

Management Alert



If Pain, Yes Gain—Part XLII: Maryland Becomes Ninth State to Enact Paid Sick Leave Law

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Seyfarth Synopsis: Following successful votes by the Maryland Senate and House of Delegates to override Governor Larry Hogan's veto of a 2017 paid sick leave bill, on January 12, 2018 Maryland became the ninth state in the country to pass a mandatory paid sick leave law. While the effective date could be delayed given the procedural hurdle of having to override the Governor's veto, the law currently is scheduled to go into effect on February 11, 2018.

As the 2018 calendar year (and, by extension, flu season) are now upon us, so too is the country's ninth statewide paid sick leave law. On January 12, 2018, the Maryland Senate voted to override Governor Larry Hogan's 2017 veto of a paid sick leave bill that was [passed by the Maryland legislature during the 2017 legislative session](#). The Senate's successful vote follows the Maryland House of Delegates' vote from January 11, 2018 to override the Governor's paid sick leave veto.¹

The Maryland paid sick leave law, which is known as the Healthy Working Families Act ("HWFA" or the "Act") is scheduled to go into effect on February 11, 2018—30 days from the January 12th state Senate vote. Under Maryland law, bills that become law following an overridden governor veto take effect on the later of the effective date listed in the bill or 30 days after the override. Because the HWFA calls for a January 1, 2018 effective date, the current effective date is scheduled for February 11, 2018. We will continue to monitor the HWFA effective date and provide any updates on whether this date is extended to afford affected businesses more than a 30-day window to comply.

Here are the highlights of the HWFA:

- **Preemption of Local Paid Sick Leave Laws:** The HWFA does not preempt or otherwise affect any other law that provides more generous paid sick leave benefits than that provided under the HWFA. However, there is one major caveat. Namely, local Maryland jurisdictions are preempted from passing ordinances on or after January 1, 2017 that impose sick and safe leave obligations on private employers. As a result, [the Montgomery County, MD Earned Sick and Safe Leave Act](#), which went into effect on October 1, 2016 and was amended in November 2016, is shielded from the HWFA's preemption, but the preemption would apply to the [Prince George's County Earned Sick and Safe Leave ordinance](#), which was enacted on December 12, 2017 and planned to go into effect in May 2018. It is unclear if the January 1, 2017 preemption cutoff date will be updated in consideration of the delay in enacting the HWFA.

¹ The other eight states that have passed a statewide mandatory paid sick leave law are: (1) [Connecticut](#); (2) [California](#); (3) [Massachusetts](#); (4) [Oregon](#); (5) [Vermont](#); (6) [Arizona](#); (7) [Washington](#); (8) [Rhode Island](#). The Rhode Island governor signed the state's paid sick leave law on September 28, 2017 and it is scheduled to go into effect on July 1, 2018. The Washington statewide paid sick leave law went into effect on January 1, 2018. The other six statewide laws are in effect.

- Existing Paid Leave Policies:** The HWFA expressly states that employers do not need to modify existing paid leave policies to comply with the Act if (a) employees can accrue and use paid leave under terms and conditions that are at least equivalent to paid sick leave provided under the Act, or (b) the paid leave policy does not reduce employee compensation for an absence due to sick or safe leave. At this time, the safest course of action for employers that want to use an existing non-sick paid leave policy for HWFA compliance is to ensure their existing policy meets all substantive, technical requirements of the Act. That being said, the HWFA later states in the law that an employer's existing paid leave policy will be "presumed to be equivalent" to the sick and safe leave provided under the Act if the existing policy allows an employee to (i) accrue paid leave at least as fast as sick and safe leave accrual under the HWFA, and (ii) use paid leave for the same purposes set forth in the HWFA. We expect this position to be further clarified in forthcoming sick leave rules and regulations from the state and will provide updates as new information becomes available.
 - Types of "Existing Paid Leave":** The HWFA notes that "existing paid leave" includes vacation days, sick days, short-term disability benefits, floating holidays, parental leave, and other PTO.
- Employee Eligibility:** The HWFA excludes certain individuals from its definition of "employee." Specifically, the HWFA excludes individuals who (a) work under a contract for hire that is determined not to be covered employment under Maryland law, (b) are certain licensed real estate salespersons or brokers, (c) are under the age of 18 years old before the beginning of the year, and (d) are employed in the agricultural sector on an agricultural operation.
 - Staffing Agencies:** The HWFA also expressly excludes individuals who are employed by a temporary services agency to provide temporary staffing services to another person as long as the agency does not maintain day to day control over and supervision of the individual's work assignments while he/she is providing the temporary services. In addition, the HWFA states that an employee does not include someone who is directly employed by an employment agency to provide part-time or temporary services to another person.
 - Weekly Hours Worked:** The HWFA does not apply to an employee who regularly works less than 12 hours per week for an employer.
 - Construction Industry:** The HWFA does not apply to an employee who works in the construction industry and is covered by a collective bargaining agreement that expressly waives the HWFA's requirements in clear and unambiguous terms. This exception does not apply to individuals who are employed as a janitor, building cleaner, building security officer, concierge, door person, handyperson or building superintendent.
 - Health or Human Services Industry:** The HWFA does not apply to an employee who (a) is called to work by the employer on an as needed basis in the health or human services industry, (b) can reject or accept the shift offered by the employer, (c) is not guaranteed to be called on to work by the employer, and (d) is not employed by a temporary services agency.
- Covered Employers:** Employers with 15 or more employees must provide paid sick and safe leave benefits to eligible employees, while employers with fewer than 15 employees must provide their employees with unpaid sick and safe leave benefits. An employer's number of employees is determined by calculating the average monthly number of employees employed during the immediately preceding year. The HWFA explains that each employee of an employer is included in this calculation, regardless of whether the employee is a full-time, part-time, temporary or seasonal employee **or** would be eligible for paid sick leave under the HWFA.
- Start of Accrual:** Employees begin to accrue sick and safe leave on the later of their date of hire or, presumably due to the delay in overriding the vetoed sick leave bill, the HWFA's February 11, 2018 effective date or other effective date that is set (see above for further discussion on the HWFA's effective date).
- Accrual of Sick Leave:** Eligible employees will accrue sick and safe leave at a rate of at least one hour for every 30 hours worked. Unlike most paid sick leave laws and ordinances which contain either an annual accrual cap or a "point in time" accrual cap,² covered Maryland employers must comply with both forms of accrual caps. The HWFA states that employees can accrue up to 40 hours of sick and safe leave per year.³ Further, the HWFA sets a 64 hour "point in time" accrual cap, meaning that employers are only required to allow employees' bank of accrued, unused sick and safe leave to reach 64 hours at any one time.

² The Minneapolis and St. Paul paid sick leave ordinances are among the few existing paid sick leave jurisdictions that impose both an annual and "point in time" accrual cap on covered employers. For more information, here are our prior alerts on [Minneapolis](#) and [St. Paul](#) paid sick leave.

³ The HWFA defines "year" as a regular and consecutive 12-month period as defined by the employer.

- **Exceptions to Accrual:** Employers are not required to allow an employee to accrue sick and safe leave during a (a) two-week pay period in which the employee worked less than 24 hours total, (b) one-week pay period if the employee worked less than a combined total of 24 hours in the current and immediately preceding pay period, **or** (c) pay period in which the employee is paid twice a month, regardless of the number of weeks in a pay period, and the employee worked fewer than 26 hours in the pay period.
- **Exempt Employees:** For purposes of sick and safe leave accrual, an employee exempt from the FLSA's overtime wage requirements is presumed to work 40 hours each workweek, unless the employee's normal workweek is less than 40 hours, in which case the number of hours in the normal workweek should be used.
- **Usage Cap:** Employers must allow eligible employees to use at least 64 hours of sick and safe leave in a year.
- **Year-End Carryover:** Subject to the "frontloading" exception discussed below, employees must be allowed to carry over up to 40 hours of earned, unused sick and safe leave at year-end.
- **Frontloading:** The HWFA states that employers can award employees the full amount of sick and safe leave that they would earn over the course of the year at the start of each year instead of following an accrual system. Moreover, adopting a frontloading system will absolve employers' year-end carryover obligations under the Act.
- **Usage Waiting Period:** Employers are not required to allow an eligible employee to begin using earned sick and safe leave during the first 106 calendar days the employee works for the employer.
- **Increments of Use:** While an employer generally must allow employees to use sick and safe leave in the smallest increment that the employer's payroll system uses to account for absences or use of the employee's work time, the HWFA expressly states that an employer can require employees to take the leave in an increment not exceeding four hours.
- **Protected Reasons for Use:** Under the HWFA, employees can use sick and safe leave for the following absences:
 - To care for or treat the employee's own mental or physical illness, injury or condition, or to obtain preventive medical care;
 - To care for a covered family member with a mental or physical illness, injury or condition, or to obtain preventive medical care for the family member;
 - For maternity or paternity leave; or
 - For certain absences from work that are necessary due to domestic violence, sexual assault, or stalking committed against the employee or the employee's covered family member.
- **Covered Family Members:** The HWFA defines covered family members to include children, parents, spouses, grandparents, grandchildren, and siblings. "Child" includes a biological, adopted, foster, or step child of the employee, a child for whom the employee has legal or physical custody or guardianship, and a child for whom the employee stands in loco parentis, regardless of the child's age. "Parent" includes a biological, adoptive, foster or step parent of the employee or the employee's spouse, the legal guardian of the employee, and an individual who acted as a parent or stood in loco parentis to the employee or the employee's spouse when they were a minor. The HWFA defines "grandparent," "grandchild," and "sibling" to include biological, adoptive, foster and step relationships.
- **Payment of Leave:** When employees use paid sick and safe leave under the HWFA, the leave should be paid at the same wage rate as the employee normally earns. Employers are not required to pay a tipped employee more than the applicable minimum wage for use of paid sick and safe leave.
- **Employer Ability to Prohibit Employee Abuse:** The HWFA expressly allows employers to adopt and enforce a policy that prohibits employees from improperly using sick and safe leave, including prohibiting a pattern of abuse of paid sick and safe leave.
- **Employee Notice to the Employer:** Foreseeable Absences: An employer can require the employee to provide reasonable advance notice of not more than seven days before the sick and safe leave will begin; Unforeseeable Absences: An employer can require the employee to provide notice as soon as practicable.

- **Employer Ability to Deny Employee Request:** The HWFA notes that an employer can deny an employee’s request to use sick and safe leave if the employee failed to provide the required notice and the absence would cause a disruption to the employer.
- **Documentation:** Employers can require an employee to provide documentation justifying that their sick leave absence was appropriate if (a) the leave was used for more than two consecutive shifts **or** (b) the employee used the leave between the 107th and 120th calendar days (both inclusive) of their employment, and the employee agreed to provide documentation under terms agreed upon by the employer and employee when the employee was hired.
 - **Employer Ability to Deny Employee Subsequent Request:** The HWFA states that if an employee fails or refuses to provide required documentation, the employer can deny an employee’s subsequent request to take sick and safe leave for the same reason.
- **Notice of Available Leave:** The HWFA mandates that employers provide employees with a statement of their available sick and safe leave balance each time wages are paid. This requirement can be met through the use of an online system.
- **Notice and Posting Requirement:** The HWFA states that employers must notify employees of their entitlement to sick and safe leave under the Act. The notice must include various topics, including a statement about how sick and safe leave is accrued and the reasons for which the leave can be used under the Act. While the Act does not state whether this notice requirement includes a posting obligation and/or obligation to provide individual notice to employees upon hire, it does state that the Maryland Commissioner of Labor and Industry must create and distribute to employers a poster and model notice for compliance with this notice requirement.
- **Recordkeeping:** Employers must keep for at least three years a record of sick and safe leave accrued and used by each employee.
- **No Payout on Termination:** The HWFA does not require employers to compensate employees for earned, unused paid sick and safe leave upon separation of employment. However, if an employee is rehired by the employer with 37 weeks of separation, the employer must reinstate any earned, unused sick leave to the employee. This reinstatement requirement does not apply if the employer paid an employee for his/her unused sick and safe leave upon separation.

Employers should take steps now to comply with the requirements of HWFA before the Act’s current February 11, 2018 effective date. Here are some steps to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the HWFA.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the HWFA.
- Monitor the Maryland Department of Labor and Industry website for information on the HWFA, including a model poster, model notice, and proposed and final regulations.
- Train supervisory and managerial employees, as well as HR, on the new requirements.

We will continue to monitor and provide updates on Maryland paid sick leave developments as the February 11th effective date approaches and any changes that take place thereafter. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth’s Paid Sick Leave mailing list.

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Seyfarth Shaw LLP Management Alert | January 15, 2018

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