

"Flexible" Leave Act Complicates Paid Time Off Policies for Maryland Employers

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On October 1, 2008, the Maryland Flexible Leave Act (MFLA or "the Act") became effective. It entitles employees to use accrued personal paid leave provided by their employer to care for an ill family member. At its core, the Act expands workplace policies that permit employees to take sick or vacation days only for their own illnesses.

Meeting the Requirements of the MFLA

The MFLA applies to all employers in Maryland with 15 or more Maryland employees (including leased workers). The Act does not require an employer to provide leave with pay. However, if the employer provides leave with pay pursuant to an employment policy or a collective bargaining agreement, then the employee is entitled to use such leave to care for an immediate family member who is ill. In contrast to the federal Family and Medical Leave Act (FMLA), the MFLA does not require the family member's illness be "serious" to trigger the right to use paid leave. The MFLA merely requires that an immediate family member be ill, and that the leave be used "for the illness." An *immediate family member* includes a spouse, parent, or child.

Leave with pay means "time away from work for which an employee receives compensation." This includes vacation, sick leave, and compensatory time. Under the Act, only leave that has been earned by the employee may be used, but the Act appears to apply to leave accrued before October 1, 2008. An employee who has more than one type of paid leave available may elect the type and amount of paid leave to be used. Further, if an applicable paid leave policy provides more generous terms than the MFLA, the more generous terms of that policy will prevail.

The MFLA prohibits employers from discriminating against any employee who exercises his or her rights under the Act, complains about any violation under the Act, or participates in an investigation or legal action arising out of such complaints. It is unclear how the Act will be enforced. No Maryland Agency is currently designated to enforce the Act, and the Act does not explicitly provide a private right of action for aggrieved individuals. Furthermore, the Act does not affect any employee rights under the FMLA.

What Employers Should Do to Ensure Compliance

Employers should review their leave policies and how they administer these policies to ensure that they are compliant with the MFLA. Employers may also consider adopting call-in procedures for employees who wish to use leave. Further verification procedures (that are not discriminatory) can be used to confirm that the leave taken is for the illness of an immediate family member (or other purpose permitted by the employer's policy). Once an employer voluntarily elects to provide paid leave, that employer may lose the ability to decrease that benefit. Maryland law may limit an employers' ability to withdraw or reduce vacation leave benefits provided to incumbent employees in writing at the time of hire.

We anticipate further clarification of the Act, especially as to its enforcement, over the next few months.

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