SB 485

Department of Legislative Services

Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 485 (Senator Pugh, *et al.*)
Finance

Labor and Employment - Family and Medical Leave Insurance Program - Establishment

---

This bill establishes a Family and Medical Leave Insurance (FAMLI) program administered by the Division of Unemployment Insurance (DUI). The program generally provides up to 12 weeks of benefits, ranging from $50 to $700 in weekly benefits, to an employee who is taking partially paid or unpaid leave from employment due to caring for specified family members, the employee's own serious health condition, or a qualifying exigency arising out of a family member's military deployment. The weekly benefit is 66% of the highest total amount of wages earned by the covered employee in one week during the base period, subject to the $700 cap that is indexed to inflation. The bill establishes the FAMLI Fund, which consists of employee contributions based on an employee's wages to be used to pay for benefits, a public education program, and *initial* implementation costs.

The bill takes effect June 1, 2016.

Fiscal Summary

State Effect: Special fund revenues increase significantly beginning in FY 2017 from the FAMLI Fund receiving employee contributions on employees' wages. General fund revenues increase beginning in FY 2019 as a result of taxing at least some FAMLI benefits. Special and general fund expenditures increase significantly beginning in FY 2017 for the Department of Labor, Licensing, and Regulation (DLLR) to develop, administer, and enforce the FAMLI program; however, only general fund expenditures increase on an ongoing basis for DLLR's program administration. The Comptroller's Office incurs one-time start-up costs. Beginning in FY 2019, special fund expenditures increase significantly to pay covered employees' benefits; expenditures (all funds) may also increase to provide coverage for State employees taking FAMLI leave.

Local Effect: Local government expenditures likely increase as a result of local government employees taking FAMLI leave beginning in FY 2019. Local income tax revenues may increase beginning in FY 2019 as a result of taxing FAMLI benefits. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary: A covered employee is an employee who has earned at least $1,800 in wages during the first four of the last five completed calendar quarters immediately preceding the start of an application year or, if an employee does not meet that qualification, the four most recently completed calendar quarters immediately preceding the start of an application year.

A self-employed individual may elect to participate in the program for an initial period of at least three years. After the initial period, a self-employed individual may renew participation in the program annually or notify the Secretary of Labor, Licensing, and Regulation in writing of the individual's withdrawal from the program within 30 days before the participation period expires. A self-employed individual participating in the program must pay the employee portion of the required wage contribution.

The bill applies only prospectively and may not be interpreted to have any effect on or application to any collective bargaining agreement entered into before its June 1, 2016 effective date.

Administration

The Secretary of Labor, Licensing, and Regulation may delegate powers to an employee of DLLR that are necessary to administer the program. A DLLR employee may not disclose information pertaining to an individual who has applied for or received FAMLI benefits, except in specified circumstances. It is the General Assembly's intent that, to the extent permissible under federal law, existing employees and resources of DUI be used to carry out the FAMLI program. The Secretary must:

- adopt regulations to implement the bill by October 1, 2016, that are consistent with the federal Family and Medical Leave Act (FMLA) and any relevant State laws;
- establish procedures and forms for filing claims for benefits;
- use information-sharing and integration technology to facilitate the disclosure of relevant information or records needed to administer the bill;

- carry out a public education program to educate the public about available benefits; and
- report by September 1 of each year to the Governor and General Assembly on the preceding year's administration and operation.

The bill specifies how the Secretary of Labor, Licensing, and Regulation may enforce the FAMLI program, which includes issuing subpoenas and bringing a civil action in the county where the violation allegedly occurred. The bill describes the process relating to subpoenas and prosecution. The Secretary and the State may be represented by the Attorney General or specified qualified attorneys in a civil action to enforce the bill.

The bill does not diminish an employer's obligation to comply with a collective bargaining agreement or an employer policy that allows an employee to take leave for longer than the employee would be able to receive FAMLI benefits. An employee's rights to FAMLI benefits may not be diminished by a collective bargaining agreement or an employer policy in effect on or after June 1, 2016. An agreement by an employee to waive the employee's FAMLI rights is void. The FAMLI program preempts a local jurisdiction's authority to adopt a law, ordinance, rule, or regulation establishing or implementing a FAMLI program.

FAMLI Fund

The bill establishes the FAMLI Fund, which is a special fund administered by the Secretary of Labor, Licensing, and Regulation. It consists of employee contributions, money paid to the fund for reimbursing the Secretary for erroneously paid benefits, interest earned in the fund, and money from any other source. Funds must be used to pay FAMLI benefits and may be used to pay for public education on the FAMLI program and any other costs associated with the *initial* implementation of the FAMLI program. The State Treasurer is the custodian of the FAMLI Fund, and the bill specifies how the Treasurer must manage the fund. An employee does not have any prior claim or right to money that the employee pays into the fund.

Contributions

Beginning on ***January 1, 2017***, each employee must pay to the Secretary of Labor, Licensing, and Regulation contributions on wages, which are established in regulation. The contribution rate established in regulations must be sufficient to fund the FAMLI benefits.

Benefits

Beginning on ***July 1, 2018***, to be eligible for benefits, a covered employee must be taking partially paid or unpaid leave from employment (1) to care for a newborn child or a child newly placed for adoption or foster care with the employee; (2) to care for a family member with a serious health condition; (3) because the employee has a serious health condition and is unable to perform the functions of the employee's position; (4) to care for a next-of-kin service member; or (5) because the employee has a qualifying exigency arising out of the employee's family member's deployment, as defined by the bill. The bill specifies who is included as a family member.

A covered employee may not receive more than 12 weeks of benefits in an application year, except under specified circumstances. A covered employee may take eligible leave on an intermittent leave schedule under specified conditions. Unless the intermittent leave schedule is medically necessary, an employer is not required to allow an intermittent leave schedule for more than 24 consecutive weeks.

A covered employee may not be paid benefits for the first 5 consecutive calendar days after the covered employee becomes eligible for benefits, unless the covered employee has used at least 10 days of paid or unpaid leave during the application year or has already undergone the waiting period in the same application year. A covered employee may not be paid benefits for less than 1 day or 8 consecutive hours of leave taken in one work week.

All weekly benefits paid under the program are subject to the minimum and maximum levels specified below. For employees taking *unpaid* leave, the weekly benefit is 66% of the highest total amount of wages earned by the covered employee in one week during the base period. For employees taking *partially paid* leave, the weekly benefit amount is the lesser of (1) the amount required to make up the difference between the wages paid to the employee while the employee is taking partially paid leave and the full wages normally paid to the employee and (2) 66% of the highest total amount of wages earned by the covered employee in one week during the base period. The weekly benefit payable to a covered employee ranges from a minimum of $50 to a maximum of $700 for the 12-month period beginning July 1, 2018. Beginning July 1, 2019, the maximum weekly benefit must generally be increased by the annual percent growth in the Consumer Price Index, and the bill specifies the procedures to adjust the maximum weekly benefit. DUI must pay benefits to a covered employee within two weeks after the claim is filed and make subsequent payments every two weeks until the benefit period ends. DUI must notify an individual filing a new claim for benefits of specified tax information, and if an individual elects to have federal income tax deducted and withheld, DUI must do so in a manner required by the Internal Revenue Service.

If a covered employee is receiving FAMLI benefits or is taking leave that fulfills the required waiting period, the employer must continue any employment benefits in the same manner as required under FMLA for the time that the covered employee is absent from work and receiving FAMLI benefits. Additionally, the employer must restore the employee to an equivalent position of employment in the same manner as required under FMLA.

Prohibited Acts and Penalties

An individual is disqualified from receiving benefits for one year if the individual willfully makes a false statement or misrepresentation regarding a material fact or willfully fails to report a material fact to obtain benefits.

DUI may seek repayment of benefits from an individual who received benefits in error or as result of willful misrepresentation or if a claim for benefits is rejected after the benefits were paid. The Secretary may waive the repayment of benefits if the repayment would be against equity and good conscience.

A person may not discharge, demote, discriminate, or take adverse action against a covered employee for specified actions.

Current Law:

Federal Family and Medical Leave Act of 1993

FMLA requires covered employers to provide eligible employees with up to 12 work weeks of unpaid leave during any 12-month period under the following conditions:

- the birth and care of an employee's newborn child;
- the adoption or placement of a child with an employee for foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;
- medical leave when the employee is unable to work due to a serious health condition; or
- any qualifying circumstance arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

Generally, an FMLA-covered employer is an entity engaged in commerce that employs at least 50 employees. Public agencies and public or private elementary or secondary schools

are considered to be covered employers regardless of the number of individuals they employ.

An eligible employee is an individual employed by a covered employer who has been employed for at least 12 months; however, these may be nonconsecutive months. Among other criteria, the individual must have been employed for at least 1,250 hours of service during the 12-month period.

Maryland Flexible Leave Act

A private-sector employer who provides paid leave to its employees must allow an employee to use earned paid leave to care for immediate family members, including a child, spouse, or parent, with an illness. An employer is prohibited from taking action against an employee who exercises the rights granted or against an employee who files a complaint, testifies against, or assists in an action brought against the employer for a violation of these provisions.

An employer is considered a person that employs 15 or more individuals and is engaged in a business, industry, profession, trade, or other enterprise in the State, including a person who acts directly or indirectly in the interest of another employer. State and local governments are not included.

Employees who earn more than one type of paid leave from their employers may elect the type and amount of paid leave to be used in caring for their immediate family members.

Maryland Parental Leave Act

Firms with 15 to 49 employees are required to provide employees with unpaid parental leave benefits. An eligible employee may take unpaid parental leave up to a total of six weeks in a 12-month period for the birth, adoption, or foster placement of a child. During parental leave, the employer must maintain existing coverage for a group health plan and, in specified circumstances, may recover the premium if the employee fails to return to work. State and local governments are not included.

To be eligible for the unpaid parental leave, an employee must have worked for the employer for at least one year and for 1,250 hours in the previous 12 months. An eligible employee does not include an independent contractor or an individual who is employed at a work site at which the employer employs fewer than 15 employees if the total number of employees employed by that employer within 75 miles of the work site is also fewer than 15. An eligible employee has to provide the employer with 30-day prior notice of parental leave. However, prior notice is not required if the employee takes leave because of a premature birth, unexpected adoption, or unexpected foster placement.

Unemployment Insurance

Unemployment insurance provides temporary, partial wage replacement benefits to individuals who are unemployed through no fault of their own and who are willing to work, able to work, and actively seeking employment. Both the federal and state governments have responsibilities for unemployment insurance programs. Funding for the program is provided by employers through unemployment insurance taxes paid to both the federal government for administrative and other expenses and to the states for deposit in their unemployment insurance trust funds. Using federal tax revenues, the unemployment insurance program is administered pursuant to state law by state employees. Each state law prescribes the tax structure, qualifying requirements, benefit levels, and disqualification provisions. These laws must, however, conform to broad federal guidelines.

Background: Three states, California, New Jersey, and Rhode Island, provide paid family and medical leave to employees. The programs are funded through payroll taxes and are administered by their temporary disability insurance (TDI) programs. Hawaii and New York also have TDI programs, but they do not offer paid family leave. These plans provide temporary income for a limited period to workers who are unable to work because of nonwork-related accidents or illnesses. California and Rhode Island TDI plans do not require employer contributions, while Hawaii, New Jersey, and New York require employer contributions.

The California, New Jersey, and Rhode Island TDI programs are administered by the same agency that administers unemployment insurance. Under those programs, the unemployment insurance administrative machinery is used to collect contributions, to maintain wage records, to determine eligibility, and to pay benefits to workers under the state-operated funds. By contrast, the New York program is administered by the state Workers' Compensation Board, and the Hawaii program is administered by a separate division of the Department of Labor and Industrial Relations.

The California Paid Family Leave Insurance Program provides up to six weeks of paid leave to care for a seriously ill child, spouse, parent, parent-in-law, grandparent, grandchild, sibling, or registered domestic partner, or to bond with a new child. The benefit amount is approximately 55% of an employee's weekly wage, ranging from a minimum of $50 to a maximum of $1,129. In 2015, 237,864 claims were filed and the program paid $661.7 million in benefits. In addition, under its TDI program, it had 636,090 claims and paid $4.8 billion in benefits.

The New Jersey Family Leave Insurance Program provides six weeks of benefits to bond with a new child or to care for a family member. For claims beginning January 1, 2016, the weekly benefit rate is two-thirds of an employee's weekly wage, up to $615. As of

January 1, 2016, the maximum yearly deduction for Family Leave Insurance is $26.08 and is based on 0.08% tax rate of a taxable wage base of $32,600. In 2015, 35,293 claims were filed and the program paid $85.8 million in benefits. Under its TDI program, it had 93,889 claims and paid $422.7 million in benefits in calendar 2014.

The Rhode Island Temporary Disability Insurance/Temporary Caregiver Insurance Program provides 4 weeks of paid leave for the birth, adoption or fostering of a new child or to care for a family member with a serious health condition and up to 30 weeks of paid leave for a worker's own disability. Benefits range from a minimum of $84 and a maximum of $795 per week, based on earnings. The current withholding rate as of January 1, 2016, is 1.2% of an employee's first $66,300 in earnings. In 2015, Rhode Island paid out $164.2 million in in temporary disability benefits, of which $9.2 million was in temporary caregiver benefits.

State Revenues:

FAMLI Fund Revenues

Special fund revenues increase significantly beginning in fiscal 2017 as a result of DUI collecting employee contributions from employees' wages. The contribution rate is to be set in regulations and must be sufficient to cover benefits paid. Thus, it is unknown by how much special fund revenues increase. *For illustrative purposes only*, if the contribution rate is set at 1%, based on wages and salaries reported on State tax returns in 2012 and inflation, State special fund revenues increase by approximately $600 million if a wage contribution ceiling cap of $100,000 is in place. Additionally, FAMLI Fund revenues increase from interest earned on money in the fund and from any repayments of benefits paid in error.

Income Tax Revenues

State income tax revenues increase beginning in fiscal 2019 by approximately 4.75% of benefits paid out in tax year 2018 that the Internal Revenue Service deems taxable. The Department of Legislative Services (DLS) assumes benefits paid as a result of the employee's serious health condition would be nontaxable while all other benefits would be taxable. Additionally, since the bill only specifies provisions relating to withholding federal income taxes from benefits, DLS assumes State and local income tax revenues from benefits are received in the following year when an individual files his or her tax return.

State Expenditures:

Administration

DLLR currently collects payroll taxes for unemployment insurance; however, those funds cannot be used for any purpose other than unemployment insurance. DUI is 100% federally funded under provisions of the Social Security Act. The Social Security Act provides that the federal funds can only be used to administer the unemployment insurance program, and if any funds are used for purposes other than administering the unemployment insurance program, the funds must be repaid to the federal government. DLLR advises that DUI is precluded from using any of its funds to administer any other state or federal program. However, since California, New Jersey, and Rhode Island are able to use unemployment insurance administrative machinery to administer their disability and family leave programs, it is assumed that DUI can use its administrative machinery to administer the FAMLI program.

Thus, to implement the FAMLI program, DUI must create a new program without utilizing existing staff, but it is assumed DUI can use existing administrative machinery. DUI must develop a tax structure, payment structure, complaint and investigative structure, and require the imposition of an employee contribution. Employees include all employees in the State earning at least $1,800, not just the employees covered under the Maryland unemployment insurance program. Thus, the scope of the bill is much greater than employees included in unemployment insurance. The U.S. Department of Labor reports that 13% of all employees took FMLA leave in 2011, about double the proportion of employees who submitted initial unemployment insurance claims, so the scope of the program may be quite large. This is further supported by the experience of New Jersey, which processed almost 130,000 applications last year. DUI advises it would incur $15 million in implementation costs, including a new computer system, and an additional $17.4 million for annual ongoing operations. This estimate includes $15.6 million for salaries and fringe benefits for approximately 234 employees. DLLR estimated the cost of implementing the bill based on 50% of the costs it incurs to administer unemployment insurance because administering unemployment insurance is similar to administering the FAMLI program. However, since DUI can likely use its existing administrative machinery, DLS believes a new information technology system may not be necessary and that the start-up costs are likely less than $5 million as staffing can be phased in; some of these start-up costs can be offset with revenues from the employee contributions, but ongoing expenses cannot be offset under the terms of the bill.

DLS concurs that implementing the FAMLI program requires a significant increase in personnel resources for DUI. Assuming a one-month implementation delay, DLLR employees are needed to set up the program beginning in fiscal 2017, and more DLLR employees will be needed to process and investigate claims and for assistant Attorneys

General to enforce civil actions and for the Judiciary to handle increased caseloads once covered employees start claiming benefits in fiscal 2019. Based on California, Rhode Island, and New Jersey's claims for TDI and paid family leave benefits, DLS estimates DLLR may receive between 85,000 and 265,000 claims annually. Thus, in the out-years, general fund expenditures easily exceed $15 million a year for personnel and related costs.

The Central Payroll Bureau (CPB) must create new programs, processes, and procedures to calculate the State's portion of the FAMLI contribution for State employees. Expenditures increase by $58,400 for CPB to calculate and send the employee portions to the Secretary of Labor, Licensing, and Regulation. The Comptroller's Office notes it would have difficulties implementing the FAMLI contributions by January 1, 2017. Thus, CPB may require additional resources to enable a January 1, 2017 implementation date for required contributions to the fund.

FAMLI Fund Expenses

DUI must make benefit payments to eligible covered employees beginning on July 1, 2018. It is unknown how much in benefits will be paid to covered employees because it depends on the number of employees claiming FAMLI benefits, the wages of those employees, and the number of days that employees take leave. However, the rate of FAMLI contributions must be sufficient to cover the benefits payable. *For illustrative purposes only*, if the amount of FAMLI benefits is proportionate to the amount of benefits paid out to employees in California, New Jersey, or Rhode Island, DLS estimates the FAMLI Fund paying employees in the range of $340 million to $980 million annually beginning on July 1, 2018. Additionally, general fund expenditures increase beginning in fiscal 2017 to pay for administering the FAMLI program.

Leave

The Department of Budget and Management reports that the bill conflicts with current leave benefits established under the State Personnel Management System (SPMS) and exceeds the conditions, benefits, and eligibility requirements established under SPMS and FMLA. As a result of the expanded applicability and circumstances to use FAMLI leave for employees, expenditures may increase significantly to provide coverage for those employees. The University System of Maryland reports Contingent Category I employees, which consists of temporary adjunct faculty and student employees, do not receive any leave benefits. Many of these employees have annual earnings of at least $1,800 and, thus, could be covered employees eligible to take leave.

Local Revenues: Local income tax revenues increase beginning in fiscal 2019 by approximately 3% of the amount of taxable benefits paid out in tax year 2018.

Local Expenditures: To the extent that local government employees take more leave, the FAMLI program may overburden other employees and create additional personnel expenses for overtime costs for local jurisdictions.

Small Business Effect: The bill has a significant impact on small businesses. The U.S. Department of Labor found that 40% of employees who took FMLA leave returned to work due to their inability to afford leave. By establishing FAMLI, more employees may take leave and take leave for longer periods of time.

Additional Information

Prior Introductions: A similar bill, HB 985 of 2015, received a hearing in the House Economic Matters Committee, but was subsequently withdrawn.

Cross File: Although HB 740 (Delegate Kelly, *et al.* - Economic Matters) is designated as a cross file, it is not identical.

Information Source(s): Baltimore, Dorchester, Garrett, Howard, and Montgomery counties; Maryland Association of Counties; City of Laurel; Maryland Municipal League; Town of La Plata; Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; U.S. Department of Labor; U.S. Social Security Administration; California Employment Development Department; New Jersey Department of Labor; Rhode Island Department of Labor and Training; National Conference of State Legislatures; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2016
kb/mcr

Analysis by: Heather N. Ruby

Direct Inquiries to:
(410) 946-5510
(301) 970-5510