MARYLAND
CHAMBER of COMMERCE

LEGISLATIVE POSITION
OPPOSED
House Bill 1
Labor and Employment – Maryland Healthy Working Families Act
Thursday, February 9, 2017

Dear Chairman Davis and House Economic Matters Committee Members:

This constitutes the position statement position of the Maryland Chamber of Commerce on HB 1, the proposed legislation requiring employers with more than 15 employees to provide fifty-six hours (i.e. 7 days) of paid leave per year, and those with 14 employees or less to provide unpaid leave, for employees to use for purposes of illness or health care for themselves and family members, and for certain absences associated with domestic violence.

This bill is clearly well-intentioned – to provide financial support to employees who miss work because of illness or domestic violence, and to prevent workers from coming to work when ill and potentially infecting others. Despite this worthy objective, we see a significant number of problems with the overall concept of imposing paid leave mandates on employers and more specifically with the implementation of this bill as currently drafted, which is in essence anti-business. Accordingly, the Maryland Chamber opposes this legislation.

Issues with Paid Leave as a Mandated Benefit

Most businesses want to treat their employees fairly and well. It is better for business when employees are happy, productive and loyal. In addition, there are costs associated with recruiting, hiring, and training employees. If employees leave, it is expensive to recruit, hire and train new employees. Moreover, there are also costs associated with employees who leave, such as unemployment insurance. The more unemployment claims filed against an employer, the higher the taxation rate for that employer.

But there is the business reality. Employers tend to give what they can afford and still remain competitive. Many employers do provide leave benefits that cover illness – either sick leave or general paid time off that can be used for illness. Most of those employers who do not give these benefits cannot afford to do so. This is particularly true for smaller employers.

It is critical to recognize the impact on these organizations from mandated benefits laws. Even the federal government understands that smaller employers are less able to provide certain types of benefits. For example, the Family and Medical Leave Act mandates unpaid leave for medical reasons, and applies for conditions that last longer than 3 days. It only applies to employers with 50 or more

employees. Congress recognized that this unpaid leave requirement would be too burdensome on smaller employers. Paid leave, of course, is an even greater burden.

In the present economy, as businesses are slowly making a recovery from the economic downturn of the past few years, we cannot do anything to threaten this fragile growth. Imposing new costs on businesses would no doubt imperil this recovery. Employers are already incurring increased costs for health insurance as a result of the Affordable Care Act.

In addition, there are issues and costs associated with the implementation of paid sick leave. We can look to the experiences of other jurisdictions. For example, San Francisco passed their paid leave law in 2006. According to the 2011 study by the Institute for Women's Policy Research, 18.7% of leisure and hospitality workers faced layoffs or hour reductions as a direct result of the ordinance.

When the state of Connecticut enacted the first state-wide paid sick leave law in 2012, The Employment Policy Institute surveyed employers affected by the new law. Of the 156 businesses who participated, 31 had to scale back on employee benefits and/or reduce paid leave benefits to account for the costs. Of those employers, thirty-one had to scale back on employee benefits and/or reduced paid leave benefits to account for the cost of the new law. Twelve cut employee hours, six reduced employee wages, nineteen raised consumer prices, and six laid off employees. Sixteen employers indicated that they had decided to limit or restrict expansion of their business within the state. Thirty-eight stated that they would hire fewer people as a result of the law.

In Washington D.C., the Sick and Safe Leave Act was passed in 2008, with unexpected consequences, significant costs of implementation, and great confusion. Employers were required to spend a substantial money in 2008 and 2009 to revamp their payroll and leave tracking systems, as well as expend costs in bringing policies into compliance with the strict accrual and use requirements of the law. The law posed challenges for smaller employers with regard to implementation, as many smaller employers do not have human resources departments or personnel to manage the leave. In addition, many smaller employers do not have the money to hire attorneys to figure out how to comply with the law. Moreover, there were ambiguities regarding the definition of an employee and employee eligibility.

Last year, Gonzales Research and Marketing Strategies, Inc. conducted a poll on Maryland voters on the issue of mandatory paid leave. When questioned if they favored the concept of paid leave, 73% of Marylanders "favored" the idea. However, if a paid leave law resulted in certain potential outcomes, such as: reduced benefits (77%- Opposed), less hours (59% - Opposed), fewer jobs (57%- Opposed), or a payroll tax (55%), these same Marylanders overwhelmingly were opposed.

We certainly understand the social justice concerns that underlie this proposed legislation. We caution the General Assembly, however, that mandating this leave is the beginning of a slippery slope. In past sessions, there have been bills instituting other forms of leave. All of these bills have a worthy purpose, but where do we draw the line? In addition, the General Assembly passed the bill mandating leave associated with a family member's military deployment or recuperation, and previously passed the Maryland Flexible Leave Act, which allows employees to use already accrued paid leave for family illness. Requiring employers to provide these and other types of leave creates economic and practical difficulties for those businesses, particularly smaller companies. In addition, the more types of leave, the more onerous it will be.

Issues with the Current Proposed Bill

The actual proposed bill is severely problematic for many reasons. In terms of the actual provisions of the bill, some of the more significant concerns that the Chamber has are as follows:

Section 3-1301(E) - The definition of employee states who is not an employee, but does not provide any guidance on who is an employee. Like the Maryland Flexible Leave Act, which also deals with leave rights for family illness, employees should be "primarily employed" in Maryland – otherwise, multi-state employers could face a situation where employees in other states would try to invoke rights under Maryland.

Section 3-1301(G) – The definition of "family member" is overly broad, including grandparents and grandchildren, siblings, including foster siblings. The definition, like the federal Family and Medical Leave Act and the Maryland Flexible Leave Act, should be limited to immediate family members – spouses, children under 18 years of age (unless disabled), and parents. Further it is unclear what "child for whom the employee has physical custody" means.

Section 3-1302 (A)(2) – A majority of employers, with existing paid leave policies, will not be exempt from this bill because the provision is narrowly written. Unless the terms and conditions for accruing and using leave for an employee matches those contained within this bill, employers shall be forced to modify their policies for all employees. Not all leave policies administered by employers are a "one size" fits all model. However, this language will not only compel most employers to radically alter established leave policies, but it will now subject them to potential sanctions and private cause of actions that are also contained in this bill.

Section 3-1302 (C) – While this section prospectively preempts local jurisdictions from enacting a law regulating leave benefits by an employer, it blatantly excludes one county from compliance - Montgomery County. For multi-jurisdictional operators, it is becoming increasingly burdensome to operate businesses in different counties as the volume of locally enacted labor laws increase. Failure to preclude Montgomery County in this provision will become an administrative nightmare for employers to comply with various paid leave laws when conducting business located in numerous counties in Maryland. In addition, by permitting two different and conflicting policies to exist, employers would now face the challenges of which laws they must be in compliance.

Section 3-1303 (A)(1) – There are two major issues with this provision. First, the word "regularly" requires further clarification or definition. Failure to define "regularly" makes the language vague, unworkable, and unforeseeable – most importantly, it makes it impossible for employers to comply. Secondly, the current language, an employee merely has to work 8 hours per week. The administrative burden of administering a paid leave benefits for employees who work a minimum of 8 hours far outweighs the benefit. Moreover, this is far more generous than any other standard contained in Maryland's Labor and Employment Code, when defining part-time employee. We urge that the minimum weekly hours of work for leave eligibility be increased from 8 to at least 30 hours.

Section 3-1303(2) – The bill excludes from coverage employees in the construction industry who are "covered by a bona fide collective bargaining agreement in which the requirements of this subtitle are expressly waived." Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts state laws which requires an interpretation of a collective bargaining agreement. Whether the requirements have been expressly waived in this context requires an interpretation of a CBA. As such,

this provision (and potentially others that involve whether leave offered to employees is equivalent to what is offered under employer policy) may be preempted as to unionized workers.

Section 3-1304(A)(1) – It is wholly unclear how leave that is "paid at the same rate as the employee normally earns" should be applied with regard to tipped and commissioned employees and employees who earn incentives and bonuses.

In addition, the bill requires all employers with more than fifteen (15) employees, regardless of size beyond that, to have the same required number of paid days of leave. Thus, those with only 15 employees must provide 7 days of paid leave, just as employers with thousands of employees must do. As noted above, with many smaller employers struggling to stay in business during the most challenging economic situation in decades, the costs of providing this leave – or even a lesser amount of leave – poses an untenable burden.

We further note that the trigger for paid leave at 15 employees is inconsistent with many other employment-related state statutes, which begin coverage at 50 or more employees, such as the Economic Stabilization Act (1985/1995), the Healthy Retail Employee Act (2010), and the Deployment of Family Members in Armed Forces Act (2013). This inconsistency adds to the difficulty of an employer ensuring that it is in compliance with all applicable state statutes.

Section 3-1304(A)(2) – As iterated above, this type of requirement on a smaller employer (14 or less employees) can be challenging, as these employers have less staff and are less able to provide coverage when employee taken the earned sick and safe leave.

Section 3-1304(B) and (D) – The bill contemplates accrual of paid leave at 1 hour for every 30 hours worked, or a front load (where all the leave is granted at the beginning of the year). There may be other accruals (e.g. by days or weeks worked, or pay period) that employers currently use for paid leave that would still result in the total required days – even assuming that such existing paid leave programs would be permissible under this legislation. As drafted, employers would be forced to change to one of the specified methods. In D.C., only the specified accrual method is permitted, and this has posed an administrative and cost-intensive challenge for employers to change their leave policies to meet that accrual method.

Section 3-1304(C) – The amount of paid leave earned each year for all employees – 7 days is extremely high. No other state in the Nation has enacted a law that provides more than 6 days of paid leave. Connecticut, Massachusetts, and Oregon provide up to 5 days, while California provides 6 days. Washington D.C. and San Francisco provide a tiered schedule of accruals, depending on the size of the employer with only the largest employers required to provide 7 days. Seven (7) days is simply too burdensome for smaller employers.

In addition, under this provision, there is no definition of the "hours worked" on which the accrual is based. Does this include other paid leave? Unpaid leave? This was an interpretation issue in D.C. that caused much confusion, including different readings by different District agencies.

Furthermore, this provision creates an equity issue for employees. Without expressly permitting pro-rating, which employers regularly do in their employee handbooks, two employees, one full-time and one part-time (32 hours per week), could earn the same amount of leave under this Act - 56 hours in a calendar year. But an employer's other paid leave policies would usually pro-rate accrual for part-

time employees. So under this bill, those employers would have to administer two "clocks" for leave accrual and use, depending on the type of leave being accrued and used

Section 3-1304(E)(1) –By merely assuming that the exempt employee works 40 hours, if the employee claims to work more, and if the employer does not keep complete time records, because the employee is exempt, this could be problematic and potentially could lead to litigation.

Section 3-1304(G)(1) – Inconsistency issues exist for this provision, as it would pose an administrative burden for employers with regard to rollover provisions. Existing rollover provisions may not be compliant with this provision, and employers would be forced to change those provisions or to have differing rollover requirements for different types of leave. Additionally, we recommend that the election of carrying over the balance of the earned sick and safe leave rest with the employer, as the employer is in the best situation to assess its ability to permit roll over.

Section 3-1304(H) – This provision is troubling because it would permit employees to return to a full bank of leave. The concept generally is a problem, because many employers do not have benefits reinstatement provisions, such as the one the bill mandates.

Moreover, this provision imposes an administrative burden to require all employers to retain records about the timing and length of employment and perform calculations to determine a rehired employee's eligibility for paid leave. More significantly, the employer would be required to carry this accounts payable liability for a rolling 12 months following each employee's separation date, on a "just in case" basis. Also, the phrase "when the employee left" is unclear.

Section 3-1305(A)(2) – This provision permits an employee to use paid leave for preventative medical care. Unlike the FMLA, this legislation does not require an employee to try to schedule such care, which is clearly planned in advance, so as to avoid disrupting an employer's operations. This also creates an administrative burden on management and human resources personnel.

Section 3-1305(E)(1) and (2) – Allowing an employee to take earned leave in the smallest increment that the employer's payroll system uses to account for absences can be an administrative burden for personnel to manage and track.

Section 3-1305(G) – This provision also only permits verification that the leave was used appropriately after using it for two consecutive shifts. This prevents an employer from trying to address leave abuse, since leaves of two days or less would not be subject to any questioning by the employer. For example, patterns of leave on shifts before a scheduled day off or before holidays. The D.C. law at least contemplates verifications where leave abuse is suspected. Without the ability to address potential leave abuse, employees will in effect be granted seven vacation days that they can take off whenever they want, without consequence.

Section 3-1307 (B) - Provides that an employer that fails to keep accurate records ("accurate" is undefined), or that refuses to allow the Labor Commissioner to inspect its records of an employee's earned paid leave, shall be presumed to have violated the paid leave statute. It is the long experience of employers that errors in employee record keeping can and do occur, but in most instances they arise unintentionally, not due to negligence or malice.

However, an employer is presumed guilty for failing to keep accurate records, irrespective, of the reasons. The is a completely absence of any language affording the employer any opportunities (or due process) to rebut the presumption of guilt to the Commissioner.

The presumption of employer wrongdoing is extraordinary and unwarranted. Nowhere else in Maryland labor and employment law is there such a shifting of the burden to employers to prove their innocence. By creating vague standards for enforcement, and by presuming guilt and thus requiring the employer to prove innocence, employers are unduly exposed to the excessive penalties contained in the sanction provisions of this legislation. Moreover, such a provision utterly fails to account for the likely prevalence of inadvertent record-keeping errors by employers (or even employees), which should never result in presumed guilt or onerous penalties for employers.

Section 3-1308 – We oppose any creation of a new private right of action against employers. If these provisions are enacted, it would become one the most excessive and onerous sanctions against an employer in Maryland's Labor and Employment Code, to date. Nine (9) separate forms of penalties against the employer that include:

- Economic damages,
- Hourly wages – three times the value amount, per violation,
- Civil penalties – up to $1,000 per employee,
- Triple the value of unpaid leave,
- Punitive damages,
- Legal fees,
- Court costs,
- Injunctive relief, and
- Any other relief that the court deems appropriate.

Given that most violations of mandatory paid leave requirements will be inadvertent errors involving record keeping and tracking of each employee's work and leave hours, such measure are extremely unwarranted and disproportionate to most forms of wrongdoing by the employer. Such enforcement and remedies afforded to the employee must be proportionate, reasonable, and consistent with exiting state law, notably parental leave (Labor and Employment Article, Section 3-1201).

Section 3-1309(C)(1)(II) – This provision grants absolute protection to leave taken under this policy, which is hugely problematic. Many employers have no fault attendance policies, and absences for any reason (other than FMLA and ADA) are counted for purposes of the policy. This provision would exempt such leave from no fault attendance policies. This is particularly problematic since, as noted above, the employer has no ability to obtain verification of the actual need and use of leave for absences of 2 days or less. This leaves the door wide open for flagrant abuse of this leave. Employees could call in "sick," provide no verification, and receive no discipline. Employers would be forced to cover for last-minute no-shows, with no ability to ascertain if such absences were legitimate and no way to deter employees from fraudulent use of this leave.

Conclusion

Although, well intended, the breadth of this bill's application is extensive and unwarranted. This legislation reaches into every business throughout the state, with little regard to the bill's potential impact on employers. It is probable that the implementation of this legislation will lead to unintended consequences and unnecessary litigation. Further, this bill will likely increase the number of disputes between employees and their employers, which is unnecessary as employers typically accommodate employee leave requests to retain them on their employment team.

Many Maryland employers have already created competitive benefits to attract and retain good employees and this bill would create an anti-business environment. HB1 is unnecessary legislation that will hurt small employers and expose all employers to increased employment litigation. It would help foster an anti-business climate in this State, at a time when we need to bring employers into the State to create new jobs. In summation, we turn to the famous words of Nobel Prize winner economist, Milton Friedman, who said, "*One of the great mistakes is to judge policies and programs by their intentions rather than their results.*"[1]

Despite its good intentions, there would be numerous negative results that outweigh those positive intentions of this Bill. **Therefore, the Maryland Chamber of Commerce opposes this legislation and respectfully urges this committee to give House Bill 1 an unfavorable vote.**

Contact: Larry Richardson, Vice-President, Governmental Affairs, Maryland Chamber of Commerce: lrichardson@mdchamber.org.

[1] Milton Friedman, in an interview with Richard Heffner on The Open Mind. Aired December 7, 1975 bfi.uchicago.edu/post/Milton-friedman-his-own-words.