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# US Regional Employment 2022

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**Maryland: Law & Practice**

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# MARYLAND

## Law and Practice

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## 1. Current Socio-economic, Political, and Legal Climate; Context Matters

### 1.1 The Impact of COVID-19 on the Workplace

Like other US states, Maryland has responded to the COVID-19 pandemic with a combination of laws, orders and agency guidance, supplementing federal efforts. Early on in the pandemic, Maryland passed the COVID-19 Public Health Emergency Act, which contained several employment-related provisions, but these expired on April 30, 2021. The Essential Workers Protection Act was then enacted during the 2021 General Assembly session to provide certain paid leave benefits for essential workers during future catastrophic health emergencies, as well as establish certain workplace safety standards applicable to employers of those workers.

The Governor also issued a number of executive orders that impacted the workplace. Initially, the Governor ordered universal face coverings, as well as the closure of non-essential businesses, and encouraged telework to the greatest extent possible. Certain travel restrictions were also put into place, impacting business travel and commuting. These restrictions have since been lifted.

### 1.2 “Black Lives Matter,” “Me Too” and Other Movements

Maryland is a progressive state and has enacted legislation in response to current social movements. Even before the “Me Too” movement gained traction, Maryland bolstered its Equal Pay Act, including by adding a pay transparency provision. More recently, it also vastly expanded the protections against sexual and other harassment (including by lowering the standard for establishing illegal harassment), instituted a salary history ban, and implemented a gender

diversity reporting requirement on certain corporate boards.

In the context of the “Black Lives Matter” movement, in addition to the above-mentioned easing of the harassment standard, the General Assembly also expanded the protections against race discrimination by clarifying that “race” includes traits associated with race, including hair texture, afro hairstyles, and protective hairstyles. It further adds “protective hairstyle” to the law’s list of protected characteristics.

As to discrimination protections generally, the General Assembly has extended the time period for filing complaints of discrimination with the Maryland Commission on Civil Rights, which is the state agency charged with enforcing the state anti-discrimination law. It also vastly expanded the filing period for discrimination and harassment lawsuits under state law by tolling (eg, putting on hold) the applicable two- or three-year suit-filing period while an administrative complaint is pending – a period that, in the authors’ experience, can range widely from only a couple of months to several years (Md. Code Ann. State Govt. §§ 20-601 et seq).

### 1.3 “Gig” Economy and Other Technological Advances

In response to technological developments in the workplace, Maryland was the first state to pass a social media privacy law, has enacted a personal information protection statute that includes biometric privacy, and, in 2020, implemented one of the first employment laws in the nation addressing the use of facial recognition technology.

Maryland has also focused on gig economy issues. It enacted a law that prohibits employers in the landscaping and construction industries

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from misclassifying employees as independent contractors, and has increased the penalties for worker misclassification generally. The Maryland courts have followed suit, with the US Court of Appeals for the Fourth Circuit (which includes Maryland) imposing strict tests for joint employment and employee status that result in most workers being found to be employees.

## 1.4 Decline in Union Membership?

Maryland has experienced an increased and well-publicized interest in union membership, arising out of workplace challenges from the COVID-19 pandemic and the “Black Lives Matter” movement. Although the percentage of those employed who are union members decreased from 13.1% in 2020 to 11.0% in 2021, according to the US Bureau of Labor Statistics, there have been high-profile and successful union organizing campaigns in this state, including the first Apple store to be unionized, as well as the Baltimore Museum of Art. Other efforts are ongoing at Starbucks stores and Amazon warehouses. Given the Biden administration’s support for unions, it is expected that union membership in Maryland will continue to grow.

## 1.5 National Labor Relations Board

As a strongly Democratic state, Maryland is friendly to unions. The union-employer relationship in Maryland is generally governed by the federal National Labor Relations Act.

## 1.6 The Great Resignation and Workforce Changes

As in the rest of the US, Maryland employers are facing significant staffing shortages, resulting in market pressures to increase wages and benefits to attract qualified candidates. At the same time, the progressive Maryland General Assembly is seeking to legislate such increases, which is concerning for smaller employers who

are already struggling with financial challenges arising out of the COVID-19 pandemic and the current recession.

Maryland employers are also seeing an increase in worker activism, including interest in the unionization of companies and organizations that have historically remained union-free. The first Apple store to be unionized is in Maryland. Workers at the Baltimore Museum of Art also recently voted in favor of a union.

## 2. Nature and Import of the Relationship

### 2.1 Defining and Understanding the Relationship

#### At-Will Employment

In Maryland, the employment relationship is presumed to be at-will. This means 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, by an individual contract or by a collective bargaining agreement.

#### Statutory Protections

In addition to applicable federal laws, numerous Maryland laws contain protections against adverse employment actions, including termination from employment, for exercising rights under those laws. In relation to the COVID-19 crisis, the following are among the most important: the Civil Rights Law (Md. Code Ann. State Govt. §§ 20-601 et seq); the Healthy Working Families Act (requiring paid sick leave) (Md. Code Ann. Lab. & Empl. § 3-1301); the Occupational Safety and Health Act (Md. Code Ann. Lab. & Empl. §§ 5-101 et seq); the Wage and Hour Law (Md. Code Ann. Lab. & Empl. §§ 3-401 et seq); and

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the Workers' Compensation Act (Md. Code Ann. Lab. & Empl. §§ 9-101 et seq).

## Contractual Exceptions

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: *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: *Bagwell v Peninsula Reg'l Med. Center*, 665 A.2d 297 (Md. App. 1995).

Additionally, although the implied covenant of good faith and fair dealing is an implied term of a contract under state law, Maryland does not recognize this implied covenant in at-will relationships: *Adams v Catalyst Research*, 659 F. Supp. 163 (D. Md. 1987).

## Abusive Discharge

Maryland recognizes a cause of action for "abusive discharge" in violation of public policy as an exception to at-will employment: *Makovi v Sherwin-Williams Co.*, 561 A.2d 179 (Md. 1989). The public policy must be clearly articulated in law. Thus, employers may not terminate an employee for refusing to engage in conduct that violates the law or for asserting rights protected by law. This cause of action is not available where the law contains a specific statutory procedure and remedy for violations (see previous citation); see also *Insignia Residential Corp. v Ashton*, 755 A.2d 1080 (Md. 2000).

## Child Labor

There are special rules for employees under the age of 18 under Maryland law. The minimum age for employment varies according to the occupation, and minors are prohibited from working in certain dangerous occupations altogether. In most cases, a minor must be at least 14 years of age in order to work and they must obtain a work permit. There are restrictions on the number of hours that minors may work and they must receive a 30-minute break after five consecutive hours of work (Md. Code Ann. Lab. & Empl. §§ 3-201 et seq).

## Retail Employees

Non-managerial retail employees may choose either Sunday or the employee's Sabbath as a day of rest. Certain counties have additional requirements related to this law (Md. Code Ann. Lab. & Empl. § 3-704). In addition, retail employers with more than 50 employees in Maryland must provide shift breaks for non-exempt employees working more than four hours. The number and length of breaks depend on the number of hours worked (Md. Code Ann. Lab. & Empl. § 3-710).

## Joint Employer Status

Another employment relationship issue is whether two entities may be considered "joint employers" of a particular employee and thereby are together responsible for ensuring compliance with and liable under the various employment laws. Maryland state courts generally apply a right to control test that reviews various factors, as applicable – 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 US Court of Appeals for the Fourth Circuit, which includes Maryland within its juris-

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diction, articulated a more expansive standard under which joint employer status is more likely to be found under the Fair Labor Standards Act: *Salinas v Commercial Interiors Inc.*, 848 F.3d 125 (4th Cir. 2017).

## Worker Misclassification

Maryland recognizes other work-based but non-employee relationships, including interns and independent contractors. Notably, the Maryland Department of Labor (MDOL) has a particular interest in the issue of employee misclassification – ie, when an employee is incorrectly designated as an independent contractor, thereby enabling the employer to avoid paying employment taxes and benefits. Where the MDOL finds that an employer has knowingly misclassified workers, a penalty in the amount of no more than USD5,000 per employee is payable for a first violation and USD10,000 per employee for subsequent violations. There is also a separate misclassification law specific to the construction and landscaping industries.

Whether an individual is deemed to be an employee or an independent contractor is subject to different tests depending on the law at issue. For example, the Unemployment Insurance Law and the Workplace Fraud Act (which applies only to the landscaping and construction industries) utilize 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.

On the other hand, both the Workers' Compensation Act and the common law apply a "right to control" test under which an employer/employee relationship exists when the employing entity has the right to control and direct the individual performing the services. Many factors are reviewed under the "right to control" test, none of which are individually determinative.

## 2.2 Immigration and Related Foreign Workers

Immigration issues and the use of foreign workers are governed by federal law.

## 2.3 Collective Bargaining Relationship or Union Organizational Campaign

Union-management relations in the private sector are generally governed by federal law. Maryland is not a right-to-work state and therefore all bargaining unit employees may be required to join the union as a condition of employment. Maryland has passed an Anti-Injunction Act, which prohibits injunctive relief for most labor-related disputes (Md. Code Ann. Lab. & Empl. § 4-301). Maryland law also contains other union provisions, such as an anti-strikebreaker statute, the right to picket in connection with a labor dispute, and confidentiality privileges for certain union communications in the context of an employee grievance.

## 3. Interviewing Process

### 3.1 Legal and Practical Constraints Non-discrimination and Accommodations

Whether in an employment application or an interview, Maryland employers must avoid asking questions that elicit information about pro-

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tected characteristics under federal or state law. Under a 2022 amendment to the state antidiscrimination law as well as existing federal law, reasonable accommodations must be provided to enable disabled applicants to engage in the application process (Md. Code Ann. State Govt. §§ 20-601 et seq). In the context of COVID-19, this may involve virtual interviews and other protections to reduce or prevent possible exposure for applicants with underlying medical conditions placing them at greater risk for severe illness.

In addition, under the Medical Questions Law, Maryland employers may not require an applicant to answer oral or written questions that relate 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 proper medical evaluation by a physician to assess the applicant's ability to perform the job (Md. Code Ann. Lab & Empl. § 3-701).

### **Wage Ranges and Salary History Ban**

A 2020 amendment to the Equal Pay Act requires an employer to provide the wage range for the position in question upon an applicant's request. It further prohibits an employer from asking about or relying upon an applicant's wage history in screening, hiring or determining wages. Employers may not retaliate against an applicant for exercising their rights under the law. The law acknowledges that an applicant may voluntarily provide their wage history and, after a conditional offer of employment is made, permits the employer to confirm and to rely on this information to support a higher wage offer than initially offered (Md. Code Ann. Lab & Empl. § 3-304.2).

### **Lie Detector Testing**

Applicants and employees may not be required to undergo lie detector testing (Md. Code Ann. Lab & Empl. § 3-702). The law specifies that Maryland applications 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 MISDEMEANOUR, AND SUBJECT TO A FINE NOT EXCEEDING \$100.”**

### **Drug Testing**

Maryland has passed a law that permits employers to drug test applicants and employees. The law contains detailed requirements that must be met, including the use of state-approved laboratories, specific notice requirements and restrictions on the type of specimens (blood, urine and saliva, and in the pre-employment context, hair samples) that may be used. If the applicant or employee tests positive, the employer must provide the employee with a copy of the lab results, the employer's written substance abuse policy, notice of any intent to take adverse action 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).

### **Recruiting**

Pursuant to the “anti-strikebreakers statute”, Maryland employers may not refer, obtain or recruit for employment individuals who customarily and repeatedly offer to be employed in

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place of labor strikers (Md. Code Ann. Lab. & Empl. § 4-403).

Another recruiting law allows employers to grant a preference in hiring or promotion to an eligible veteran, a veteran who has a service-connected disability or, if 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 (Md. Code Ann. Lab. & Empl. § 3-714).

### Credit History Checks

Under the Job Applicant Fairness Act, employers are prohibited from using an applicant's or employee's credit report or credit history to deny employment, terminate employment or otherwise make decisions about compensation or other terms of employment except where expressly authorized by the law.

The law does not apply to employers that are required by federal, state or local law to check an individual's credit history, nor does it apply to financial entities that are required to register as investment advisors with the SEC. Employers are permitted to procure the credit reports or credit histories of applicants (after a conditional offer of employment is extended) or employees if the employer has a bona fide reason for obtaining the information that is substantially job-related, as defined in the law and the employer discloses in writing that a report is being procured (Md. Code Ann. Lab. & Empl. § 3-711).

### Social Media Checks

The User Name and Password Privacy Protection Act was the first workplace social media privacy law in the nation. Under this law, Maryland employers are prohibited from requiring employees or applicants to turn over passwords need-

ed to access private websites, including those used for social media. Specifically, the law bars employers from requiring or even requesting that an applicant or employee divulge their "user name, password, or other means for accessing a personal account or service through an electronic communication device". Employers may, however, require employees to divulge passwords for "non-personal accounts or services that provide access to the employer's internal computer or information systems" (Md. Code Ann. Lab. & Empl. § 3-712).

### Criminal Background Checks

Maryland enacted a statewide "Ban the Box" law that took effect in early 2020. Employers with 15 or more employees are prohibited from asking about an individual's criminal record prior to the first in-person interview. During that interview, however, such information may be required to be disclosed. There are 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 (Md. Code Ann. Lab. & Empl. §§ 3-1401 et seq). Of note, the law specifically does not pre-empt any local ban-the-box laws, such as those previously enacted by Baltimore City, Prince George's County, and Montgomery County, which impose greater restrictions on employers than this law.

On the other hand, 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).



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The Maryland Second Chance Act permits an individual to petition the court to shield certain specific misdemeanor convictions from public disclosure, including to employers, unless an exception applies. 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).

### 3.2 Artificial Intelligence and the Hiring Process

Proponents of Artificial Intelligence (AI) in the hiring process cite its benefits, which include streamlining the hiring process and eliminating human bias. Yet, there are some concerns that these tools can actually exacerbate bias or discrimination in the hiring process. Further, an employer's use of AI could violate the American with Disabilities Act by "screening out" an individual with a disability who could perform the task with a reasonable accommodation. In addition, there are a multitude of privacy concerns with using AI in the hiring process, particularly with respect to biometric data. In response to the possible legal implications of using AI in the hiring process, Maryland was one of the first states to pass AI regulations for the workplace. In October 2020, the Maryland General Assembly passed the Facial Recognition in Employment Act, which prohibits employers from using facial recognition technology during the hiring process without obtaining consent. This is currently the only Maryland law regulating AI usage in the workplace.

## 4. Terms of the Relationship

### 4.1 Restrictive Covenants

Although Maryland is an at-will employment state, employers and employees can enter into agreements that govern other aspects of the employment relationship.

#### Non-compete and Non-solicitation Agreements

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 USD15 or less per hour or USD31,200 or less annually (Md. Code Ann. Lab. & Emp. § 3-716). Such provisions restricting 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. Employers, however, may still prohibit such employees from taking client lists or other proprietary client-related information.

With regard to higher-wage employees, restrictive covenants, such as non-compete or non-solicitation agreements, are generally enforceable in Maryland as long as the restrictions as to geographic area and duration are reasonably necessary for the protection of the employer's business, do not impose an undue hardship on the employee and do not disregard the public interests: *Labor Ready, Inc. v Abis*, 767 A.2d 936 (Md. 2001). Continued employment is considered sufficient consideration to support a non-compete or non-solicitation agreement: *Tolman Laundry, Inc. v Walker*, 187 A. 836 (Md. 1936). Maryland courts may "blue pencil" or revise such agreements if it deems the original provisions to be too onerous and thereby unenforceable: *Tawney v Mut. System of Maryland*, 47 A.2d 372, 379 (Md. 1946).

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## Arbitration Agreements

Arbitration agreements are enforceable in Maryland but must be supported by mutually binding promises to arbitrate. Employment or continued employment is not sufficient consideration for an enforceable agreement: *Cheek v United Healthcare of the Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003). The waiver of a right to bring a class or collective action in an arbitration agreement has been found to be enforceable by the U.S. Supreme Court; Maryland courts have not weighed in on this issue but would be expected to follow federal law.

## Confidentiality Agreements

Maryland employers may protect confidential and proprietary business information, including trade secrets, through the use of a confidentiality agreement that specifically identifies the protected information. Of relevance to this issue, Maryland has adopted the Model Uniform Trade Secrets Act. There are two types of trade secrets under the Act: internal operating information and technological developments. Employers may seek injunctive relief for actual or threatened misappropriation of trade secrets, as well as damages for actual loss, unjust enrichment and, if the actions were willful and malicious, attorneys' fees and exemplary damages (Md. Code Ann. Comm. Law §§ 11-1201 et seq).

## Waiver of Sexual Harassment Claims

In the context of the "Me Too" movement, Maryland passed the Disclosing Sexual Harassment in the Workplace Act, which prohibits an employer from requiring a waiver of future sexual harassment or retaliation claims and prohibits an employer from taking adverse action against an employee for refusing to enter into an agreement with such a waiver (Md. Code Ann. Lab. & Empl. § 3-715).

## 4.2 Privacy Issues

### Electronic Surveillance

The Maryland Wiretap Act prohibits an employer from listening to or recording a confidential communication without the consent of all parties. The law further prohibits the interception of oral, wire or electronic communications and thereby encompasses the monitoring of email (Md. Code Ann. Cts. & Jud. Proc. §§ 10-401 et seq). Employers should inform employees through a written policy or a message at the point of logging into the communications system that their communications are not private and may be monitored and that employees consent to such monitoring by using the system.

### Other Statutory Privacy Protections

The Maryland Personal Information Protection Act governs the disposal of personal information, including employee data, and provides for notification of the breach of electronically maintained personal information. Of particular interest, the definition of personal data includes biometric data (Md. Code Ann. Comm. Law §§ 14-3501).

As noted at 3.2 **Artificial Intelligence and the Hiring Process**, in 2020, Maryland also enacted a law governing the use of facial recognition technology in the hiring process. The Facial Recognition in Employment Act prohibits the use of a facial recognition technology during an applicant's interview without their consent, which must meet specific statutory requirements (Md. Code Ann. Lab. & Empl. §3-717).

The Wage Payment and Collection Act prohibits the display of social security numbers on employee checks, notices of direct deposit or notice of wage credits to debit cards or card accounts (Md. Code Ann. Lab. & Empl. §3-502).

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The Visual Surveillance with Prurient Interest Law makes it unlawful for any person, including an employer, 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 may disrobe and has a reasonable expectation of privacy, such as a dressing room or rest room (Md. Code Ann. Crim. Law § 3-902).

The User Name and Password Privacy Act and the Medical Questions Law (see **3.1 Legal and Practical Constraints**), also contain protections for employee privacy.

## Tort Claims

Maryland recognizes certain tort claims for invasion of privacy.

“Intrusion upon seclusion” is an intentional intrusion on the solitude or seclusion of another or their private affairs or concerns that would be highly offensive to a reasonable person: *Furman v Sheppard*, 744 A.2d 583 (Md. App. 2000).

“Appropriation of name or likeness” is the use or benefit, which need not be directly economic, of the name or likeness of another: *Lawrence v A.S. Abell Co.*, 475 A.2d 448 (Md. 1984).

“False light” involves knowingly or recklessly placing an individual before the public in a false light that is highly offensive to a reasonable person: *Bagwell v Peninsula Reg'l Med. Ctr.*, 665 A.2d 297 (Md. App. 1995).

Finally, “publicizing private facts” arises when publicity to a matter concerning an individual's private life would be highly offensive to a reasonable person and is not of legitimate concern to the public: *Klipa v Bd. of Educ. of Anne Arundel Cty.*, 460 A.2d 601 (Md. App. 1983).

## 4.3 Discrimination, Harassment, and Retaliation Issues

### Harassment and Discrimination

Maryland law protects employees, independent contractors, and interns from employment discrimination and harassment on the basis of race, protective hairstyles (arising from the heightened awareness of racial equity issues), color, religion, sex, age, pregnancy, national origin, marital status, sexual orientation, gender identity, disability, or genetic information or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test. In addition, individuals are protected from retaliation for asserting rights under the law. The law further requires employers to provide reasonable accommodations for disabilities, specifically including those caused or contributed to by pregnancy.

The law applies to employers with 15 or more employees, except that if a harassment claim is involved it applies to employers with a single employee. Revisions to the law in 2018 and 2022, spurred by the “Me Too” movement, expanded the definition of harassment beyond the federal law (Md. Code Ann. State Gov't §§ 20-600 et seq). In the context of COVID-19, the issues of harassment against those of Asian descent and reasonable accommodations for those with underlying health conditions that place them at greater risk of severe illness due to COVID-19 have taken on greater prominence.

Specifically as to sexual harassment, an employer is prohibited from requiring employees to waive future sexual harassment or retaliation claims (Md. Code Ann. Lab. & Empl. § 3-715).

### Equal Pay

Maryland's Equal Pay for Equal Work Statute prohibits discriminatory pay practices based on

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sex or gender identity against employees who work in the same establishment and perform work of comparable character or work on the same operation, in the same business or of the same type. The law also contains pay transparency provisions that protect employees' rights to discuss their pay (Md. Code Ann. Lab. & Empl. § 3-404.1).

### **Military Service**

As mentioned at **3.1 Legal and Practical Constraints**, employers in Maryland may grant a preference in hiring or promotion to an eligible veteran or, under certain conditions, the veteran's spouse. Other military-type protections are provided to National Guard members by the National Guard Employment and Reemployment Rights Act (Md. Code Ann. Pub. Safety § 13-704).

### **4.4 Workplace Safety**

Like the Federal Occupational Safety and Health Administration (OSHA), the Maryland Occupational Safety and Health (MOSH) Administration has promulgated rules and regulations on workplace safety. The MOSH Act adopts OSHA standards in most respects, including record-keeping, requiring safety training for employees and investigations into workplace injuries and illnesses. In addition to notifying OSHA of any serious injury or death, employers must also notify MOSH (Md. Code Ann. Lab. & Empl. §§ 5-101 et seq).

In the context of COVID-19, the Essential Workers Protection Act required MOSH to adopt any Emergency Temporary Standard issued by federal OSHA; OSHA's subsequently-issued ETS, which is no longer in effect, applied only to healthcare employers. With regard to other industries, MOSH has not adopted any state-

specific COVID-19 standards, but rather relies upon federal OSHA guidance.

As for workplace violence protections, a 2021 law modifies the existing peace order process to permit an employer to petition a court for a peace order (ie, a restraining order) on behalf of an employee based on acts or threatened violence against that employee in the employer's workplace.

### **4.5 Compensation and Benefits Wage and Hour Law**

Employees are designated as either "exempt" or "non-exempt" from the requirements to pay the minimum wage rate and overtime premiums under the Maryland Wage and Hour Law and the Federal Fair Labor Standards Act (FLSA) (Md. Code Ann. Lab & Empl. §§ 3-401 et seq).

Maryland law generally follows the FLSA, but sets a higher state minimum wage, currently USD12.50 for employers with at least 15 employees and USD12.20 for those with fewer than 15 employees. This will increase to USD13.25 for those with at least 15 employees and USD12.80 for smaller employers on January 1, 2023, with further increases over the next several years such that those larger employers will be subject to a rate of USD15.00 by January 1, 2025. A longer schedule of increases applies to smaller employers, who will reach that rate by July 1, 2026.

There are also some differences with regard to certain specific provisions, such as travel time and overtime for nurses. Maryland does not recognize the FLSA's highly-compensated employees' exemption, and has not adopted the federal Portal-to-Portal Act, which excludes certain activities from compensable hours worked.

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## Wage Payment Law

The payment of wages is governed by the Maryland Wage Payment and Collection Law (Md. Code Ann. Lab & Empl. §§ 3-501 et seq). Employers must provide notice of the pay days, leave benefits and rate of pay at the time of hiring. With each pay check, employers must also provide a statement of gross earnings and deductions as well as the amount of earned sick and safe leave available to the employee (Md. Code Ann. Lab & Empl. § 3-1301 et seq). Employers must pay an employee's wages at least every two weeks or twice a month. Payment must be made by cash or check and, with the employee's consent, may be made by direct deposit or to a debit card. Upon termination of employment, the final pay check must be issued by the next regular payday following the termination.

## Deductions

Only certain deductions may be made from employees' pay checks under Maryland law. 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.

## Garnishments

Maryland law places restrictions on the amount that may be garnished from an employee's wages. This varies, depending on the county in which the employee is located (Md. Code Ann. CL § 15-601.1). In *Marshall v Safeway*, 437 A.2d 542 (Md. 2014), the Court of Appeals ruled that

if the amount subject to garnishment based on the Maryland statute exceeds the amount that may be garnished under federal law, the federal law pre-empts the state law.

## Paid Sick Leave

The Maryland Healthy Working Families Act requires employers to provide earned sick and safe leave to their eligible employees. Employers with 15 or more employees are required to provide paid leave accrued at a rate of one hour for every 30 hours worked to a maximum of 40 hours a year. Employers with fewer than 15 employees, however, need only provide unpaid leave.

Employees may use the leave for personal or family illness or injury, preventive medical care, maternity or paternity leave or to address domestic violence against the employee or a family member. A broad definition of family members includes the employee's spouse, children, parents and parents-in-law, grandparents, grandchildren and siblings (Md. Code Ann. Lab & Empl. §§ 3-1301 et seq). Employers in Montgomery County must also comply with that jurisdiction's paid sick and safe leave law, which differs in some significant respects from the state law, including the amount of leave that must be provided.

The Flexible Leave Act, which predates the sick leave law, applies to all Maryland employers with 15 or more employees and entitles employees to use any accrued paid leave for an illness of an immediate family member or, under a 2021 amendment to the law, bereavement of an immediate family member. It does not require an employer to provide leave with pay, but if any form of paid leave (vacation, sick, paid time off, floating holidays, etc) is provided by policy or according to a collective bargaining agreement,

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the employee is entitled to use such leave to care for or for bereavement of an immediate family member (Md. Code Ann. Lab. & Empl. § 3-802).

### **Paid Family and Medical Leave**

Under a new law that was passed in 2022, all eligible Maryland employees will be entitled to 12 weeks of paid family and medical leave, with the possibility of an additional 12 weeks of paid parental leave (for a possible total of 24 weeks of paid leave). This USD1.6 billion program will be administered by the state and funded by contributions from employers and employees, the amount of which will be determined by the Secretary of Labor. Contributions begin October 1, 2023, and benefits will be paid starting January 1, 2025. The Maryland Department of Labor will issue regulations to implement the provisions of the law (Md. Code Ann. Lab. & Empl. §§ 8.3-101 et seq.).

### **Other Family and Medical Leaves**

Employers with 50 or more employees are subject to the Federal Family and Medical Leave Act. Beyond the newly-enacted paid family and medical leave law, Maryland has enacted several other laws relating specifically to leave for family and medical reasons. The Parental Leave Act applies to those Maryland employers with 15-49 employees and provides eligible employees with up to six weeks of unpaid leave for the birth, adoption or foster-care placement of a child (Md. Code Ann. Lab. & Empl. §§ 3-1201 et seq.). In addition, an adoption leave statute requires employers who provide paid leave to biological parents following the birth of a child to provide the same paid leave to adoptive parents (Md. Code Ann. Lab. & Empl. § 3-801).

Maryland also has an Organ Donation Leave Law. Employers with 15 or more employees must

provide eligible employees with up to 60 business days of unpaid leave during any 12-month period for organ donation and up to 30 business days for bone marrow donation. Notably, this leave does not run concurrently with any leave under the Family and Medical Leave Act (Md. Code Ann. Lab. & Empl. §§ 3-1401 et seq).

Other medical leaves may be required as reasonable accommodations under the disability and pregnancy accommodations provisions of the Maryland Civil Rights Act. See **4.3 Discrimination, Harassment, and Retaliation Issues**.

Maryland has a Deployment Leave Law that overlaps part of the FMLA by requiring employers with 50 or more employees to provide unpaid leave to employees on the day that a covered family member, who is a member of the US armed forces, is leaving for or returning from active duty outside the USA (Md. Code Ann. Lab. & Empl. § 3-803).

### **Leave Related to the Judicial and Political Process**

Employers must provide leave for jury service and, further, may not require an employee who appeared for jury service for four or more hours including travel time to work a shift that begins on or after 5pm on the day of jury service or before 3am on the day following service (Md. Code Ann. Cts. & Jud. Proc. § 8-501). Employers must also provide leave for employees to serve as witnesses pursuant to a subpoena for any civil or criminal proceeding, including depositions (Md. Code Ann. Cts. & Jud. Proc. § 9-205). In addition, an employee who is a victim of a crime or a victim's representative is entitled to leave to attend any legal proceedings (Md. Code Ann. Crim. Proc. § 11-102).

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Finally, employers must provide up to two hours of paid leave for voting, if the employee does not have sufficient time either before or after work in which to vote (Md. Code Ann. Elec. Law § 10-315). This last leave has become less relevant with the implementation of early voting throughout the state.

### Volunteer Activities Leave

Maryland also provides leave for certain volunteer activities – civil air patrol, civil defense, volunteer fire department or volunteer rescue squad – in response to a governor-declared emergency or the request of the local government (Md. Code Ann. Lab. & Empl. § 3-703). A separate law additionally (and somewhat redundantly) provides that employees may take up to 15 days of unpaid leave to respond to an emergency mission of the Maryland Wing of the Civil Air Patrol (Md. Code Ann. Lab. & Empl. §§ 3-1001 et seq).

### Vacation or Paid Time Off

Maryland employers are not required to provide paid vacation or paid time off. If they choose to do so, they should state in the policy document whether accrued, unused vacation or PTO will be paid out upon termination or not; the failure expressly to state that vacation or PTO will not be paid out will make such payment mandatory. The leave policy must be in writing and communicated to the employee at the time of hire (Md. Code Ann. Lab. & Empl. § 3-505(b)).

### Retirement Benefits

Maryland has created the Maryland Small Business Retirement Savings Program and Trust for smaller employers, which will be available in the fall of 2022. All employers that use an automatic payroll system and do not have an employer-sponsored retirement plan may participate in this program. If the employer participates in the pro-

gram or has an employer-sponsored retirement plan, its annual state business filing fee (required by corporate law) will be waived. The Maryland Small Business Retirement Savings Board will adopt regulations and will issue information about the program to employers and employees before enrolment begins (Md. Code Ann. Lab. & Empl. §§ 12-101 et seq).

### Healthcare Benefits

Maryland does not require employees to provide healthcare insurance to employees, but those who choose or are required by federal law to do so should be aware of state coverage requirements. Examples of required coverage include but are not limited to, mammograms, in vitro fertilization, home healthcare services and hospice benefits (Md. Code Ann. Ins. §§ 15-801 et seq).

### Other State Benefits

Employers are required to provide workers' compensation insurance, which provides compensation and healthcare benefits for employees who suffer an on-the-job injury or illness (Md. Code Ann. Lab. & Empl. §§ 9-101 et seq). In addition, employers must participate in the State Unemployment Insurance program, which provides benefits to unemployed individuals (Md. Code Ann. Lab. & Empl. § 8-101 et seq).

## 5. Termination of the Relationship

### 5.1 Addressing Issues of Possible Termination of the Relationship

As discussed in 2.1 Defining and Understanding the Relationship, termination of at-will employees may take place at any time, with or without cause or notice. If the employee has a contract for a specific period or that provides for termination only for cause, then the terms of the contract must be followed. Similarly, if the

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employee is subject to a collective bargaining agreement (CBA), termination must comply with the terms of the CBA.

## Severance and Benefits

Maryland law does not require the payment of severance. If an employer chooses to pay severance and obtain a release of claims, the release must contain certain language to comply with federal law (eg, Age Discrimination in Employment Act language, carve-out for filing of charges with the Equal Employment Opportunity Commission, and whistle-blower language), but there are no specific state requirements.

As for benefits upon termination, employers must comply with their notice obligations under the Federal Consolidated Omnibus Budget Reconciliation Act (COBRA) for continued healthcare coverage. Maryland also has a healthcare continuation law that is similar to COBRA, applicable to all employers regardless of size. Employees are entitled to up to 18 months of continuation coverage if they are a resident of Maryland, they have been covered by the employer's plan for three months and they resign or are involuntarily terminated not for cause. This coverage also extends to the employee's spouse or dependent child in the case of the death of the employee (Md. Code Ann. Ins. §§ 15-401 et seq).

## Mass or Group Layoffs

With regard to mass or group layoffs, Maryland has a law similar to the Federal Worker Adjustment and Retraining Notification (WARN) Act. Compliance with the state law, the Economic Stabilization Act, was originally voluntary; however, it was amended in 2020 to make its requirements mandatory and further amended in 2021 to better – but not wholly – conform to the federal law. The mandatory provisions will not be enforced, however, until the Maryland

Department of Labor (MDOL) issues regulations to implement the revisions.

Employers with at least 50 employees will need to provide 60 days' advance notice to employees and certain other entities of a reduction in operations, which is defined as (i) the relocation of a part of the employer's business from one workplace to another existing or proposed site that may result in the reduction in the number of employees by at least 25% or 15 employees, whichever is greater, or (ii) shutting down a workplace that reduces the number of employees by the greater of at least 25% or 15 employees over a three-month period. There are certain statutory exceptions to this notice requirement.

If there is a violation, the Secretary can issue an order compelling compliance and may assess a discretionary civil penalty of up to USD10,000 per day, subject to notice and hearing requirements (Md. Code Ann. Lab. & Empl. § 11-304).

In addition, the law is intended to provide assistance to employers and employees to mitigate the impact of a reduction. Through its "Quick Response Program", the Department of Economic and Employment Development provides services such as on-site registration for mass unemployment claims, job placement and referrals for job training opportunities (Md. Code Ann. Lab. & Empl. §§ 11-301).

## 6. Employment Disputes: Claims, Dispute Resolution Forums, and Relief

### 6.1 Contractual Claims

#### Contract and Tort Claims

Claims based on contracts and torts may be brought before Maryland district courts or circuit



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courts. Maryland district courts hear civil cases involving claims up to USD30,000; circuit courts hear cases exceeding USD5,000 (there is concurrent jurisdiction between USD5,000-30,000). In addition, state contract and tort claims may be asserted in a lawsuit in federal court as pendant claims to a federal claim, or if there is federal diversity jurisdiction between the parties.

There is a one-year statute of limitations for assault, libel and slander claims (Md. Code Ann. Cts. & Jud. Proc. § 5-105); all other tort claims, such as for abusive discharge, negligent misrepresentation, negligent hiring or supervision or tortious interference with contractual relations, are subject to a three-year statute of limitations (Md. Code Ann. Cts. & Jud. Proc. § 5-101). Contract claims are also subject to a three-year statute of limitations (see previous citation).

In a contract claim, a plaintiff may obtain actual damages arising from the breach of contract. Liquidated damages are not available unless the contract provides for their recovery. As for tort claims, a plaintiff may receive compensatory damages and, if actual malice is shown by clear and convincing evidence, punitive damages: *Bowen v Caldor, Inc.*, 710 A.2d 267 (Md. 1998). There is no cap on economic compensatory damages; however, for 2022, there is a USD905,000 cap on non-economic compensatory damages such as pain and suffering (Md. Code Ann. Cts. & Jud. Proc. § 3-2A-09).

### Other Statutory Claims

All of the various employment laws in Maryland provide for complaints to the Commissioner of Labor and Industry who may mediate the dispute or direct the Attorney General to bring suit on behalf of the employee for damages, injunctive relief or other relief. The employer may also be liable for administrative or civil penalties.

In addition, some but not all of the laws also provide a private right of action for violations of those laws and specify the damages that may be obtained. These laws include:

- the Civil Air Patrol Leave Act (Md. Code Ann. Lab. & Empl. § 3-1007);
- the Healthy Retail Employment Act (Md. Code Ann. Lab. & Empl. § 3-710);
- the Healthy Working Families Act (Md. Code Ann. Lab. & Empl. § 3-1308);
- the Parental Leave Act (Md. Code Ann. Lab. & Empl. §§ 3-1207 et seq); and
- the Workplace Fraud Act (Md. Code Ann. Lab. & Empl. § 3-911).

### 6.2 Discrimination, Harassment, and Retaliation Claims

If an employee, intern or independent contractor believes that they have been subjected to discrimination, harassment or retaliation in violation of the state's antidiscrimination law, they must first file a complaint of discrimination with the Maryland Commission on Civil Rights (MCCR).

Any complaint filed with the MCCR is deemed to be "dual filed" with the Equal Employment Opportunity Commission (EEOC). Discrimination complaints must be filed with the MCCR or EEOC within 300 days of the alleged incident, while harassment complaints must be filed with the MCCR within two years (300 days with the EEOC). The MCCR or EEOC will then conduct an investigation, which before the MCCR typically involves an in-person fact-finding conference. If the MCCR concludes that discrimination has occurred, it will seek to conciliate the matter. If the complainant is an intern, they are entitled only to non-monetary relief. If conciliation fails, the case may be certified for a public hearing where a Commission attorney will prosecute the matter. If the MCCR finds no evidence of dis-

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crimination, it will dismiss the matter. The EEOC typically adopts the findings of the MCCR.

Regardless of the MCCR's findings and/or after 180 days have passed since the filing of the MCCR complaint, an employee or contractor (but not an intern) may then bring a private lawsuit before the state circuit court. Discrimination lawsuits must be filed within two years of the alleged incident, while harassment lawsuits are subject to a three-year statute of limitations. Under a 2022 revision to the law, however, the filing period is tolled during the MCCR or EEOC's investigative process. The damages available generally mirror those under Title VII: back pay, reinstatement, compensatory damages, attorneys' fees, expert witness fees and costs. The amount of compensatory fees, like those under Title VII, range from USD50,000 to USD300,000 depending on the size of the employer (Md. Code Ann. State Gov't §§ 20-1001 et seq).

Under the Equal Pay Act, an employee may file a complaint with the Commissioner of Labor and Industry, who may mediate the dispute or direct the Attorney General to bring suit on behalf of the employee for damages, injunctive relief or other relief. Moreover, if an employer is found to have violated the law two or more times within a three-year period, either the Commissioner of Labor and Industry or a court may assess a civil penalty equal to 10% of the damages owed by the employer. If the employer hinders the Commissioner's investigation into the complaint, it may be found to be guilty of a misdemeanor and subject to a fine not exceeding USD300.

The employee may also bring their own lawsuit and a court may award the wage differential and an additional equal amount as liquidated damages, as well as injunctive relief, attorneys' fees, costs and prejudgment interest. Any such

lawsuit must be filed within three years of the employee's final pay check (Md. Code Ann. Lab. & Empl. §§ 3-306.1 et seq).

## 6.3 Wage and Hour Claims

Under the Maryland Wage and Hour Law (Md. Code Ann. Lab. & Empl. §§ 3-423 et seq), an employee who failed to receive either the minimum wage rate or overtime premiums can bring a claim before the state circuit court for the amount that was underpaid. The court may award the difference in wages, attorneys' fees and costs. In addition, the court may award an equal amount of the wage differential as liquidated damages, unless the employer can show that it acted in good faith and reasonably believed it was in compliance with the law, in which case the court may either waive or reduce the liquidated damages amount. An employee may also request the Commissioner to take an assignment of the claim in trust for the employee and the Commissioner may then direct the Attorney General to bring an action on behalf of the employee.

In addition, any violations of the law, including the employer's failure to cooperate with the Commissioner's investigation into a complaint or retaliatory action against an employee who asserts rights under this law, will result in the employer being found guilty of a misdemeanor and subject to a fine not exceeding USD1,000.

Although some employers have provided "hazard pay" for workers, particularly those in essential industries, during the COVID-19 pandemic, such payments are not required by law.

## Wage Payment Violations

Under the Maryland Wage Payment and Collection Law, if wages are not timely paid, the employee may file a complaint with the Com-

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missioner of Labor and Industry. If the Commissioner finds a violation, the Commissioner may attempt to mediate the dispute or may direct the Attorney General to bring suit on behalf of the employee. If the amount in dispute is less than USD5,000, the Commission may issue an order to pay the wages, in response to which the employer may request an administrative hearing. The Commissioner may seek enforcement of a wage order in district court. Additionally, violations will be considered a misdemeanor and subject the employer to a fine not exceeding USD1,000.

If the failure to pay lasts longer than two weeks, an employee also has the option to file a private lawsuit with the circuit court. If a court or jury finds a violation, the employer will be liable for the amount of the withheld wages and, if the withholding was not the result of a bona fide dispute, up to three times the amount of the lost wages, in addition to attorney's fees and costs. Notably, an individual owner or supervisor with the power to hire and fire, supervise and control terms and conditions of employment, determine the rate and method of payment and maintain employment records can be held individually liable under the law (Md. Code Ann. Lab. & Empl. §§ 3-507 et seq).

In addition, Maryland has enacted a wage lien law providing a mechanism for an employee or the Commission to obtain a lien on an employer's personal or real property in order to secure an amount of unpaid wages and penalties allegedly due before any judgment has been entered (Md. Code Ann. Lab. & Empl. §§ 3-1101 et seq).

See also **6.1 Contractual Claims**.

## 6.4 Whistle-Blower/Retaliation Claims

Maryland has enacted several statutes that provide whistle-blower protections for private sector employees. Under these statutes, employees are protected from adverse employment action for reporting certain kinds of wrongdoing or legal violations to state governmental agencies.

The Maryland Occupational Safety and Health Act protects employees who file complaints about safety violations (Md. Code Ann. Lab. & Empl. §§ 5-103 et seq). The State Contractor Employees' Whistleblower Protection Act protects contractors and subcontractors of Maryland's executive branch agencies who report abuse of authority, gross mismanagement, gross waste of money, a substantial and specific danger to public health or safety or a violation of law (Md. Code Ann. State Fin. & Proc. §§ 11-301 et seq). In addition, the Health Care Worker Whistleblower Protection Act protects licensed or board-certified health care workers who make written reports to management of legal violations that pose a danger to public health or safety (Md. Code Ann. Health Occ. §§ 1-501 et seq).

## 6.5 Special Training and Resolution Approaches

Maryland employers may set up internal grievance or appeal procedures, but there are no state laws that govern such internal procedures. Unionized employers are required to follow the grievance procedures contained in a collective bargaining agreement.

In addition to filing suit in court, the parties to a dispute may agree to mediation or arbitration. There are no specific Maryland laws that govern the choice of these alternative dispute resolution options. As discussed at **4.1 Restrictive Covenants**, however, arbitration agreements require consideration beyond continuing employment.

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Jury trial waivers, in which the employee retains the right to go to court but waives the right to have a jury hear their claims, are enforceable in Maryland. Although Article 23 of the Maryland Declaration of Rights guarantees the right to a jury trial in civil cases in state court, the Maryland courts have found that this right may be waived, as long as the waiver is knowing and intelligent: see for example, *Walther v Sovereign Bank*, 386 Md. 412 (2005). The jury trial waiver should be drafted and positioned in a conspicuous manner.

## **6.6 Class or Collective Actions**

Maryland Rule of Civil Procedure 2-231 expressly provides for the ability to bring a class action.

As long as statutory prerequisites are met, any employment claim may be asserted as a class action. As noted at **4.1 Restrictive Covenants**, Maryland employers may require employees to waive the right to assert a class action or a collective action under the Federal Fair Labor Standards Act in an enforceable arbitration agreement.

## **6.7 Possible Relief**

See **6.1 Contractual Claims**; **6.2 Discrimination, Harassment, and Retaliation Claims**; **6.3 Wage and Hour Claims**; and **6.4 Whistle-Blower/Retaliation Claims**.

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Shawe Rosenthal LLP was one of the first law firms in the country devoted exclusively to the representation of management in labor and employment matters, and represents employers throughout the USA in federal and state courts and arbitral forums, as well as before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, and other administrative agencies. Shawe Rosenthal's 17 attorneys have joined from judicial clerkships and federal agen-

cies, as well as large and small firms, bringing a wealth of practical experience on labor and employment matters. Shawe Rosenthal is the sole Maryland law firm belonging to two major alliances of management labor and employment lawyers – the Employment Law Alliance and Worklaw Network – affording the firm access to resources of the highest caliber across the country and around the world to better serve its clients, wherever they may be.

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