Maryland Chamber of Commerce

Legislative Position

HB 968

OPPOSE

Economic Matters Committee

2/18/14

HB 968
Labor and Employment- Maryland Earned Sick and Safe Leave Act

Maryland Chamber's Position:
This constitutes the statement of position of the Maryland Chamber of Commerce on HB 968, the proposed legislation requiring employers with more than nine employees to provide fifty-six hours (i.e. 7 days) of paid leave per year, and those with nine 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. 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 because 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 really cannot afford to do so. This is particularly true for smaller employers.

It is critical to recognize the impact on these organizations of 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 recession 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 facing imminent and increased costs for health insurance as a result of the Affordable Care Act. In addition, the federal Bureau of Labor Statistics estimates the cost of providing paid sick leave at $.23/hour per employee. This works out to $478 per year – per employee. Even for a small employer, this is thousands of dollars per year in increased labor costs.

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. A recent study by the Institute for Women's Policy Research evaluated the impact. While their report placed an

overall positive spin on the results of the study, a look at their actual numbers reveals significant negative impact on employers as a result of the paid sick leave mandate:

- According to the study, 2/3 of workers in San Francisco reported that their employer did not increase work demands, reduce work hours or reduce compensation as a result of the paid leave law. But that means 1/3 of employers did have to do so.
- Similarly, the Institute reported that 2/3 of employers did not have to change their policies. But again that means 1/3 of them had to do so.
- The Institute generally reported that employers had "little to moderate difficulty" in (1) understanding the law, (2) administering the law, and (3) reassigning or delaying work. But what their numbers actually reflect is that half of all employers said they had "little to moderate difficulty", which means that half of the employers had greater difficulty with all of those issues.
- According to the Institute, most employers reported no effect on the predictability of employee absence, employee morale, customer service or employees coming into work sick as a result of the paid leave mandate. Thus, it appears that there was no benefit to employers as a result of the law, contrary to what proponents of paid leave mandates assert.
- The Institute reported that 6 out of 7 employers reported no negative impact on profitability. But that means 1 in 7 did have a negative impact – 14% of all employers.

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 good deal of 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.

Connecticut enacted a paid sick leave law, which took effect at the beginning of 2012. The Employment Policies Institute undertook a survey of employers affected by the law. 156 businesses participated in the survey. Of those employers, thirty-one had scaled 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.

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 of other leaves, paid and unpaid, that have a social justice underpinning as well. In past sessions, there have been bills instituting other forms of leave – paid jury duty leave, pregnancy leave, school leave and religious 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

Regardless of whether a paid leave mandate is a good or bad idea, 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 3-1201(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 law.

Section 3-1201(G) – The definition of "family member" is overly broad, including grandparents and grandchildren, as well as sisters-in-law and brothers-in-law, as well as adult children. 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.

Section 3-1202 – To the extent the bill requires a sick leave plan under a collective bargaining agreement to be at least as generous as the provisions of the legislation; it would run afoul of and be preempted by the National Labor Relations Act, which governs the rights of employers and employees to negotiate the terms and conditions of employment.

Section 3-1205 generally – The legislation does not acknowledge that employers who provide paid leave already that may be used for the specified purposes have met the requirements of the law. Does this legislation create an entirely new bank of leave, even where such paid leave is already available? Does sick and safe leave need to be split out separately from a general paid leave program? The D.C. law, for example, does recognize that employers' general paid leave programs can meet the requirements of the DCSSLA.

Section 3-1205(A)(1) – It is wholly unclear how leave that is "paid at the same rate and with the same benefits as the employee normally earns" should be applied with regard to tipped and commissioned employees. D.C., in fact, exempts tipped employees from coverage under the paid leave law.

In addition, the bill requires all employers with more than nine employees, regardless of size beyond that, with the same required number of paid days of leave. Thus, those with only 10 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 10 employees is inconsistent with many other employment-related state statutes, which commence coverage at 15 employees. This inconsistency adds to the difficulty of an employer ensuring that it is in compliance with all applicable state statutes.

Section 3-1205(A)(3)(I) – The bill sets forth a calculation of employees for triggering coverage. However, given the ambiguity of the definition of "employee," as noted above, it is unclear who is counted for purposes of calculating the average monthly number of employees. Are part-time employees counted – including those who work less than 8 hours a week? Temporary employees? Seasonal employees? Those who work outside the State of Maryland? We submit that it would be inappropriate to include these individuals within the calculation.

Section 3-1205(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 3-1205(C) – The amount of paid leave earned each year for all employees – 7 days – is extremely high, more than any of the other paid sick leave laws currently in existence. Connecticut provides up to 5 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. 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 3-1205(G)(1) – Inconsistency issues also exist for this provision, as it would posed 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.

Section 3-1205(I) – 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. And what if the employer chose to pay this leave out when the employee originally terminated? There is no recognition of this specific circumstance.

Section 3-1206(A) – This provision allows an employee to use paid leave for the stated purposes, but does not require them to do so (so that they could opt to take unpaid leave). This is inconsistent with the federal Family and Medical Leave Act, under which employers may require employees to use all paid leave for FMLA purposes before using unpaid leave. In addition, many employers have policies that also require an employee to exhaust paid leave before using unpaid leave. As drafted, the employee would have the choice. Moreover, such a choice increases the employer's accounts payable liability, as the employee might be required to carry the benefits liability on its books for a longer period of time.

Section 3-1206(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.

Section 3-1206(C)(3) and (G)(3)(I) – These provisions prohibit an employer from obtaining information about "the mental or physical illness, injury, or condition of the employee or the employee's family member." This limitation is severely problematic. What exactly could the verification contain? And how could the employer determine whether the verification was valid? There would be no ability for the employer to prevent or address abuse of the leave without being able to obtain more specific information.

Moreover, this limitation is wholly inconsistent with the employer's right to obtain medical information under the federal Family and Medical Leave Act and the Americans with Disabilities Act, which may also apply to an employee's (or family member's) need for leave due to a medical condition. For example, the FMLA specifically authorizes employers to request appropriate medical facts about the illness, injury, or condition. See DOL forms WH-380-E and WH-380-F. Under this legislation, an employer would be required to explain to an employee that under Maryland law, the employer cannot ask for detailed information about employee's illness; however, so as to not violate the employee's federal rights under FMLA, the employee's health care provider should fill out this form providing that information so the employer can determine whether the employee qualifies for FMLA leave. This situation is clearly untenable.

Section 3-1206(D)(1) – This provision permits an employee to make up time within the same "pay period." This is a violation of the Fair Labor Standards Act, which only permits hours to be made up within the same work week.

Section 3-1206(F) – Requiring an employer to notify the employee each pay period of the amount of earned sick leave that is available to the employee imposes an administrative burden on employers. In addition, some employers have systems that make information like that (e.g. – leave balances) available on demand to an employee. It is not clear that making the information available on demand meets this specific notification requirement.

Section 3-1206(G)(1) – This provision also only permits verification after two days of illness. 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. The D.C. law, for example, at least contemplates more frequent verifications and verifications after fewer days 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 3-1206(G)(4)(II) – This provision only permits disclosure of verification documentation to the employee or with the permission of the employee, but does not acknowledge that there may be required disclosures pursuant to a governmental investigation or a litigation subpoena. Thus, an employer who is legally compelled to produce such documents would be in violation of this provision.

Section 3-1208 (C)(1) – We believe the rebuttable presumption of violation and the required standard of "clear and convincing evidence" needed to overcome the presumption is too harsh against employers. It imposes an unnecessarily high barrier for employers to overcome for even inadvertent recordkeeping mistakes, particularly as employers try to implement this legislation if it should pass.

Section 3-1209(B) – We oppose any creation of a new private right of action against employers. Our state courts systems are already overburdened, and employers already face a multitude of possible claims – many of which are without merit. Moreover, sick and safe leave, as a benefit of employment, would be covered by the remedies for failure to pay such benefits under the Maryland Wage and Hour law.

Section 3-1210(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) 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 2days 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.

Section 3-1210(C)(2) - The rebuttable presumption granting a 90-day protection of employment is very troubling, and is overly broad as to the actions that are protected. For example, under section (II), if an employee simply "informed a person" (such as a coworker) that he/she felt a supervisor had "threatened" him for taking a half-day off to care for a child with a cold, the employee could be protected from discharge at-will for the next 90 days based on the rebuttable presumption. Presuming the employer's guilt is an unduly high barrier for the employer to overcome.

Section 3-1211 - An employee cannot file a complaint, bring an action or testify in an action in "bad faith," but apparently there is no recourse if an employee provides false information to support a request for absence.

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. HB 968 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 summary, despite its good intentions, there would be numerous negative results that outweigh those positive intentions of this Bill. This Bill should not pass.

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