

# Management Alert



## If Pain, Yes Gain — Part XLI: Prince George's County, MD Passes Paid Safe Leave Ordinance

By Christine M. Costantino, Tracy M. Billows, and Joshua D. Seidman

**Seyfarth Synopsis:** Earlier this month Prince George's County, MD passed a paid safe leave ordinance that is scheduled to go into effect in May 2018. The ordinance mandates that covered employers provide eligible employees with certain amounts of "earned sick and safe leave" during a benefit year. However, despite its title and referring to the leave benefit as "sick and safe leave," the ordinance limits the protected reasons for use to certain absences from work related to the employee or the employee's covered family member's status as a victim of domestic violence, sexual assault or stalking.

Prince George's County, MD enacted a paid "safe" time law, titled "Earned Sick and Safe Leave" (the "Law"), on December 12, 2017. The Law will become effective on May 24, 2018 (45 calendar days after the April 9, 2018 adjournment of the 2018 Maryland General Assembly). The Law requires that covered employers provide employees with certain amounts of paid leave to use for certain absences in connection with domestic violence, sexual assault or stalking. Notably, despite the Law's title, it is unique in that its focus is exclusively on "safe leave" and does not contain a separate paid sick leave component.

Some of the primary requirements of the Law are:

- Employers with more than 15 employees who are not owners must provide earned sick and safe leave to their eligible Prince George's County (the "County") employees.
- Employees must accrue paid sick and safe leave at a rate of at least one hour for every 30 hours the employee works in the County.
- Employers may cap earned sick and safe leave accrual at 40 hours per calendar year.
- Employers may cap earned sick and safe leave use at 64 hours per calendar year. However and notably, if an employee begins working outside the County, the employer still must allow the employee to use any accrued, unused earned sick and safe leave.
- Employers must permit employees to carry over up to 40 hours of unused earned sick and safe leave at year-end.
- Employers must provide employees with a written statement of available earned sick and safe leave each time the employer pays wages to the employee.

### Which Employers Are Covered Under the Law?

Employers who are required to provide earned sick and safe leave include any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs 15 or more persons in the County in addition to the owners. Employer includes the County government, but does not include the United States, any State, or any other local government.

## Which Employers Are Covered Under the Law?

The Law provides earned sick and safe leave to any person permitted or instructed to work or be present by an employer in the County. However, this broad definition of employee contains several exclusions. The Law does not apply to individuals who: (1) do not have a regular work schedule with the employer; (2) contact the employer for work assignments and are scheduled to work the assignments within 48 hours after contacting the employer; (3) have no obligation to work for the employer if they do not contact the employer for work assignments; (4) perform work under a contract for hire as defined by the Maryland Code; (5) are real estate salespersons or associate real estate brokers under Maryland's Workers' Compensation law; (6) are under the age of 18 before the beginning of the calendar year; (7) are employed in the agricultural sector; (8) are employed by a temporary services agency to provide temporary staffing services to another person if the temporary services agency does not have day-to-day control over the work assignments and supervision of the individual while the individual is providing the temporary staffing services; or (9) are directly employed by an employment agency to provide part-time or temporary services to another person.

## How Much Sick and Safe Leave Can Employees Use, Accrue and Carry Over?

*Accrual:* An employee must accrue paid sick and safe leave at least as fast as one hour of leave for every 30 hours worked in the County. For exempt employees, accrual shall be based on the employee's hours worked in a normal workweek up to 40 hours per week. An employer is not required to permit an employee to earn more than 40 hours of sick and safe leave per calendar year.

*Frontloading:* The Law expressly allows employers to award the full amount of paid sick and safe leave that an employee would earn over an entire calendar year at the beginning of the calendar year. However, unlike many other paid sick and safe time laws and ordinances, the Law does not identify the impact, if any, that frontloading earned sick and safe leave has on employers' year-end carry over obligations.

*Use:* Employers are not required to permit an employee to use more than 64 hours of paid sick and safe leave per calendar year. Employees must be permitted to use sick and safe leave in the smallest increment that an employer's payroll system uses to record absences or work time; however, an employer cannot require employees to use sick and safe leave in increments larger than one hour.

*Carry Over:* An employer must permit employees to carry over at least 40 hours of unused, earned sick and safe leave at year-end.

## Under What Circumstances May Employees Use Sick and Safe Leave?

Employees may use earned sick and safe leave for absences due to domestic violence, sexual assault or stalking committed against the employee or the employee's family member if the leave is used for any one of the following reasons:

- Obtaining medical attention needed to recover from physical or psychological injury due to domestic violence, sexual assault or stalking;
- Obtaining services from a victim services organization related to domestic violence, sexual assault or stalking;
- Obtaining legal services, including preparation for or participation in a civil or criminal proceeding related to domestic violence, sexual assault or stalking; or
- Leave during the time that an employee has temporarily relocated due to domestic violence, sexual assault or stalking.

Family member is defined broadly and includes: (1) an employee's child (biological, adopted, foster, or stepchild, child for whom the employee has legal or physical custody or guardianship, or child for whom the employee is a primary caregiver); (2) biological, adoptive, foster, or step parent of the employee or the employee's spouse; (3) an employee's legal guardian; (4) an

individual who served as the primary caregiver of the employee when the employee was a minor; (5) an employee's spouse; (6) an employee's grandparent; (7) spouse of a grandparent of the employee; (8) an employee's grandchild; (9) an employee's sibling (biological, adopted, foster); and (10) an employee's sibling's spouse.

*Work Outside of the County:* Significantly, if an employee earns sick and safe leave under the Law while working in the County, but later begins working for the same employer outside of the County, the employee must still be permitted to use the earned sick and safe leave that accrued while working for the employer in the County. In other words, while accrual of sick and safe leave is limited to work performed within the County, use of sick and safe leave is not.

## What Employers Can and Cannot Do:

*Verification of Need for Safe Time:* An employer may require an employee that uses more than three consecutive days of earned sick and safe leave to provide "reasonable documentation" to verify that the leave was used appropriately. The Law does not provide any guidance as to what constitutes "reasonable documentation." However, the Law expressly forbids employers from requiring employees to: (1) disclose details of the mental or physical illness, injury or condition of the employee or the employee's family member; or (2) provide as certification any information that would violate the Federal Social Security Law or the Federal Health Insurance Portability and Accountability Law.

*Employee Notice of Need for Safe Time:* To use earned sick and safe time, an employee must take these steps: (1) request leave from the employer as soon as practicable after the employee determines the need to take leave; (2) notify the employer of the anticipated duration of the leave; and (3) comply with any reasonable procedures established by the employer when requesting and taking leave. Notably, the Law does not differentiate between employee notice requirements for foreseeable and unforeseeable absences and also leaves open the question of how "as soon as practicable" will be interpreted.

*Denial Permitted:* An employer may deny an employee's request to take earned sick and safe leave if (1) the employee fails to provide the required notice, and (2) the employee's absence will cause a disruption to the employer. Both requirements must be met to lawfully deny a request to use earned sick and safe leave.

*Retaliation Prohibited:* Employers may not retaliate against an employee for lawfully opposing a violation of the Law or for filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the Law. Employers also may not obstruct or prevent enforcement or compliance with the Law.

*Separation of Employment:* There is no requirement in the Law that an employer "cash out" an employee's accrued, unused sick and safe leave. However, an employer is obligated to reinstate any accrued, unused sick and safe leave if an employee is rehired within 12 months of separation.

## Notice and Recordkeeping Requirements

*Notice and Posting:* An employee must provide notice to employees that they are entitled to earned sick and safe leave under the Law. The notice must include (1) a statement of how earned sick and safe leave is accrued, (2) the permitted uses of earned sick and safe leave, (3) a statement that the employer will not retaliate against an employee for exercising rights under the Law, and (4) information about the employee's right to file a complaint for violation of any rights under the Law. The County's Human Relations Commission will create a model notice in English and Spanish that the employer may use to comply with its notice obligations under the Law.

An employer may provide the required notice by (1) displaying the notice in a conspicuous and accessible area at each of the employer's work locations in the County, (2) including the notice in an employee handbook or written guidance distributed to all employees, or (3) distributing the notice to each employee upon hire.

*Available Balance Notification:* Employers must provide employees with a written statement of available earned sick and safe leave each time the employer pays wages to the employee. However, the Law is silent as to the specific form this notification

must take, including whether the obligation may be fulfilled through an online system allowing employees to access their own earned sick and safe leave balances.

*Record Retention:* Employers must maintain records for at least three years containing the earned sick and safe leave accrued and used by each employee.

## Looking Ahead

Prince George's County joins [Montgomery County, Maryland](#) as the second county in the state to pass its own paid leave legislation in advance of the anticipated statewide paid leave legislation. Although there are significant similarities in the requirements of the Prince George's County and Montgomery County legislation, the Prince George's County Law is less detailed, leaving more open questions for employers regarding its implementation once effective.

In addition to those open issues under the Law itself, there also remains a possibility of complete preemption of the Law under the expected Maryland statewide paid sick and safe leave legislation. Although Governor Hogan vetoed the Maryland Healthy Working Families Act (HB1) in 2017, it is anticipated that the House and Senate will have sufficient votes to pass that legislation over the veto in the 2018 legislative session. If passed as previously drafted, the Act would preempt any local legislation regulating sick and safe leave provided by an employer that was enacted after January 1, 2017. However, it is unknown at this time if those dates will be updated in consideration of the delay in the enactment of the Maryland Healthy Working Families Act, or if other compromise legislation providing for complete preemption of local paid sick and safe time laws will pass in its stead.

Therefore, employers will want to keep informed on any guidance from the Prince George's Human Relations Commission to address the open questions created by the Law and on the actions of the 2018 Maryland General Assembly as it looks to pass some form of statewide paid sick and safe leave legislation. To stay up-to-date on those, and other, Paid Sick Leave developments, click [here](#) to sign up for Seyfarth's Paid Sick Leave mailing list.

If you would like further information, please contact [Christine M. Costantino](#) at [ccostantino@seyfarth.com](mailto:ccostantino@seyfarth.com), [Tracy M. Billows](#) at [tbillows@seyfarth.com](mailto:tbillows@seyfarth.com), or [Joshua D. Seidman](#) at [jseidman@seyfarth.com](mailto:jseidman@seyfarth.com).

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