agreement. I would urge that the clause "OR AN EMPLOYER POLICY" be deleted.
- State Administration and Fiscal Note – the bill and Fiscal Note do not describe when, with what frequency or how the employer is to submit the employer's and employees' portion of the tax to the State. They only indicate 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 all the time and costs imposed on employers.

This bill imposes a number of fiscal challenges, many of which may be missing from the Fiscal Note.

The fiscal note references "Current Law." But it fails to include a number of Maryland leave laws, paid and unpaid, in effect today. Most Maryland employers with at least 15 employees are also 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
- Reasonable Accommodation for Pregnancy-Disability, which may include paid leave
- Voting Leave
- Military Deployment Leave (for employers with 50 or more employees)

**Leave may be unpaid.*

The fiscal note reads the bill “has a significant impact on small business.” Not that it *may* have but, it “has” a significant impact. I and many of my small business clients agree. Here are just two examples shared with me by one or more small business and non-profit clients:

- Last year, a non-profit employer projected this tax would cost them \$41,500/year. They will likely offset that cost by reducing or abolishing one or more employee benefits, such as health insurance subsidies. That employer submitted written testimony last year.
- 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 the Society for Human Resource Management (“SHRM”) in 2014, “Total Financial Impact of Employee Absences Across the United States, China, Australia, Europe, India and Mexico” 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 higher today than they were seven (7) years ago, particularly in light of Maryland’s minimum wage increases and paid sick and safe leave enacted since then.

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

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 HB 375. 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 is *Not* the Time

The COVID-19 pandemic has adversely impacted employees and employers across the nation. Imposing a new tax on both is a burden that many will be unable to bear. Now is not the time to pass this bill.

Treasury Secretary Janet Yellen [announced](#) that President Biden is open to a national paid family and medical leave law and advocacy groups are [pressing](#) Congress to take action. Having one national standard will provide consistency for employees and the employers. Now is not the time to pass this bill.

The National Partnership for Women and Families [reports](#) that as of January 2021 only nine 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. Our state theme was, "Open for Business." That theme even won an [award](#) in 2019. Let us support that theme. Now is not the time to pass this bill.

Last year, the Department of Legislative Services (DLS) issued a report on paid family and medical leave insurance. I recommend that report be updated and considered before we move to pass a legislative proposal that may not have been thoroughly researched. 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

Christine V. Walters, J.D., MAS, SHRM-SCP, SPHR

Cc: Carroll County Delegates Krebs, Rose, and Shoemaker