

Employment: North America 2021



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Lexology Getting The Deal Through is delighted to publish the second edition of *Employment: North America*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Iowa.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.



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United States – Maryland

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STATE SNAPSHOT

Key considerations

1 Which issues would you most highlight to someone new to your state?

Maryland is a progressive state, including with regard to employment legislation. In the state General Assembly, Democrats generally outnumber Republicans by a 2:1 ratio. Maryland's current Governor, Larry Hogan, however, is a pro-business Republican. This has resulted in some conflict between the two, as evidenced by the minimum wage increase and the Ban-the-Box legislation that were passed by the General Assembly in the 2019 session, vetoed by the Governor, and then subjected to a veto override. At other times, there is a willingness to collaborate, such as on the sexual harassment bills arising in the context of the "#MeToo" movement, which were unanimously passed by the General Assembly and signed by the Governor in 2018 and 2019 sessions, as well as emergency legislation enacted in 2020 that gave the Governor expansive powers to address the covid-19 crisis.

In a prior Democratic administration, Maryland was the first state to pass a social media privacy law. It was also at the forefront of states enacting worker misclassification and pregnancy accommodations laws. In the 2020 legislative session, the General Assembly passed a bill regulating the use of facial recognition technology in the application process, which makes Maryland one of the first states in the U.S. to address artificial intelligence in the employment context.

2 What do you consider unique to those doing business in your state?

In the past, Maryland's courts – in particular at the federal level – were reliably business-friendly. In more recent years, however, a number of federal judicial vacancies were filled by President Obama, and thus these courts have trended more towards the employee side. In addition, the Maryland anti-discrimination law was amended several years ago to permit private rights of action, which are brought in plaintiff-friendly state courts. Taken in combination with the General Assembly's progressive emphasis on employee protections, this has made Maryland a rather more challenging business environment than some of its neighboring states, with the exception of the District of Columbia.

3 Is there any general advice you would give in the labor/employment area?

Although Maryland generally follows federal law, there are certain areas in which it imposes greater obligations on employers. For example, there are certain small but key differences with regard to exemptions to overtime under state vs. federal wage and hour laws, such that an employer may be compliant with federal law yet violate state law. Another critical

difference can be found with regard to an employer's obligation to provide reasonable accommodations for disabilities, with state law requiring more than federal law, both in general and in specific regard to disabilities caused or contributed to by pregnancy and childbirth.

In addition, Maryland's General Assembly has passed a number of significant employment-related laws each session, thereby changing the legal landscape within which state employers operate. For these reasons, it is critically important for Maryland employers to ensure that they stay abreast of these differences and developments in order to avoid liability under state statutes, particularly given the increasingly pro-employee bent of the federal and state courts.

Emerging issues

4 What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Over the past several years, the Maryland General Assembly has focused on expanding protections for workers on several fronts. A major pro-employee initiative was accomplished with the 2019 enactment of a paid sick and safe leave law, and Democratic legislators have now turned their attention to paid family and medical leave benefits legislation. Under this proposed legislation, employees taking unpaid leave for family and medical reasons would be able to obtain income replacement benefits through a state-administered program funded by both employers and employees. This legislation has been proposed for several years and, like paid sick and safe leave, gains additional support each year.

Another issue that has been repeatedly brought up before the General Assembly is employment protections for medical marijuana users. At this time, Maryland permits the use of medical marijuana for specified conditions pursuant to a doctor's certification. The law, however, does not currently address the workplace implications of such use and, according to the Maryland Medical Cannabis Commission, employers are permitted to test for and take action against employees testing positive for any reason, including medical use. Thus, there has been an effort to provide some workplace protections for medical marijuana users. On a related note, there has not been much legislative interest in permitting the recreational use of marijuana in Maryland so far, despite the fact that Washington D.C. does so.

In addition, in the context of the covid-19 pandemic, the General Assembly has focused on general workplace safety and health protections as well as enhanced benefits for essential workers of essential employers in a catastrophic health emergency, by enacting the Essential Workers Protection Act (Md. Code Ann. Lab. & Empl. §§ 3-1601 et seq.).

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

Having passed an increased minimum wage and mandatory paid sick and safe leave in recent years, the next major progressive initiative for the Maryland General Assembly seems to be the implementation of a state-administered paid family and medical leave benefits program. This proposed program would be jointly funded by employers and employees through payroll deductions, and would provide a certain amount of income replacement benefits during family and medical leave.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

In addition to applicable federal laws, numerous Maryland laws govern the employment relationship.

These include certain anti-discrimination laws: the Civil Rights Act (including reasonable accommodations for disabilities and pregnancy) (Md. Code Ann. State Govt. §§ 20-601 et seq.); the Equal Pay for Equal Work Act (Md. Code Ann. Lab. & Empl. §§ 3-310 et seq.), which includes a pay transparency provision.

The following laws govern compensation: the Wage and Hour Law (Md. Code Ann. Lab. & Empl. §§ 3-401 et seq.); the Wage Payment and Collection Law (Md. Code Ann. Lab. & Empl. §§ 3-501 et seq.); the Wage Garnishment Statute (Md. Code Ann. Comm. Law § 15-606).

There is a general workplace safety and health law: the Occupational Safety and Health Act (Md. Code Ann. Lab. & Empl. §§ 5-101 et seq.). Another addresses these topics in the context of a public health emergency: the Essential Workers Protection Act (Md. Code Ann. Lab. & Empl. §§ 3-1601 et seq.). Another specifically focuses on workplace violence by allowing employers to obtain workplace peace orders on behalf of an employee: Peace Orders (Md. Code Ann. Cts. & Jud. Proc. §§ 3-1502 et seq.).

Child labor is governed by law: (Md. Code Ann. Lab. & Empl. §§ 3-201 et seq.).

A number of laws provide leave rights: the Healthy Working Families Act (sick and safe leave) (Md. Code Ann. Lab. & Empl. §§ 3-1301); the Flexible Leave Act (permitting use of existing paid leave for family illness and family bereavement) (Md. Code Ann. Lab. & Empl. § 3-804); the Jury Duty Statute (Md. Code Ann. Cts. & Jud. Proc. §§ 8-501); the Parental Leave Act (Md. Code Ann. Lab. & Empl. §§ 2-1201 et seq.; applicable to employers with 15-49 employees); the Civil Air Patrol Leave Statute (Md. Code Ann. Lab. & Empl. §§ 3-1001 et seq.); the Deployment Leave Law (Md. Code Ann. Lab. & Empl. § 3-803); the Organ Donation Leave Act (Md. Code Ann. Lab. & Empl. §§ 3-1401 et seq.); the Victim's Rights Statute (Md. Code Ann. Crim. Proc. § 11-102); the Volunteer Activities Law (civil air patrol, civil defense, volunteer fire department, or volunteer rescue squad) (Md. Code Ann. Lab. & Empl. § 3-703); the Witness Duty Statute (Md. Code Ann. Cts. & Jud. Proc. § 9-205); the Voting Leave law, (Md. Code Ann. Elections § 10-305).

Several laws govern background checks: the salary history ban (which prohibits employers from asking applicants as well as their prior employers about their salary history) (Md. Code Ann. Lab. & Empl. § 3-304.2); the User Name and Password Privacy Protection Act (generally prohibiting employers from demanding social media passwords from applicants and employees) (Md. Code Ann. Lab. & Empl. § 3-712); Applicant Criminal History Ban Act (restricting questions about applicant criminal history to the time of the first in person job interview) (Md. Code Ann. Lab. & Empl. §§ 3-1401 et seq.); the Job Applicant Fairness Act (restricting the use of credit history for job applicants) (Md. Code Ann.

Lab. & Empl. § 3-711); the Second Chance Act (permitting the shielding of certain convictions) (Md. Code Ann. Crim. Proc. §§ 10-301 et seq.); the Lie Detector law (Md. Code Ann. Lab. & Empl. § 3-702); the Medical Questions law (prohibiting pre-offer medical exams and inquiries) (Md. Code Ann. Lab. & Empl. § 3-701).

Certain laws provide benefits: the Workers' Compensation Act (Md. Code Ann. Lab. & Empl. §§ 9-101 et seq.); the Unemployment Insurance Act (Md. Code Ann. Lab. & Empl. §§ 8-101 et seq.); the Healthcare Coverage law (certain required coverage) (Md. Code Ann. Ins. §§ 15-801 et seq.); the mini-Healthcare Continuation law (COBRA, applicable to employers with fewer than 20 employees) (Md. Code Ann. Ins. §§ 15-401 et seq.).

Other laws protect confidential information and privacy interests: the Uniform Trade Secrets Act (Md. Code Ann. Comm. Law §§ 11-1201 et seq.); the Personal Information Protection Act (governing the maintenance and disposal of employee and consumer information) (Md. Code Ann. Comm. Law §§ 14-3501); the Maryland Wiretap Act (Md. Code Ann. Cts. & Jud. Proc. §§ 10-401 et seq.); a Facial Recognition Services law (prohibiting the use of such technology during applicant interviews without consent) (Md. Code Ann. Lab. & Empl. § 3-717).

Additional laws include the following: the Noncompete law (prohibiting such agreements for low-wage workers) (Md. Code Ann. Lab. & Empl. § 3-716); the Health Care Workers Whistleblower Protection Act (Md. Code Ann., Health Occ. 1-501 et seq.); the State Contractor Employees' Whistleblower Protection Act (Md. Code Ann. State Fin. & Proc. § 11-301 et seq.); the Workplace Fraud Act (prohibiting misclassification in the landscape and construction industries) (Md. Code Ann. Lab. & Empl. §§ 3-901 et seq.); the Day of Rest Statute (applicable to retail workers, allowing the choice of a day of rest) (Md. Code Ann. Lab. & Empl. § 3-704); the Healthy Retail Employee Act (providing shift breaks for retail workers) (Md. Code Ann. Lab. & Empl. § 3-710); the Veterans' Hiring Preference Act (Md. Code Ann. Lab. & Empl. § 3-714); the National Guard Employment and Reemployment Rights Act (Md. Code Ann. Pub. Safety § 13-704); the Economic Stabilization Act (mini-WARN Act, providing for notice of mass employment losses) (Md. Code Ann. Lab. & Empl. § 11-304).

7 | Who do these cover, including categories of workers?

The employment relationship in Maryland encompasses different types of workers, such as regular full-time and part-time employees, probationary employees, temporary employees, contract employees, seasonal employees, and apprentices. In addition to the employer-employee relationship, Maryland recognizes other work-based but non-employee relationships, including interns and independent contractors, who are entitled to protections under the anti-discrimination law but no other employment laws.

Maryland has also addressed the issue of whether two entities may be considered "joint employers" of a single worker, who are therefore jointly responsible for ensuring compliance with and liable under the various employment laws. Maryland state courts generally apply a right to control test such that if each employer has the ability to control or direct the employee's performance of the job, then they would be deemed joint employers. However, the U.S. Court of Appeals for the Fourth Circuit, which includes Maryland within its jurisdiction, articulated a more expansive standard for determining if two entities are joint employers under the Fair Labor Standards Act, and identified a set of six non-exclusive factors that courts should consider:

- whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the worker's employment;

- the degree of permanency and duration of the relationship between the putative joint employers;
- whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer – such as handling payroll, providing workers' compensation insurance, paying payroll taxes, or providing the facilities, equipment, tools, or materials necessary to complete the work.

The Fourth Circuit emphasized that one factor alone may be sufficient to conclude that two entities are "not completely disassociated" so as to render them joint employers if the facts supporting that factor demonstrate that the entity has a "substantial role" in determining the workers' terms and conditions of employment. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).

Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

The Maryland Department of Labor has focused on the issue of employee misclassification – whereby an individual is improperly designated an independent contractor, thereby enabling the employer to avoid employment taxes and certain benefits. In 2016, a new law added penalties where the MDDOL finds that an employer knowingly misclassified workers, up to \$5,000 per employee. (Md. Code Ann. Lab. & Empl. § 8-201.1).

There are different tests to determine whether an individual is deemed to be an employee or an independent contractor, depending on the law at issue. For example, the Workplace Fraud Act (which applies only to the landscaping and construction industries) and the Unemployment Insurance Law apply the ABC test, under which a worker is presumed to be an employee unless all of the following are met:

- the individual is free from direction and control;
- the individual is customarily engaged in an independent business of the same nature as that involved in the work; and
- the work is outside the usual course of business of the person for whom it is performed, or the work is performed outside any place of business of the person for whom it is performed.

The Workers' Compensation Act and common law, however, utilize a "right to control" test, utilizing the factors discussed in the joint employer section above.

Contracts

9 | Must an employment contract be in writing?

No written employment contract is necessary in an at-will relationship. An individual contract that modifies the at-will relationship may be either express or implied, and may be based on either verbal statements or written documents, such as offer letters, employee handbooks, or employment agreements that provide for a term of employment or termination for cause. *See Staggs v. Blue Cross of Md., Inc.*, 486 A.2d 798 (Md. 1985). An employer may expressly disclaim the creation of such contracts by placing a clear and conspicuous disclaimer in all such written documents that reiterates the employee's at-will status, and further provides that the document should not be construed as a

contract and that statements by any supervisor or manager will not alter the employee's at-will status. *See Bagwell v. Peninsula Reg'l Med. Center*, 665 A.2d 297 (Md. App. 1995).

10 | Are any terms implied into employment contracts?

Although Maryland recognizes the implied covenant of good faith and fair dealing in contracts under state law, it has not been extended to the at-will relationship. *See Adams v. Catalyst Research*, 659 F. Supp. 163 (D. Md. 1987).

11 | Are mandatory arbitration agreements enforceable?

Arbitration agreements are enforceable in Maryland, as long as they are supported by mutually binding promises to arbitrate. Unlike in some other jurisdictions, employment or continued employment is not sufficient consideration for an enforceable arbitration agreement. *See Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003).

The U.S. Supreme Court has found enforceable the waiver of a right to bring a class or collective action in an arbitration agreement (*Epic Syst. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018)); although Maryland courts have not specifically addressed this issue, they would likely follow federal law.

12 | How can employers make changes to existing employment agreements?

Any changes to existing employment agreements must be negotiated between the employer and employee. Such changes should be recorded in a written agreement that modifies or replaces the original agreement.

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

Other than the general prohibition against discrimination based on protected characteristics, Maryland law does not impose any other requirement on advertising open positions.

Background checks

14 | (a) Criminal records and arrests

Maryland enacted a Ban-the-Box law in 2020, prohibiting criminal background inquiries at the initial application stage, although such inquiries may be made at or after the first in-person interview. The law provides exceptions where an employer is required or authorized to seek such information by Federal or State law or where an employer provides programs, services, or direct care to minors or vulnerable adults (meaning someone lacking the mental or physical capacity to provide for his/her own daily needs). Of course, once in receipt of such information, the employer should be careful to utilize it in a manner that would not violate any discrimination laws.

In addition, several local jurisdictions, including Baltimore City, Prince George's County and Montgomery County, have enacted ordinances prohibiting inquiries until the first interview or even until a conditional offer of employment has been made, unless otherwise required or permitted by law.

Maryland's Second Chance Act permits an individual to petition the court to shield certain specific misdemeanor convictions from public disclosure. A "shielded" convictions will not be disclosed as part of a criminal record background check to third parties, including

employers. The law sets forth certain exceptions to shielding applicable to employers, including: those who are required or authorized by statute or regulation to conduct criminal background checks; those using volunteers who care for or supervise children; and those who employ or seek to employ a caregiver for a minor or vulnerable adult. The law further specifically prohibits employers who conduct a criminal background check from requiring applicants to disclose if they have any such shielded convictions, or from discharging or refusing to hire an individual because that person refuses to disclose shielded convictions (Md. Code Ann. Crim. Proc. §§ 10-301 et seq.).

State law requires certain employers to conduct criminal background checks of applicants. These include schools, childcare centers, day or residential camps, and recreation centers (Md. Code Ann. Fam. Law § 5-561), and employers providing adult dependent care services (Md. Code Ann. Health §§ 19-1901 et seq.).

15 | (b) Medical history

Maryland employers may not require an applicant to respond to oral or written questions relating to a physical, psychiatric, or psychological disability, illness, handicap or treatment, unless that condition has a direct, material, and timely relationship to the capacity or fitness of the applicant to perform the job properly. Employers may, however, require a medical evaluation by a physician to assess legitimately the applicant's ability to perform the job. (Md. Code Ann. Lab & Empl. § 3-701).

16 | (c) Drug screening

Maryland's drug testing law permits drug testing of applicants and employees for bona fide job-related reasons. The law requires employers to have a drug-testing policy in order to be able to conduct such testing. Any testing must be conducted by state-approved laboratories. There are restrictions on the type of specimens that may be used – blood, urine and saliva are permitted. In addition, at the pre-employment stage, employers may use hair and single-use testing devices, typically for saliva. All other testing must allow for a second, confirmatory test.

In the case of a positive test, the employer must provide the employee or applicant with the following: a copy of the lab results; a copy of the employer's written substance abuse policy; notice of any intent to take adverse action (failure to hire, discipline, termination, or other changed conditions of employment), and a statement or copy of the statutory provisions regarding the employee's right to request independent testing of the same sample (Md. Code Ann. Health Genl. § 17-214).

17 | (d) Credit checks

Maryland's Job Applicant Fairness Act prohibits employers from using the credit report or credit history of an applicant or employee to deny employment, terminate employment, or otherwise make decisions about compensation or other terms of employment, except as expressly authorized by the law. The law exempts employers that are required by federal, state or local law to check an individual's credit history for employment purposes. Additionally, it does not apply to banks, credit unions, or entities that are required to register as investment advisors with the SEC.

The law permits employers to procure the credit reports or credit histories of employees, or of applicants after a conditional offer or employment is extended, if position is one for which the employer has a bona fide reason for obtaining the information that is substantially job-related, and the employer discloses in writing that a report is being procured. The law identifies such positions as follows:

- 1 Is managerial and involves the direction and control of a business, department, division, unit or agency of a business.
- 2 Has access to personal information of a customer, employee or employer. Personal information includes an individuals' first name or first initial and last name in combination with a social security number, driver's license number, financial account number, individual taxpayer identification number. Personal information does not include personal information customarily provided in a retail transaction.
- 3 Involves a fiduciary responsibility to the employer such as the authority to issue payments, collect debts, transfer money or enter into contracts.
- 4 Is provided an expense account or a corporate debit or credit card.
- 5 Has access to information such as formulas, programs, methods, techniques or processes that derive independent economic value, whether actual or potential, due to its confidential nature that the employer has made reasonable efforts to protect, or other confidential business information.

(Md. Code Ann. Lab. & Empl. § 3-711).

18 | (e) Immigration status

Immigration issues are governed by federal law. Maryland does not have specific laws related to immigration status.

19 | (f) Social media

Maryland passed the first social media privacy law in the U.S.—the User Name and Password Privacy Protection Act. This law prohibits Maryland employers from requiring applicants, as well as employees, to turn over passwords needed to access private websites, including those used for social media. Specifically, employers may not require, or even request, that an applicant divulge his or her "user name, password, or other means for accessing a personal account or service through an electronic communication device." Expressly excluded from the protection are user names or passwords for accounts to access employer systems and devices. (Md. Code Ann. Lab. & Empl. § 3-712). The law does not prevent employers from viewing or relying upon publicly available social media content, but employers should ensure that such activity does not give rise to discrimination claims in recruiting and hiring.

20 | (g) Other

Under the salary history ban, employers may not ask about or rely upon an applicant's salary history in hiring or determining wages. This includes inquiries to prior employers. Applicants may voluntarily provide their history, which employers may then verify in setting a higher wage offer. Another provision of the law requires employers to provide wage ranges to applicants upon request. (Md. Code Ann. Lab. & Empl. § 3-304.2)

Employers may not require applicants and employees to undergo lie detector testing (Md. Code Ann. Lab & Empl. § 3-702). The law specifies that Maryland application forms must contain, in bold-faced, upper case type, the following statement, with a separate signature line:

Under Maryland law, an employer may not require or demand, as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a lie detector or similar test. An employer who violates this law is guilty of a misdemeanor, and subject to a fine not exceeding \$100.

Another law relating to an applicant's background permits employers in Maryland to grant a preference in hiring or promotion to an eligible veteran or, if the veteran has a service-connected disability or

is deceased, the veteran's spouse without violating state or local equal employment opportunity laws. An "eligible veteran" is one who received an honorable discharge or certificate of satisfactory completion of military service from any branch of the armed forces, the National Guard, or the reserves. (Md. Code Ann. Lab. & Empl. § 3-714).

WAGE AND HOUR

Pay

21 | What are the main sources of wage and hour laws in your state?

The Wage and Hour Law (Md. Code Ann. Lab. & Empl. §§ 3-401 et seq.) governs minimum wage and overtime. The Wage Payment and Collection Law (Md. Code Ann. Lab. & Empl. §§ 3-501 et seq.) sets forth the wage payment requirements and rights, including the frequency of payment and restrictions on deductions.

22 | What is the minimum hourly wage?

As of January 1, 2021, the minimum wage in Maryland is \$11.75 per hour for employers with 15 or more employees and \$11.60 for those with fewer employees. This rate increases in annual increments to \$15.00. For employers with 15 or more employees, the schedule of hourly rate increases is as follows:

- January 1, 2022: \$12.50;
- January 1, 2023: \$13.25;
- January 1, 2024: \$14.00; and
- January 1, 2025: \$15.00.

In recognition of the impact on small employers, meaning those with 14 or fewer employees, the law provides a longer schedule of increases:

- January 1, 2022: \$12.20;
- January 1, 2023: \$12.80;
- January 1, 2024: \$13.40;
- January 1, 2025: \$14.00;
- January 1, 2026: \$14.60; and
- July 1, 2026: \$15.00.

The law also permits an employer to pay a training wage at 85 per cent of the State minimum wage rate for employees under the age of 18 years.

Notably, Montgomery County has a higher minimum wage rate than the state. Effective July 1, 2021, the rate is \$15.00 per hour for employers with more than 50 employees, \$14.00 for those with 11-50 employees, and \$13.50 for the remaining smallest employers, with scheduled annual increases.

There is a state prevailing wage law applicable to contractors on public work contracts, under which employees performing work on such contracts must be paid a prevailing wage rate established by the Commissioner of Labor and Industry. (Md. Code Ann. State Fin. & Procurement § 17-208). There is also a state living wage law applicable to contractors on certain state service contracts, under which the Commissioner sets an enhanced wage rate for workers on those contracts (Md. Code Ann. State Fin. & Procurement § 18-103).

23 | What are the rules applicable to final pay and deductions from wages?

Upon termination, the employee must be paid all wages due on or before the day on which the employee would otherwise have been paid. Accrued and unused vacation or PTO must be paid unless the employer has a policy that specifically states it will not be paid out. (Md. Code Ann. Lab. & Empl. § 3-505).

Under the law, only certain deductions may be made from an employee's pay check. These are as follows:

- amounts that an employer is required or empowered to deduct in accordance with state or federal law;
- deductions expressly authorized by the employee in writing;
- deductions ordered by a court; and
- deductions allowed by the Commissioner of Labor and Industry because the employee has received full consideration for the deduction.

(Md. Code Ann. Lab. & Empl. § 3-503).

Hours and overtime

24 | What are the requirements for meal and rest breaks?

There is no Maryland law requiring private employers to provide meal and rest breaks, except as to retail employees and minors.

Under the Healthy Retail Workers Act, certain retail employees working four to six consecutive hours are entitled to a 15-minute break. If they work more than six consecutive hours, they are entitled to a 30-minute break. If they work eight or more consecutive hours, they are entitled to a 30-minute break plus an additional 15-minute break for every additional consecutive four hours following the first break. (Md. Code Ann. Lab. & Empl. § 3-710).

Minors under age 18 must receive a 30-minute break for every five hours of work. (Md. Code Ann. Lab. & Empl. § 3-210).

25 | What are the maximum hour rules?

There are no maximum hour limits for adult employees. As for minors, 14–15 year olds may not work more than four hours a day or 23 hours a week while school is in session, and may not work more than eight hours a day or 40 hours a week when school is not in session. 16–17 year olds may not spend more than a combined 12 hours of work and school each day. (Md. Code Ann. Lab. & Empl. §§ 3-210 and 3-211).

26 | How should overtime be calculated?

Like federal law, overtime in Maryland is calculated at one and one-half times the employee's regular rate for all hours worked over 40 in a workweek. (Md. Code Ann. Lab. & Empl. § 3-415).

27 | What exemptions are there from overtime?

As under federal law, Maryland exempts salaried administrative, executive and professional employees. Outside salespersons, commissioned employees, and minors under 16 years old are also exempted. In addition, Maryland provides exemptions to a lengthy list of specialized jobs and industries, including certain agricultural, railway, and entertainment categories. (Md. Code Ann. Lab. & Empl. §§ 3-403 and 3-415).

Record keeping

28 | What payroll and payment records must be maintained?

Maryland law requires employers to keep the following records for at least three years:

- the name, address, and occupation of each employee;
- the rate of pay of each employee;
- the amount that is paid each pay period to each employee;
- the hours that each employee works each day and workweek; and
- records of statutory sick and safe leave accrued and used by each employee. (Md. Code Ann. Lab. & Empl. §§ 3-424 and 3-1307).

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

PRIVACY IN THE WORKPLACE

Privacy and monitoring

29 | What are employees' rights with regard to privacy and monitoring?

There are a number of Maryland laws that relate to employee privacy and monitoring. Under the Maryland Wiretap Act, an employer is prohibited from listening to or recording a confidential communication absent the consent of all parties involved. In addition, the law prohibits the interception of oral, wire, or electronic communications, and thereby encompasses the monitoring of email without consent. (Md. Code Ann. Cts. & Jud. Proc. §§ 10-401 et seq.). In order to conduct such monitoring of calls or emails, employers should implement a written policy that employees' communications are not private and may be monitored, and that employees consent to such monitoring by using the system.

Maryland's Visual Surveillance with Prurient Interest Law makes it unlawful for any person, including employers, with prurient intent to conduct visual surveillance of an individual in a private place without that individual's consent. A private place is a room where an individual has a reasonable expectation of privacy and may disrobe, such as a dressing room or rest room. (Md. Code Ann. Crim. Law § 3-902).

A 2020 law prohibits the use of a facial recognition technology during an applicant's interview without their consent. An applicant may consent to the use of such technology by signing a waiver that contains the applicant's name, the interview date, the applicant's consent to the use of facial recognition during the interview, and whether the applicant read the consent waiver. (Md. Code Ann. Lab. & Empl. § 3-717).

Maryland also recognizes certain tort claims for invasion of privacy. "Intrusion upon seclusion" is an intentional intrusion on another's solitude or seclusion or their private affairs or concerns that a reasonable person would find highly offensive. See *Furman v. Sheppard*, 744 A.2d 583 (Md. App. 2000). "Appropriation of name or likeness" is the use or benefit of the name or likeness of another. Such use or benefit need not be directly economic. See *Lawrence v. A.S. Abell Co.*, 475 A.2d 448 (Md. 1984). A "false light" claim involves knowingly or recklessly placing an individual before the public in a false light that is highly offensive to a reasonable person. See *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297 (Md. App. 1995). And a "publicizing private facts" claim arises when publicity regarding an individual's private life would be highly offensive to a reasonable person and is not of legitimate concern to the public. See *Klipa v. Bd. of Educ. of Anne Arundel Cty.*, 460 A.2d 601 (Md. App. 1983).

30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Maryland passed the first social media privacy law in the U.S.—the User Name and Password Privacy Protection Act. This law prohibits Maryland employers from requiring employees or applicants to turn over passwords needed to access private websites, including those used for social media. Specifically, employers may not require, or even request, that an applicant or employee divulge his or her "user name, password, or other means for accessing a personal account or service through an electronic communication device." Employees may be required to provide passwords for "nonpersonal accounts or services

that provide access to the employer's internal computer or information systems." "Nonpersonal" account is not defined, however, and the law does not make any exception for personal accounts used to access work accounts. (Md. Code Ann. Lab. & Empl. § 3-712).

Bring your own device

31 | What is the latest position in relation to bring your own device?

Maryland has no laws relating to the use of personal devices for business purposes (i.e., bring-your-own-device). Employers are, therefore, free to implement whatever policies they like with regard to such use.

Off-duty

32 | To what extent can employers regulate off-duty conduct?

Unlike some other states, Maryland has no laws protecting employees' legal off-duty conduct. Accordingly, Maryland employers may take employment action based on such conduct to the extent it has an impact in the workplace.

Gun rights

33 | Are there state rules protecting gun rights in the employment context?

Maryland has no state laws protecting gun rights in the employment context. Thus, Maryland employers are free to ban all weapons in the workplace, including in employer parking lots.

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual Property

34 | Who owns IP rights created by employees during the course of their employment?

There are no laws in Maryland governing ownership rights in intellectual property created by employees during their employment. An employer may certainly specify that any such creations are its property; otherwise, ownership may depend on the particular circumstances of each situation.

Restrictive covenants

35 | What types of restrictive covenants are recognized and enforceable?

Maryland law prohibits non-compete agreements for lower-wage workers. (Md. Code Ann. Lab. & Emp. § 3-716). As for higher-wage workers, court cases have established that restrictive covenants, such as non-compete or non-solicitation agreements, are generally enforceable in Maryland, although because they are considered restraints on trade, they are strictly scrutinized. The restrictions in such agreements may not impose an undue hardship on the employee and may not disregard the public's interests. In addition, any limitations as to geographic area and duration must be no broader than reasonably necessary for the protection of the employer's business. See *Labor Ready, Inc. v. Abis*, 767 A.2d 936 (Md. 2001).

Continued employment has generally been sufficient consideration to support a non-compete or non-solicitation agreement. See *Tolman Laundry, Inc. v. Walker*, 187 A. 836 (Md. 1936).

Maryland courts may revise (i.e., "blue pencil") such agreements if it deems the original provisions to be unenforceable. See *Tawney v. Mut. System of Maryland*, 47 A.2d 372, 379 (Md. 1946). However, in so doing, a court may not rearrange or supplement the language of the

restrictive covenant. *See Fowler v. Printers II, Inc.*, 598 A.2d 794, 802 (Md. App. 1991).

Non-compete

36 | Are there any special rules on non-competes for particular classes of employee?

In 2019, Maryland enacted a law prohibiting employers from including a non-compete or conflict of interest provision in an employment contract with an employee earning \$15 or less per hour or \$31,200 or less annually. The law states that such provisions, which restrict the ability of the employee to work for a new employer or become self-employed in the same or similar business or trade, are void as against public policy. The law specifically provides that employers may still prohibit such employees from taking client lists or other proprietary client-related information. (Md. Code Ann. Lab. & Empl. § 3-716).

LABOR RELATIONS

Right to work

37 | Is the state a "right to work" state?

Maryland is not a "right to work" state.

Unions and layoffs

38 | Is the state (or a particular area) known to be heavily unionized?

As a strongly Democratic and generally progressive state, Maryland is union-friendly. Unlike the national trend of declining union membership, Maryland has experienced a slight increase over the past several years. The percentage of union members, which includes both public and private sector unions, among those employed in the state rose from 11.3 per cent in 2019 to 13.1 per cent in 2020.

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

Maryland's Economic Stabilization Act provides voluntary guidelines for employers on major workforce reductions. (Md. Code Ann. Lab. & Empl. §§ 11-301 et seq.). Notably, the General Assembly revised the law in 2020 to make such guidelines mandatory, and then further revised it in 2021 to better conform it to the federal Worker Adjustment and Retraining Notification Act (WARN), although some significant differences still remain.

Maryland's law applies to employers with at least 50 employees operating an industrial, commercial or business enterprise within the state for at least a year who are facing a reduction in operations. "Reduction in operations" includes (1) a relocation of part of an employer's operation that results in the reduction of the total number of employees by the greater of at least 25% or 15 employees or (2) the shutting down of a part or all of the operation that reduces the number of employees by the greater of 25 per cent or 15 employees over any three-month period. Under the revised law, such employers must give employees 60 days' notice of expected terminations, with the appropriate continuation of benefits, such as health, severance and pension benefits, to affected employees. In addition, employers may ask for assistance from the Dislocation Services Unit of the Maryland Department of Labor, which provides services to help mitigate the impact on affected employees. There are exceptions to the 60-day notice requirement where the employer is actively seeking capital that would prevent or postpone the reduction or in the case of a natural disaster, although notice must still be provided as soon

as practicable. Unlike federal law, there is no exception for unforeseen business circumstances.

The required notice must be provided to: all employees in the affected workplace; any representative or bargaining agency representing those employees (i.e., a union); Maryland's Dislocated Worker Unit; and the chief elected official in the jurisdiction where the affected workplace is located. It must include: the name and address of the affected workplace; a company official's name, telephone number and email address to contact for further information; a statement explaining whether the reduction in operations is expected to be temporary or permanent, and whether the workplace is expected to shut down; and the expected date the reduction in operations will begin.

The Secretary of Labor, in cooperation with the Workforce Development Board, will develop regulations regarding the required written notice and the continuation of benefits, such as health, pension, and, of particular concern, severance.

Unionized employers may have additional bargaining obligations in the context of a reduction in operations.

DISCIPLINE AND TERMINATION

State procedures

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

There are no laws in Maryland requiring that private sector employers follow particular steps with regard to discipline or grievance procedures. As a practical matter, however, employers should ensure that discipline and grievance procedures are applied consistently throughout the workforce in order to avoid discrimination claims.

At-will or notice

41 | At-will status and/or notice period?

Maryland is an at-will employment state, meaning that either the employer or employee may terminate the relationship at any time, with or without cause or notice, as long as the termination is not prohibited by law, an individual contract, or a collective bargaining agreement.

42 | What restrictions apply to the above?

Many Maryland employment laws contain an explicit provision prohibiting adverse action, including termination from employment, for exercising rights under those laws. These include the anti-discrimination laws, the leave laws, the wage and benefits laws, the workplace safety and health law, the workers' compensation law, the whistleblowing laws, and others.

As another exception to at-will employment, Maryland recognizes a cause of action for "abusive discharge" in violation of public policy. *See Makovi v. Sherwin-Williams Co.*, 561 A.2d 179 (Md. 1989). The public policy must be clearly set forth in the law, regulation, or the Constitution, and employers may not terminate an employee for refusing to violate the law or for asserting legally protected rights. This cause of action is not available where the law contains a specific statutory procedure and remedy for violations: *Id.*; *see also Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. 2000). Examples of the types of conduct subject to this public policy exception include reporting suspected criminal activity to law enforcement, refusing to violate clients' and customers' constitutional rights to privacy, and protecting children from abuse and neglect. In addition, because the state anti-discrimination statute only applies to employers with 15 or more employees (although the harassment provisions apply to employers with a single employee), the courts have also

recognized the claim with regard to smaller employers, based on the public policy of prohibiting discrimination and harassment set forth in the law. See *Molesworth v. Brandon*, 672 A.2d 608 (Md. 1996).

Final paychecks

43 | Are there state-specific rules on when final paychecks are due after termination?

Upon termination, the employee must be paid all wages due on or before the day on which the employee would otherwise have been paid. Accrued and unused vacation or PTO must be paid unless the employer has a policy that specifically states it will not be paid out. (Md. Code Ann. Lab. & Empl. § 3-505).

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