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March 23, 2018

Mr. Michael L. Harrison
Policy Director
State of Maryland
Department of Labor, Licensing and Regulation
500 North Calvert Street, 4th Floor
Baltimore, MD 21202

Re: Sick and safe leave issues

Dear Michael:

As I previously threatened, Shawe Rosenthal has an extensive list of questions about the Maryland Healthy Working Families Act. We would appreciate greatly the DLLR's guidance on these issues. The questions below are organized by section.

§ 3-1301

1. What is the difference between a Temporary Services Agency (§ 3-1301(E)(5)) and an Employment Agency that provides part-time or temporary services to another person (§ 3-1301(E)(6))?

2. May an employer obtain verification of the family relationships in § 3-1301(G)? If so, what type of verification may be required?

3. Are places like bakeries and coffee houses (e.g. Starbucks) considered to have a dining room with facilities for preparing and serving regular meals (§ 3-1301(I))?

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§ 3-1302

4. Please confirm that short-term disability (STD) benefits (§ 3-1302(A)(3)) may only be used for the employee's own illness, and not for any other SSL reason (e.g. preventive care, family illness, safe leave).

5. Please clarify whether the partial wage replacement that STD provides would need to be supplemented by additional paid leave to satisfy the requirement that the employee be paid his/her normal rate of pay for an SSL absence under § 3-1304.

6. Please clarify the existing leave policy provision in § 3-1302(B)(2)(I): "The policy permits an employee to accrue and use leave under terms and conditions that are least equivalent to the earned sick and safe leave provided for under this subtitle." § 3-1302(C) states that the policy is equivalent if it allow the employee to "Access and accrue paid leave at the same rate or at a greater rate than provided for in §3-1304 of this subtitle" (i.e., 1 hour leave per 30 hours worked).

    a. The existing policy provides for the grant of a block of leave that meets or exceeds the 40 hour requirements and the grant took place before the effective date of the law (2/11/18). The employee has used some or all of the leave prior to the effective date, meaning that they have less than 40 hours on the effective date. Given that the law is prospective only (Section 2), does the employer need to grant another block of leave to that employee to bring them to 40 hours on the effective date?

    b. If the policy provides for a lower rate of accrual than 1 hour for every 30 worked, but the total amount that is accrued over the year exceeds 40 hours, is that considered "equivalent" for purposes of accrual? We are concerned because at the statutory rate, the employee would have more leave available earlier in the year to use. § 3-1302(C) would seem to prohibit this conclusion, because the employees are not accruing and are therefore unable to access the leave at the same rate as the statute.

    c. If the existing policy provides for different notice requirements (e.g., 15 days' notice for scheduled leave), can the employer maintain that notice requirement, or would that not be equivalent for purposes of "use?" (Note also that § 13-1305(B)(1) provides that "not more than 7 days" notice may be required for foreseeable leave, which seems to indicate an employer cannot require more notice than that even if the employee has more notice.) We are concerned

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because arguably the different notice requirement could be viewed as interfering with the employee's ability to "use" the leave in an equivalent manner. This would seem to violate § 3-1302(C)'s requirement that the employees be able to "access" the leave at the same rate as the statute.

§ 3-1303

7. What does "regularly" works less than 12 hours a week in §3-1303 mean? (The FAQs' definition of "normal and customary" is not really helpful.) Is it one-half (26) the weeks in a year? One-third the weeks in a year? One week a month?

8. In § 3-1303(A)(3)(III), if an employer requires an on-call employee to work at least one shift a week or even one shift a month (the employee chooses the shift), is that "guaranteeing" that the employee will be called on to work?

§ 3-1304

9. The DLLR has provided guidance:

    - If an employee works primarily in another state but performs work in Maryland that is incidental to his or her work performed elsewhere, the employee would not be entitled to accrue sick and safe leave for those incidental hours or work performed in Maryland
    - If an employee performs the majority of his or her work in Maryland, the employee is entitled to accrue sick and safe leave for all time worked including any incidental work that is performed in another state.

    Please further define "primarily" and "incidental." In reading the second bullet point in relation to the first, with a majority being more than 50%, it would seem that if the employee performs more than 50% of the work in one state, that would be where he/she "primarily" works. Frankly, it's a little confusing to use "primarily" with regard to work outside the state, but "majority" with regard to work in Maryland.

10. §3-1304 requires payment "at the same wage rate as the employee normally earns." Thank you for the FAQ on commission-only employees, but:

    a. How does this get calculated for other employees who do not receive a salary or hourly wage, like day rate and piece rate? Could the employer pay the minimum wage rate, like for tipped employees?

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b. Are shift differentials and weekend differentials counted in the "normal" wage rate, or may the employer apply the base rate? The latter seems more in line with the provision on tipped employees being paid the minimum wage rate.

11. § 3-1304 provides for the accrual of 1 hour of leave for every 30 hours worked. § 3-1304(E) provides that exempt employees are assumed to work 40 hours a week and that those employees who work less than 40 use their normal workweek.

    a. How does an employer calculate this accrual for employees who are not paid hourly and whose hours are not tracked – such as day rate and piece rate employees?

    b. The law does not address (presumably non-exempt) employees whose normal workweek is more than 40 hours (including overtime). Please confirm whether all hours worked are counted, or are overtime hours excluded from the calculation of hours worked?

12. Please confirm that under the special accrual exclusions in §3-1304(C)(5), those hours that are accrued during those excluded pay periods are not counted towards the 30 hours worked in order to accrue the hour of leave. Please see example chart below:

Biweekly pay period	Hours worked	Eligibility Y or N	Cumulative hours	Hours Accrued – added on
Pay period 1	22 (do not count)	N	0	0
Pay period 2	26	Y	26	0
Pay period 3	20 (do not count)	N	26 (none added)	0
Pay period 4	30	Y	56	1
Pay period 5	15 (do not count)	N	56 (none added)	0
Pay period 6	35	Y	91	2 added for a total of 3 hours
Pay period 7	25	Y	116	0
Pay period 8	28	Y	144	1 added for a total of 4 hours

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13. § 3-1304(D) allows the employer to grant the full block of leave at the beginning of the year.

    a. Please confirm that the employer can pro-rate the block for employees who are hired during the year.

    b. Also please confirm whether the pro-rating is based on the accrual rate or the percentage of the year – in other words, will a full time employee who is hired 6 months into the year receive the amount of leave they will accrue for the remaining 6 months of the year, which is almost the full 40 hours, or ½ the leave in the amount of 20 hours given that they are working only ½ the year?

§ 3-1305

14. Please clarify what it means in § 3-1305(B)(2)(II) to "generally comply" with the employer's notice or procedural notification requirements. Does that mean less than full compliance is acceptable?

15. Also in § 3-1305(B)(2)(II), the requirements may "not interfere with the employee's ability to use earned sick and safe leave." Does that mean the call-in procedure itself cannot generally interfere with the use of leave, or that it cannot interfere in that particular circumstance?

16. § 3-1305(B)(3)(I)(2) provides that the request for leave may be denied if the employee fails to provide notice and the absence will cause a disruption. Please clarify what a "disruption" is. Is it the inconvenience of having to find a substitute worker at the last minute? Or does there have to be a demonstrable effect on customer service or production? And if the latter, what kind of effect? Any effect, or something more substantial?

17. 13-1305(B)(3)(II) applies to providers of services to the mentally ill and disabled persons. The subsection requires the employer to exercise reasonable efforts to secure a replacement for an employee seeking leave, and if it cannot do so, deny the leave if it will cause a "disruption to the services" of at least one disabled or mentally ill person. We ask for clarification on a few issues:

    a. What amount of effort is required to constitute "reasonable efforts?" Since the leave is foreseeable, if the employer can find a suitable replacement on a day other than the one requested and the leave can be rescheduled by the employee

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reasonably, would these efforts suffice? If the employee refused to reschedule, may the employer deny the leave (assuming disruption by virtue of the leave)?

b. What does an employer have to be able show to meet the "will cause disruption" standard, since it is a forecasting of a problem and not a review of what happened? How certain does the potential for disruption have to be?

c. Can this apply to non-direct service providers? For example, if the absence of a facility administrative employee means he/she is not there to answer questions that may arise about services to disabled clients, does this qualify?

18. § 3-1305(F) requires an employer to provide a statement whenever wages are paid regarding the amount of sick and safe leave available to the employee. If the employer is using other paid leave to cover SSL, does the employer have to actually state "Sick and Safe Leave" or "SSL" on the statement (typically the paystub), or is it sufficient to just reference the paid leave, e.g., PTO or vacation?

19. Can the statement of available SSL be expressed on a spreadsheet that lists all employee names and their SSL balances (which for employers without sophisticated timekeeping systems might be easiest – but we question whether this could be seen as a privacy issue).

20. Also with regard to § 3-1305(F), if the employer limits the amount of other paid leave that can be used for sick and safe leave to the statutory sick and safe leave amount, how should that be reflected on the statement? This is confusing since SSL is part of the other paid leave, but not the whole amount. For example, can the employer say:

PTO/SSL*: 80/40
*Please note that SSL is part of, not in addition to, PTO.

Or

PTO/Portion of PTO that may be used for SSL: 80/40

21. What constitutes "verification" under § 3-1305(G)? Please give examples.

22. If an employee fails to provide verification under § 3-1305(G), the statute expressly provides that future requests for the same reason can be denied (§ 3-1305(G)(2)), but does not address what, if anything, can be done in the current instance. Please confirm that the employer can also deny use of SSL for the current instance for which verification was not provided and

further, pursuant to a policy adopted in accordance with § 3-1302(B)(5), may discipline the employee for improper (i.e., "unverified") use of sick and safe leave.

23. This is not addressed in any specific provision of the law, but can an employer require an employee to use SSL leave if the employer knows that the employee's absence is for an SSL reason, even if the employee does not request SSL? For example, the FMLA permits an employer to count leave against the employee's FMLA leave entitlement if the employer knows that the absence is for an FMLA-covered reason, even where the employee has not requested FMLA leave.

§ 3-1307

24. Under § 3-1307's requirement to keep a record of sick and safe leave that is accrued and used, if an employer uses PTO or other paid leave to cover sick and safe leave, is it sufficient to keep a record of that paid leave accrued and used generally? Or does the employer need to record the portion of that paid leave that is specifically accrued and used only for sick and safe leave purposes?

§ 3-1309

25. Under § 3-1309(A)(4), "adverse action" is defined in part as "any other retaliatory action that results in a change to the terms and conditions of employment that would dissuade a reasonable employee from exercising a right under this subtitle."

    a. Many employers have a policy that if an employee calls out the day before or after a holiday (for any reason), they will not be paid for the holiday. May the employer continue to apply that policy with regard to sick and safe leave callouts? Obviously, the employee would receive the paid sick and safe leave and would not be disciplined for the use of the leave, but, like all other callouts on those pre- and post-holiday days, they would not receive pay for the holiday. (We would take the position that the denial of holiday pay is not retaliatory for using sick and safe leave.) This, by the way, is what the DOL permits for FMLA absences, provided that the employer applies this no-holiday-pay rule to other, similar absences.

    b. Similarly, we'd contend that the denial of holiday pay under these circumstances also is not a violation of the prohibition under § 3-1309(C)(2) from "interfer[ing] with" the employee's exercise of any right under the law.

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c. Many employers also have a policy that, if an employee is scheduled to work on a holiday, they will receive holiday pay in addition to pay for time actually worked, but if they call out on that holiday, they will not receive holiday pay. Similar to the issue in (a) above, may the employer continue to apply that policy with regard to holiday callouts for sick and safe leave? Again, the employee would receive the paid sick and safe leave and not be disciplined for the use of the leave, but would be treated the same as all other unscheduled callouts in being denied the holiday pay.

Yours truly,

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