A Timely Analysis of Legal Developments

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New legislation recently signed into law by the Governor of Maryland amending the Maryland Flexible Leave Act eliminates many of the concerns shared by Maryland employers, and clarifies the effect of the original Act signed into law last year. Other legislation passed by the Maryland General Assembly expands the right of individuals to initiate discrimination litigation, as well as restricts the use of independent contractors in the construction and landscape industries.

The Maryland General Assembly Amends and Clarifies Key Terms in the Maryland "Flexible" Leave Act and Other Maryland Developments

By H. Tor Christensen and Steven E. Kaplan

Based on concerns brought forth by the business community, the Maryland General Assembly overwhelmingly voted to revise and clarify key terms in the Maryland Flexible Leave Act (MFLA), which was originally signed into law on May 22, 2008. As an emergency measure, the amended Act became effective on May 19, 2009, the date on which the Governor signed it. The MFLA generally entitles employees to use any accrued personal paid leave for the illness of an immediate family member.

The purpose of the amendments to the MFLA is to provide specific definitions of key terms that had previously been undefined. The new law contains definitions of significant terms referenced in the MFLA, such as "employee," "employer," "child," "parent," "leave with pay" in addition to clarifying under what circumstances an employee is entitled to paid leave.

The amended MFLA clarifies that:

- an *employee* must be primarily employed in the State of Maryland (previously, this was an open question).
- an *employer* must employ 15 or more employees in the State of Maryland, and employ those employees for "each working day in each of 20 or more calendar weeks in the current or preceding calendar year."
- an *immediate family member* is limited to the child, spouse, or parent of the employee.
- a *child* is defined as an adopted, biological, foster child, stepchild, or legal ward who is under 18 years old. However, the age ceiling is waived where the adopted, biological, foster child, stepchild, or legal ward is incapable of self-care due to a mental or physical disability (previously, an employee could have been eligible to take leave with pay to care for any adult child with an illness).
- *leave with pay* is now defined as paid time away from work that "is earned and available to an employee" (previously, for example, a probationary employee was

arguably eligible for leave with pay, even where the employer's policy expressly stated that probationary employees are not eligible for paid time off).

Significantly, the amended MFLA clarifies that *leave with pay* does not include short term disability leave, other disability benefits, workers' compensation, or similar benefits. This was an important issue for employers who offered more generous types of leave policies and did not initially cap the amount of sick leave an employee is eligible to take under the original MFLA.

Unlike the federal Family and Medical Leave Act, however, the MFLA does not include a minimum requirement that an illness be "serious" in order to qualify for coverage. Therefore, any illness will likely trigger paid leave rights under the MFLA. However, an employee is only eligible for leave rights under the MFLA if s/he is eligible for paid leave, *i.e.*, vacation or paid time off, under an employer's policies. If, for example, an employee is not eligible to use vacation leave during his or her first year of employment, that employee will not be eligible for paid leave during his or her first year of employment under the MFLA.

Moreover, an employer may deny paid leave under the MFLA if an employee violates the employer's leave policies, which can include sufficient notice and adequate documentation. Indeed, as the amended MFLA now states: "[t]he purpose of this section is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill *under the same conditions and policy rules* that would apply if the employee took leave for the employee's own illness."

What Employers Should Do to Ensure Compliance

Maryland employers should review their leave policies as well as how their leave policies are actually administered to ensure that they are compliant with the MFLA. Employers may also consider adopting call-in procedures for employees who wish to use leave on a basis that does not discriminate against employees covered by the MFLA. Further verification procedures may be helpful to confirm that the leave taken is for the illness of an immediate family member. Finally, employers in Maryland always have the option to limit the amount of paid leave available to new employees, so long as they are not subject to a collective bargaining agreement. However, it is important to remember that current Maryland law may limit whether an employer can decrease vacation leave benefits available to incumbent employees.

Other Legislative Changes in this Session of the General Assembly

- **The Workplace Fraud Act of 2009 (SB-909):** This statute creates a *presumption* that work performed in the construction and landscape industries is performed by employees, and not by independent contractors. In short, this bill increases fines and penalties for some employers whose employees have been misclassified as independent contractors. If challenged, employers in these industries must satisfy the requirements of the rigorous "ABC DLLR" test in order to avoid liability. This law (as well as comments by the DLLR) strongly indicates increased enforcement efforts by the DLLR in these industries and others in the future.
- **Discrimination in Employment – Expansion of Disability Rights (SB-670):** This statute codifies specific existing regulations of the Maryland Commission on Human Relations as they relate to defining disability. For example, the law expands the statutory definition of *disability* to include "a record of having a physical or mental impairment" and "being regarded as having a physical or mental impairment." Moreover, it prohibits an employer or labor organization from failing or refusing to make a reasonable accommodation for the known disability of an otherwise qualified employee or applicant who has opposed any prohibited employment practice or participated in an investigation or hearing related to a discrimination charge.

The law does not codify the Commission's definitions of "major life activities" or "qualified individual with a disability." Notably, the law (and regulations) differ in some material ways from the recently amended federal ADA, so it will be important to analyze a request for an accommodation under both laws.

- **Maryland's Lilly Ledbetter Fair Pay Restoration Act of 2009 (SB-368):** The relief afforded to plaintiffs by the federal Lilly Ledbetter Fair Pay Act of 2009 has been expanded to state claims by Maryland's Lilly Ledbetter Fair Pay Restoration Act of 2009. While it is not entirely clear what the full effect of this law will be, it is clear that where an alleged discriminatory practice can be claimed to have had an effect on an employee's pay, the employee may now recover back pay for up to two years prior to the filing of the complaint, based upon discriminatory pay practices that may have occurred decades earlier. In fact, at least one state court has now held that allegations, which were based upon demotions that had occurred 16 years prior to the filing of the claim (and resulted in a pay reduction), were timely under the new legislation. Similarly, claims are not necessarily limited to raises, but can also include denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions, and other discipline — any employment decision that has the potential to affect pay. This legislation is scheduled to take effect on October 1, 2009. As with the federal Fair Pay Act, Maryland employers are advised to review their document retention policies carefully in light of this expanded state cause of action.

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