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THE MARYLAND FLEXIBLE LEAVE ACT: 
IS IT REALLY THAT SIMPLE?

By: Darrell R. VanDeusen* and Donna M. Glover**

The American workforce is aging. A “baby boomer”¹ turns sixty years old every seven seconds, according to a report published by a collection of senior representatives from nine Federal agencies, including the Equal Employment Opportunity Commission (“EEOC”) and the United States Department of Labor (“DOL”).² At the same time, the American population continues to grow: Since 1980, the population of the United States has increased from approximately 225 million to an estimated 307 million; a net gain of one person every eleven seconds.³

Amidst the baby boomers, the “sandwich generation” has become more prevalent. The term “sandwich generation”⁴ refers to that segment of the population providing support to both younger and older family members. It is a circumstance that affects a tremendous number of American workers; a Pew Research Center study said that seventy-one percent of today’s baby boomers have at least one living parent.⁵ An aging boomer population will not end the sandwich generation; it will only create the next layer of the sandwich, as the 75 million children of boomers confront the same challenges.

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⁴ Sociologist Dorothy Miller first used the term “sandwich generation” to refer to inequality in the exchange of resources and support between generations. SUZANNE KINGSMILL & BENJAMIN SCHLESINGER, THE FAMILY SQUEEZE: SURVIVING THE SANDWICH GENERATION ix (Univ. of Toronto Press 1998).

Sustained legislative efforts to address the need for American workers to take time to care for themselves, their parents, spouses, and children without jeopardizing their jobs, found support at the federal level in 1993 with the enactment of the Family and Medical Leave Act ("FMLA"). An increasing number of states have also considered protection in this regard. Maryland jumped on this bandwagon in 2008 with the passage of the Maryland Flexible Leave Act ("MFLA").

The MFLA requires employers who provide employees with any form of accrued paid time off, such as vacation, sick, or personal leave, to permit employees to use that paid time off because of the illness of a spouse, parent, or child. The MFLA’s broad brush represents the first time the Maryland General Assembly has given significant direction to employers on how to apply their leave policies. Before enactment of the MFLA, only Maryland’s “adoption leave” law provided similar direction, as it mandated that “[a]n employer who provides leave with pay to an employee following the birth of the employee’s child shall provide the same leave with pay to an employee when a child is placed with the employee for adoption.”

The General Assembly’s 2008 version of the MFLA was less than clear in many areas, requiring emergency legislation in the 2009 session to address business concerns regarding interpretation of the Act. Yet, even after the 2009 amendments, questions still remain. Although the Maryland Department of Labor, Licensing & Regulation ("DLLR") could typically provide guidance, the Fiscal and Policy Note to the amended Act expressly states that “[t]he bill does not apply to State agencies nor does it provide administrative authority or enforcement responsibility to the Division of Labor and Industry.” This means that the judiciary is left to determine how the law applies to employers. This raises perhaps the first and most significant question: Is there a private cause of action created under the MFLA?

Moreover, it remains to be seen whether the MFLA is a precursor of future legislative attempts to mandate employee benefits under state law. Will Maryland join other jurisdictions, such as the District of Columbia, which now mandates that employers provide paid sick leave to employees for their own illness or that of a family member, and for domestic

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7 See infra Part III.C.
violence situations?\textsuperscript{12}

This article addresses the many issues surrounding the creation and anticipated application of the MFLA, and its integration with the FMLA. Part I presents the requirements of the MFLA, and examines the 2008 and 2009 legislation that resulted in the current Act. Part II reviews the history of Maryland’s employment at-will doctrine as it relates to the historical recognition that employees have no particular “right” to specific leave. Part III offers an overview of past and present federal efforts to provide for and expand mandated employee leave. Part IV discusses the steps that other states have taken to mandate the way in which employers permit employees to take leave. Finally, Part V provides some analysis of the way in which the MFLA will likely be interpreted by Maryland courts.

I. THE REQUIREMENTS AND HISTORY OF THE MARYLAND FLEXIBLE LEAVE ACT

The rationale behind the MFLA is hard to challenge. There are times when an employee needs to take time off from work to care for an immediate family member. Why should an employer be permitted to make a distinction between an employee caring for him or herself, and caring for a family member, if the employee is not using any more leave than that provided by the employer in the first place? As with many things, however, the devil is in the details.

The MFLA applies to employers with fifteen or more employees in twenty calendar weeks in the current or preceding calendar year,\textsuperscript{13} and it does not require that an employer provide paid time off if the employer does not already do so.\textsuperscript{14} Employees who have any type of accrued leave (e.g., vacation, sick, paid time off, personal days, compensatory time) under any employer policy may use the leave to take time off to care for any member of their immediate family who is ill.\textsuperscript{15} The term “immediate family” includes a child, parent, or spouse.\textsuperscript{16} To the extent that the employee has more than one form of paid leave, the employee has the right to elect the type and amount of accrued, unused leave to be used.\textsuperscript{17}


\textsuperscript{13} The definition of employer under the MFLA is virtually identical to that in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e(b)-174 (2006) and Maryland’s original anti-discrimination law. See Md. ANN. CODE art. 49(B) § 15 (2003), repealed by Acts 2009, ch. 120, § 1(Oct. 1, 2009).

\textsuperscript{14} Md. CODE ANN., LAB. & EMPL. § 3-802(c) (Supp. 2009) (explaining that the purpose of the MFLA is to “allow an employee of an employer to use leave with pay to care for an immediate family member who is ill . . . .”) (emphasis added).

\textsuperscript{15} Id. at § 3-802(d).

\textsuperscript{16} Id. at § 3-802(a)(4).

\textsuperscript{17} Id. at § 3-802(e)(1)(ii).
Any employee who is covered by a collective bargaining agreement, and who uses leave under the MFLA, must also comply with the terms of that agreement. Additionally, employees are required to comply with any leave policies the employer already has in place, such as leave notice requirements.

If an employer's leave policies are more generous than the MFLA, the employer's policy prevails. However, if an employer's policy requires, for example, that an employee only use sick leave for his or her own illness, the MFLA would govern. In fact, under the MFLA, an employer's policy restricting sick leave for the employee's use might be facially discriminatory.

The MFLA contains a non-discrimination and non-retaliation provision. Employers may not discriminate against any employee who exercises his or her rights under the MFLA, and may not retaliate against any employee who "files a complaint, testifies against, or assists in an action brought against the employer." Furthermore, the MFLA "applies to any leave taken after the effective date of the bill, regardless of when the leave was accrued."

A. The "Original" MFLA from the 2008 Legislative Session

The MFLA, in its initial form, took effect on October 1, 2008. As it still does, the Act applied to employers with fifteen or more employees, and required businesses that provide employees with any form of paid leave to permit employees to use such leave for the illness of an immediate family member. But there were nearly as many questions raised as answers provided by the Act, particularly in the business community.

Lawmakers may not have foreseen the controversy that was about to unfold. While members of the business community viewed the Act as a gateway to increased litigation, supporters of the legislation considered these concerns unfounded. Senator Robert J. Gargiola (D. Montgomery County), who sponsored the bill, stated that opponents misunderstood the
intent of the MFLA, and that "[y]ou’re not going to see any greater litigation than you see today . . . [t]here’s really no reason to think that there should be any problem with this at all." 26

There was a lack of specificity in the law, which fell into several areas. “Family member” was not clearly defined. The 2008 legislation stated that “immediate family” would include a “child, spouse, and parent.” 27 The definition of “child,” however, was not limited to persons under the age of eighteen. 28 It was also not clear whether the definition of “immediate family” was limited to these persons, so it was possible that it could extend to grandparents, domestic partners, and perhaps even aunts and uncles. 29 The lack of a definition of “illness” was even more troubling. There was no indication that the definition would follow the definition of “serious health condition” under the FMLA, 30 and there was no indication in the legislation as to what conditions were intended to be covered. Therefore, it was possible that any illness, no matter how minor, could arguably be covered.

In addition to these definitional issues, employers were also concerned that the MFLA might interfere with their no-fault attendance policies. A no-fault attendance policy is one that requires employees to manage their absences. 31 Under a no-fault policy, employers typically do not require reasons for an absence in any form (unless otherwise required by policy, for example, for FMLA certification), and based on either a total number of days absent or a related point system, employers can terminate employees for work absence. 32 Under the original MFLA, could an employee accumulate points for a MFLA-related absence, or would such conduct be discrimination on the part of the employer? What about the fact that the law protects an employee when using accrued, paid time off for an employee’s immediate family members’ illnesses, but not for the employee’s own illness?

26 Andy Rosen, Flexible Leave Act in Md. to be Signed, DAILY REC. (Balt., Md.), May 22, 2008.
30 Under the FMLA, “serious health condition” entitling an employee to leave means “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider . . . .” 29 C.F.R. § 825.113 (2009).
31 See THOMAS M. HANNA, THE EMPLOYER’S LEGAL ADVISOR 195 (Amacom 2007) (“[T]he term is meant to convey the idea that a prohibited number of absences and tardies will result in discipline even if the employee claims to be without fault for some or all of the occurrences.”).
32 See id. at 197-98.
Another question arose regarding whether all covered employers must operate in Maryland. Was a company headquartered in New Jersey, with fifteen or more employees working in Maryland, covered by the MFLA? Suppose a Maryland-based employer that had fifteen employees in Maryland also had workers in other states—were the workers in other states covered? Similarly, if a Maryland employer had ten employees in Maryland, and five employees based in the District of Columbia, was the employer covered because it had fifteen employees?

Employers were also uncertain about the scope of the term “leave with pay.” The MFLA defined “leave with pay” as “time away from work for which an employee receives compensation” and specifically included “sick leave, vacation time, and compensatory time.” What about short-term disability? Paid time off programs?

B. Revisions to the MFLA: The 2009 Corrective Legislation

After almost eight months of questions regarding the ambiguities in the MFLA, the General Assembly passed emergency legislation to revise and clarify key terms in the law. Revising the MFLA, Senate Bill 562 went into effect on May 19, 2009. The bill clarified that an employer’s existing leave policy prevails. The bill then explained that the purpose of the MFLA “is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee’s own illness.”

Furthermore, the revised bill clarified certain ambiguous terms. “Child” is now defined as a child (whether adopted, biological or foster), stepchild, or legal ward, who is either (1) under eighteen-years-old, or (2) an adult who is incapable of caring for him or herself due to a mental or physical disability. “Parent” now means “an adoptive, biological, or foster parent, a stepparent, a legal guardian, or a person standing in loco parentis.” Continuing to address the original MFLA’s ambiguities, the bill clarified what constitutes “leave with pay.” As now defined by statute, “leave with pay” means paid time away from work that is earned and available to an employee . . . based on hours worked . . . or as an annual grant of a fixed number of hours or days of leave for performance or service. Expressly excluded from “leave with pay,” however, are benefits provided under an employee welfare benefits plan subject to

36 Id. at § 3-802(c).
37 Id. at § 3-802(a)(2).
38 Id. at § 3-802(a)(6).
39 Id. at § 3-802(a)(5)(i).
ERISA; insurance benefits, including benefits from an employer’s self-insured plan; workers’ compensation; unemployment compensation; disability benefits; and other similar benefits. 40

The bill also addressed which employers and employees are covered under the statute. To be covered by the MFLA, an employee must be “primarily employed in the State.” 41 Employers are covered if they employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. 42 The law does not answer, however, whether a covered employer must have fifteen employees overall, or fifteen employees within the State. Presumably, the law would cover a Maryland employer who employs workers in New Jersey, if it had fifteen or more employees working in Maryland; however, the New Jersey employees are not primarily employed in Maryland and would not be covered by the MFLA. Reading these two provisions together, it appears that the Legislature’s intent is to cover only Maryland-based employers with employees “primarily” working in Maryland. The term “primarily,” however, is not defined. Perhaps “primarily” should be interpreted to mean at least fifty-one percent of the employee’s work time is carried out in Maryland.

Finally, the bill clarified that the MFLA does not extend, nor does it limit, any leave entitlement an employee may have under the FMLA. 43 If an employer mandates that an employee substitute accrued, paid time off for the unpaid portion of the FMLA leave, the MFLA may apply. For example, if an employee is granted FMLA leave for his or her spouse’s serious health condition, and the employer’s policy requires the employee to exhaust vacation first, and sick leave next, that policy might violate the MFLA because the employee has the right to designate which leave he or she wants applied to his or her absence for a family member’s illness. The Legislature, however, left the term “illness” undefined. The absence of a formal definition suggests that the MFLA is intended to go beyond the FMLA’s limited “serious health condition” definition. 44

II. HOW THE MFLA MODIFIES MARYLAND’S AT-WILL EMPLOYMENT RELATIONSHIP

A Maryland employee not working under a contract that limits the duration of employment or reason for the termination of that employment

40 Id. at § 3-802(a)(5)(iii).
42 Id. at § 3-802(b)(2).
43 Id. at § 3-802(g).
44 See supra note 30.
is considered employed “at-will.” This common law doctrine, recognized in every state, permits an employer or employee to terminate the employment relationship at any time, for any reason, so long as the reason is not unlawful. One offshoot of the “at-will” doctrine is the generally accepted principle that private employers have discretion to establish the benefits provided for their employees; there is no entitlement to leave or any other non-statutory employer provided benefits.

The United States Congress, the Maryland General Assembly, and the Maryland judiciary have made limited modifications to the at-will doctrine. Judicially recognized exceptions to this doctrine are based in tort, contract, and statutory law. They include the tort of wrongful discharge in violation of a public policy, and federal or state anti-discrimination statutes.

A. The Tort of Wrongful Discharge

Maryland’s wrongful discharge theory provides that, where a specific federal or state statutory provision and remedy cover unlawful employer conduct, a common law remedy is not available to an employee. Thus, for example, an employee who believes she was fired for a discriminatory reason cannot bring a wrongful discharge claim against her employer if the employer is subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), Maryland’s state anti-discrimination provisions under Title 20 of the State Government Article of the Maryland Code, or local ordinances that provide a judicial remedy for violation of their respective code.

If that same employee works for an employer not subject to one of these statutes (typically because the employer does not employ a sufficient number of employees), the employee can bring a claim under a

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45 See Adler v. Am. Standard Corp., 291 Md. 31, 35, 432 A.2d 464, 467 (1981), aff’d, 830 F.2d 1303, 1305-06 (4th Cir. 1987) (seminal case in which the Court of Appeals of Maryland adopted the tort of wrongful discharge, creating an exception to the employment “at-will” doctrine).

46 See id. at 38, 432 A.2d at 468.


49 See, e.g., Suburban Hosp., Inc. v. Dwiggins, 324 Md. 294, 309, 596 A.2d 1069, 1077 (1991) (stating that limitations or conditions in "at-will" contracts should be enforced but not expanded by the courts).


wrongful discharge theory. But Maryland courts have viewed wrongful discharge as a narrow exception to the employment at-will doctrine, limited to clear violations of public policy. In Maryland, courts have applied the tort of wrongful discharge primarily to an employee’s refusal to commit a wrongful act, to an employee’s performance of an important public function, or for refusing to violate a professional code of ethics; and to an employee’s exercise of statutory rights or privileges.

The MFLA establishes that it is the public policy of the state of Maryland to require that covered employers provide leave in a certain way. Until passage of the MFLA, an employee had no reasonable statutory basis for suing an employer where, for example, the employer’s policy limited use of sick leave to the employee’s own illness. The MFLA makes possible a wrongful discharge suit against an employer in such a case. Consider, for example, the circumstance where an employee takes leave for a purpose designated as permitted under the MFLA, but is fired. Although the MFLA provides no remedy, the wrongful discharge theory could be applied.

B. Contract Exceptions to “At-Will” Employment

An enforceable contract between an employer and employee may modify the “at-will” relationship. The most common sort is the individual employment contract—typically a written agreement for a high level executive. A contract between a labor union and an employer,

53 See, e.g., Porterfield v. Mascari II, Inc., 374 Md. 402, 410, 414, 823 A.2d 590, 594, 609 (2003) (court held that wrongful discharge exception did not apply because “no sufficiently clear mandate of public policy” was violated, as employee was fired after stating intention to consult with legal counsel before formally responding to an unfavorable work evaluation).
54 See, e.g., Insignia Residential Corp. v. Ashton, 359 Md. 560, 755 A.2d 1080 (2000) (employee terminated for refusing to provide sexual favors in return for her job was tantamount to prostitution and a violation of public policy); Magee v. DanSources Tech. Servs., Inc., 137 Md. App. 527, 769 A.2d 231 (2001) (human resources director terminated for refusal to submit a false health claim was a violation of the public policy health care provisions of sections 24 and 1347 of Title 18 of the United States Code, which make it a crime to knowingly defraud a health benefit program).
55 See Wholey, 370 Md. at 43, 803 A.2d at 484 (“[A] clear public policy mandate exists in the State of Maryland which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities.”).
known as a collective bargaining agreement, likewise modifies the at-will relationship.\textsuperscript{59} A contract typically limits the relationship temporally, and contains a termination only for “cause” provision.\textsuperscript{60} Unlike at-will employment relationships, employment contracts in Maryland are subject to the covenant of good faith and fair dealing.\textsuperscript{61}

Contract-based theories have also led courts to modify the “at-will” doctrine by holding that, in appropriate circumstances, an employer’s handbook, policies, or statements may constitute contractual obligations.\textsuperscript{62} The Court of Appeals of Maryland first recognized this possibility in Dahl v. Brunswick.\textsuperscript{63} As a result, employers learned that they were able to eliminate this unintended consequence by setting forth their policies with a well-drafted and well-placed disclaimer in a handbook.\textsuperscript{64} Maryland courts have also rejected employees’ attempts to insert an implied covenant of good faith and fair dealing when the employment relationship is “at-will.”\textsuperscript{65}

Thus, when deciding what benefits to provide employees, employers in Maryland have had the discretion to establish policies, including leave provisions, without creating a contractual obligation, or being directed to provide benefits in a particular way or in a particular amount from the Legislature or the courts. The MFLA, while not creating a contractual obligation, statutorily modifies an employer’s ability to decide the manner in which leave-taking will be authorized.

C. The Reluctance of the General Assembly to Statutorily Restrict Employer Discretion in Administering Leave

Passage of the MFLA was a departure from the General Assembly’s record of permitting businesses the discretion to determine how their leave policies were administered. Recent judicial results that run counter to this practice have not withstood legislative resolve. For example, in an

\textsuperscript{60} See Johns Hopkins Univ. v. Ritter, 114 Md. App. 77, 81, 689 A.2d 91, 93 (1996).
\textsuperscript{61} See Dwigginns, 324 Md. at 309-10, 596 A.2d at 1076-77.
\textsuperscript{62} See Staggs v. Blue Cross of Md., Inc., 61 Md. App. 381, 486 A.2d 798 (1985) (order of summary judgment in favor of employer was vacated as a substantial dispute of fact existed regarding whether provisions pertaining to termination in an employer’s policy memorandum constituted a contractual obligation).
\textsuperscript{63} 277 Md. 471, 356 A.2d 221 (1976) (an employer’s policy directives can become contractual obligations where employees have knowledge of those directives and consider them to be terms of employment, and employees accepted employment or continued working for the employer in reliance on the unwritten policy or practice).
\textsuperscript{64} See Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 341, 517 A.2d 786, 793-94 (1986) (justifiable reliance on an employer’s handbook or policy is precluded where contractual intent is expressly disclaimed).
\textsuperscript{65} See generally Dwigginns, 324 Md. 294, 596 A.2d 1069.
unreported 2007 opinion, Catapult Technology, Ltd. v. Wolfe, the Court of Special Appeals of Maryland held that accrued, unused, paid time off constituted "wages" under the Maryland Wage Payment and Collection Law ("MWPCL") and must be paid to employees upon termination. The court's ruling in Catapult conflicted with common practice, and the DLLR's position, that an employer could deny payment for accrued leave upon termination if the policy had been communicated to employees. After Catapult, however, the DLLR changed its position and conferred upon employees a "right" to payment for accrued, unused leave upon termination, regardless of the employer's policy or handbook language. These changes were nevertheless short-lived, as the General Assembly did not agree with either the court's opinion or the DLLR's revised interpretation of the MWPCL.

In 2008, the General Assembly rejected the holding of Catapult by passing legislation that returned Maryland law to the pre-Catapult position. Amending the MWPCL, the law, in addition to allowing employers to adopt policies regarding employee leave, restricts the employer's obligation to pay that leave when employees terminate employment. The restriction is qualified by the need for an employer to disclose the written policy to employees at the beginning of employment. Most employers may satisfy this "safe harbor" notice requirement via their employee handbook or through other written communication provided to employees upon employment.

III. EXPANSION OF EMPLOYEE LEAVE RIGHTS AT THE FEDERAL AND STATE LEVEL

There is no doubt that advocates of the MFLA drew inspiration from the FMLA. The MFLA specifically provides that it does not "(1) extend

67 Id. at *15, *21.
68 See DIVISION OF LABOR AND INDUSTRY, MARYLAND GUIDE TO WAGE PAYMENT AND EMPLOYMENT STANDARDS 11 (Sept. 30, 2008), http://www.dllr.state.md.us/labor/wagepay/mdguidewagepay.doc (providing that whether unused accrued time is payable upon termination "depends on the employer's written policy, and whether the policy was communicated to the employee at the time of hiring").
69 After Catapult, the Maryland Guide stated, "[w]hen an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the handbook." See Richard G. Vernon, A Change in the Game Plan: New Rules for Paying for Accrued Vacation in Maryland, http://lerchearly.com/articles/employ/RGV_vacation_article.doc (last visited Nov. 24, 2009) (emphasis added).
71 MD. CODE ANN., LAB. & EMPL. § 3-505(b) (2008).
72 Id. at §§ 3-504(a)(1), 3-505(b).
the maximum period of leave an employee has under the federal Family and Medical Leave Act of 1993; or (2) limit the period of leave to which an employee is entitled under the federal Family and Medical Leave Act of 1993. This section briefly reviews the general requirements of the FMLA, examines some of the proposed federal legislation that would impact the way in which employers provide leave, and, finally, analyzes what other states have done to limit the discretion employers have in deciding how to provide leave.

A. The Family and Medical Leave Act

The FMLA was President Clinton’s first major legislative effort. Virtually identical bills were passed by the 101st and 102nd Congresses, but vetoed by President George H. W. Bush. This was the first piece of federal legislation to mandate a leave entitlement for certain employers and employees.

With the FMLA, Congress implemented “a minimum labor standard for leave,” based upon the same principles as “child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.” In essence, Congress created a baseline for unpaid leave entitlement that a covered employer must provide to eligible employees. The FMLA was intended to encourage employers to provide more generous leave than the federal minimum. Congress made it clear, however, that states may enact (and many have already enacted) leave laws that are more beneficial than leave available under the FMLA.

The FMLA seeks to balance the demands of family and work. Like most employment laws, the FMLA provides employee rights to which an employer must adhere. The Act protects employees from retaliation by an employer for exercising those rights. Provided the jurisdictional requirements are met, employees who believe that their rights have been violated under the FMLA are entitled to file a civil lawsuit or file a

73 Id. at § 3-802(g) (Supp. 2009).
74 Robert B. Moberly, Labor-Management Relations During the Clinton Administration, 24 HOFSTRA LAB. & EMP. L.J. 31, 32 (2006) (citing BILL CLINTON, MY LIFE 490 (2004)).
78 See, e.g., 29 C.F.R. § 825.701(a) (2009) (“Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA.”).
80 Id. at § 2615(a)(2), (b).
81 Id. at § 2617(a)(2). The Act provides jurisdictional requirements that determine the eligibility of both employees and employers. Id.
complaint with the Secretary of Labor. Employees who prevail in their claims are entitled to back pay, out-of-pocket expenses, attorneys' fees, and other equitable relief. It is important to note that such claims must be filed within two years, or three years in the case of an alleged willful violation of the Act.

As passed in 1993, an employee who is eligible for FMLA leave may take unpaid leave for a total of twelve workweeks of leave during any twelve-month period. Leave may be taken for one or more of the following reasons: the birth of a daughter or son and to care for this daughter or son; the placement of a daughter or son with the employee for adoption or foster care; to care for the spouse, daughter, son, or parent of the employee, if this spouse, daughter, son, or parent has a serious health condition; for a serious health condition that makes the employee unable to perform the functions of his or her position; or for any other qualifying exigency due to a spouse, daughter, son or parent of the employee on an active duty contingency operation (or notified of an impending one) in the Armed Forces. Leave taken for the birth or placement of a daughter or son expires at the end of the twelve month period, beginning on the date of the birth or placement. In almost every circumstance, an employee who returns from FMLA leave within or at the end of the twelve-week period is entitled to be restored to the position held when leave began, or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."

The FMLA has subsequently been amended by the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), extending FMLA protection to employees who are needed to care for family members in the military with a serious injury or illness incurred in the line of active duty ("Military Caregiver Leave"). Similarly, the NDAA amendment allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave in order to manage activities associated with their service, known as "qualifying exigencies" ("Qualified Exigency Leave"). Employees may take up to twenty-six weeks unpaid leave for Military Caregiver Leave in a calendar year; Qualifying Exigency Leave is limited to a period of twelve weeks during the

82 Id. at § 2617(a)(2), (b)(1).
83 Id. at § 2617(a)(1)-(3).
84 Id. at § 2617(c).
86 Id.
88 Id. at § 2614(a)(1).
employer's designated FMLA year. Under the amendments, an employee may not take more than twenty-six weeks of leave during a calendar year period regardless of the qualifying reason for the leave. The NDAA of 2010 expanded the military caregiver requirements of the FMLA, with regard to the time frame a service member may undergo medical treatment or be treated for pre-existing conditions. This version of the NDAA also extended a "qualifying exigency" to lower members of the regular Armed Forces deployed to foreign countries.

B. Other Recently Proposed Federal Legislation Expanding Employee Leave Rights

1. Proposed Amendments to the FMLA

Most of Congress' attempts to amend the FMLA in the past year related to expanding coverage to employees and certain family members. The Family and Medical Leave Enhancement Act of 2009 would increase the number of employees eligible for coverage by reducing the amount of employees required to be employed within a seventy-five-mile radius from fifty to twenty-five.

The Military Family Leave Act of 2009, would allow the spouse, child, or parent of a member of the uniformed services to take up to two weeks of leave each year if the service member is notified of an impending call or order to active duty in support of, or is deployed in connection with, a contingency operation for each military family member called to active duty. The employee could elect—but an employer could not require—the substitution of accrued paid time off for the leave provided for under this legislation.

The Balancing Act of 2009 would amend the FMLA to provide for paid time to care for a newborn child or sick family member, provide paid sick leave, provide leave related to domestic violence or sexual assault, and allow employees time away from work to attend their children's school-related activities, attend to needs of elderly family members, and obtain routine medical care. Likewise, the Domestic Violence Leave Act would amend the FMLA by extending its coverage to domestic partners, and allowing employee leave for domestic violence, sexual

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92 Id. at § 2612(a)(1), (a)(3).
93 Id. at § 2612(a)(4).
95 Id.
97 S. 1441, 111th Cong. §§ 1, 2(a) (2009); H.R. 3257, 111th Cong. §§ 1, 2(a) (2009).
98 S. 1441, § 2(a); H.R. 3257, § 2(a).
99 H.R. 3047, 111th Cong. §§ 1, 153(a), 162(a), 174(a)(1), 193(a) (2009).
100 H.R. 2515, 111th Cong. §§ 1, 2(a), 3(b), 3(d) (2009).
assault, and stalking. The Family and Medical Leave Inclusion Act\textsuperscript{101} attempts to expand the FMLA to permit eligible employees to take up to twelve weeks of unpaid leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition.

The Healthy Families Act,\textsuperscript{102} which would cover employers with fifteen or more employees, proposes to allow employees to earn one hour of paid sick time for every thirty hours worked up to a maximum of fifty-six hours annually. Employees would be able to use paid leave for their own or a family member’s illness, or use the paid time off for preventative care.\textsuperscript{103} The bill extends these paid leave provisions for employees who are the victims of domestic violence, stalking, or sexual assault.\textsuperscript{104}

Finally, there has been an effort to overturn the FMLA regulations issued by the DOL in November 2008, which became effective January 16, 2009.\textsuperscript{105} The Family and Medical Leave Restoration Act\textsuperscript{106} would essentially void the 2009 regulations, reinstate the old ones, and require the DOL to promulgate additional regulations.

2. Other Proposed Federal Leave Laws

Reaching far beyond the possibility of paid FMLA leave, or paid sick leave, the Paid Vacation Act of 2009\textsuperscript{107} would initially require employers with 100 or more employees to provide one week of paid vacation to employees with one or more years of service. After three years, employers with fifty or more employees would also have to provide one week of paid vacation, and those employers with one hundred or more employees would have to provide two weeks of paid vacation.\textsuperscript{108}

C. State Leave Laws

Maryland’s first attempt to direct employers how to structure their leave policies via the MFLA is, by comparison to other states’ provisions, a relatively modest step into the world of regulated employee leave. Maryland followed several states in enacting its own version of the FMLA, including California, Connecticut, Hawaii, Maine, Minnesota,

\textsuperscript{101} H.R. 2132, 111th Cong. §§ 1, 2(a)-(b) (2009).
\textsuperscript{102} S. 1152, 111th Cong. §§ 1, 4, 5(a)(1) (2009); H.R. 2460, 111th Cong. §§ 1, 4, 5(a)(1) (2009).
\textsuperscript{103} S. 1152, § 5(b)(1)-(3); H.R. 2460, § 5(b)(1)-(3).
\textsuperscript{104} S. 1152, § 5(b)(4); H.R. 2460, § 5(b)(4).
\textsuperscript{106} H.R. 2161, 111th Cong. (2009).
\textsuperscript{107} H.R. 2564, 111th Cong. § 3 (2009).
\textsuperscript{108} Id.
New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia.\textsuperscript{109}

State counterparts of the FMLA typically expand coverage and inflate the allotted time and protected reasons for leave.\textsuperscript{110} For example, the District of Columbia Family and Medical Leave Act ("D.C. FMLA") applies to all employers and provides coverage for employees after working 1,000 hours of service during the twelve month period before the leave.\textsuperscript{111} The D.C. FMLA allows for sixteen weeks of family leave plus sixteen weeks of medical leave for an employee's own serious health condition during a two year period, and allows for twenty-four hours leave per year to participate in children's educational activities.\textsuperscript{112}

The New Jersey Family Leave Act ("NJ FLA") requires covered employers, those with fifty or more employees, to grant eligible employees time off from work in connection with the birth or adoption of a child or the serious illness of a parent, child, or spouse.\textsuperscript{113} The NJ FLA's definition of "parent" includes a parent-in-law or a step-parent.\textsuperscript{114} The NJ FLA provides for up to twelve weeks of leave in a twenty-four month period, counted from the first day of the employee's leave.\textsuperscript{115} New Jersey also provides family leave insurance, which provides for six weeks of pay or one-third of an employee's total yearly wages (whichever is the lesser) for employee absences related to birth or adoption, or to care for a seriously ill child, spouse, parent, or domestic partner.\textsuperscript{116}

As a final example of a state FMLA law, the California Family and Medical Leave Act ("CA FMLA") covers employers with fifty or more employees, and provides for twelve weeks of family leave plus four months of maternity disability, which may be combined for a total of twenty-eight weeks per year.\textsuperscript{117} The CA FMLA also allows for up to forty hours per year to participate in children's educational activities,\textsuperscript{118} and provides for paid leave of fifty-five percent of an employee's wages up to a maximum of $959 (for 2009) for up to six weeks of leave to bond


\textsuperscript{110} The Federal FMLA does not preempt state laws providing rights greater than or equal to those granted under federal law. 29 U.S.C. § 2651(b) (2006); DOL Family and Medical Leave Act of 1993, 29 C.F.R. § 825.701(a) (2009).

\textsuperscript{111} D.C. CODE § 32-501(1)-(2) (2001).

\textsuperscript{112} Id. at §§ 32-502(a) to -503(a).

\textsuperscript{113} N.J. STAT. ANN. §§ 34:11B-2 to -3 (2000).

\textsuperscript{114} Id. at § 34:11B-4.


\textsuperscript{117} CAL. LAB. CODE §§ 230.8 (Supp. 2009).
with a newborn, adopted, or foster child (both parents), or to care for a seriously ill parent, child, spouse, or registered domestic partner.\footnote{119}{CAL. UNEMP. INS. CODE § 3301(a), (c) (Supp. 2009).}

In developing the MFLA’s provisions, the Maryland General Assembly considered legislative leave initiatives in other states.\footnote{120}{See MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).} In its Fiscal and Policy Note regarding Senate Bill 344 (cross-filed with H. 40), the Legislature noted that “[s]everal other states require employers to provide paid family medical leave.”\footnote{121}{MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).} The Legislature considered California’s law, which requires an employer who provides sick leave for employees to allow employees to use that sick leave for a child’s, parent’s, spouse’s, or domestic partner’s illness.\footnote{122}{MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).}

Additionally, the legislature measured laws in Maine, Minnesota, and Washington.\footnote{123}{See MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).} Maine’s law requires employers with more than twenty-five employees that provide paid leave to allow the employee to use the leave to care for a child, spouse, or parent who is ill.\footnote{124}{ME. REV. STAT. ANN. tit. 26 § 636 (2007).} Minnesota’s statute requires employers to allow employees to use sick leave benefits for a child’s illness, and in Washington, employers must allow employees to use accrued sick leave to care for a child with a health condition that requires treatment or supervision, and to care for an employee’s spouse, parent, parent-in-law, or grandparent who has a serious health condition.\footnote{125}{MINN. STAT. ANN. § 181.9413 (2006); WASH. REV. CODE. ANN. § 49.12.270 (2008).}

Maryland legislators likely did not consider the D.C. Accrued Sick and Safe Leave Act (“ASSLA”), as it was under construction around the same time as the MFLA.\footnote{126}{D.C. CODE §§ 32-131.01 to .17 (Supp. 2009).} ASSLA requires employers to provide employees with paid sick leave, with the amount of leave dependent on employer size.\footnote{127}{id. at § 32-131.02.} Employers with one hundred or more employees must provide one hour of paid leave for every thirty-seven hours worked up to seven days per calendar year; employers with between twenty-five and ninety-nine employees must provide one hour of paid leave for every forty-three hours worked, not to exceed five days per year; and employers...
with fewer than twenty-five employees must provide one hour of paid leave for every eighty-seven hours worked, up to three days per year.  

Leave under ASSLA may be used for an employee’s own illness, a family member’s illness, or for absences from work related to an employee or family member who is the victim of stalking, domestic violence, or sexual abuse.

Considering other states’ leave laws, the MFLA is a relatively moderate approach to expanding employee leave rights. The concern for those who have to look to it, whether employee or employer, is that the General Assembly did not provide sufficient clarity to resolve some of the issues that will no doubt come up with application of the law.

IV. INTERPRETATION OF THE MFLA

The MFLA should not be a difficult law for employers to comply with following passage of the corrective legislation in 2009. As the statute puts it: “The purpose of this section is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee’s own illness.”

Many employers already permit leave in this manner. But is it really that simple? This section addresses some of the areas that might spur litigation and require court interpretation under the MFLA.

A. The MFLA Does Not Authorize the DLLR to Issue Regulations

The DLLR’s position has been that it will not promulgate regulations interpreting the MFLA because the statute does not provide the agency with the authority to do so. As such, it appears that any interpretive analysis will be done through litigation. Since Maryland district and circuit court opinions are not reported, it may be years before judicial decisions on the MFLA are available as guidance to employers and employees.

B. The MFLA and Employer Coverage

The statute provides that an employer is a person “engaged in a business . . . in the State,” and “includes a person who acts directly or indirectly in the interest of another employer with an employee.”

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128 Id. at § 32-131.02(a)(1)-(3).
129 Id. at § 32-131.02(b)(1)-(4).
130 MD. CODE ANN., LAB. & EML. § 3-802(c) (Supp. 2009).
131 The Fiscal and Policy Note states that the law does not “provide administrative authority or enforcement responsibility to the Division of Labor and Industry.” MD. GEN. ASSEM. DEP’T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 426-562, at 1 (2009).
Revised Fiscal and Policy Note provides that the Act “does not apply to State agencies,” and, therefore, the State of Maryland may claim exemption from the requirements of the law.\footnote{MD. GEN. ASSEM. DEP’T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 426-562, at I (2009).} It is less clear whether counties and municipalities are exempt, although the 2008 Revised Fiscal and Policy Note provides that the law was intended to apply only to private sector employers.\footnote{MD. GEN. ASSEM. DEP’T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 425-40, at I (2008).} To whom does the latter phrase refer? Does this suggest that the statute provides for individual supervisor liability? Does the phrase refer to professional employer organizations that handle human resources functions for small employers, or employment agencies that provide employees to an employer?

The statute only applies to employers that employ “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”\footnote{MD. CODE ANN., LAB. & EMPL. § 3-802(b)(2)(ii) (Supp. 2009).} Does this employee complement refer to all employees the employer has nationwide, or just to the number of employees that are working in Maryland? For example, is an employer who has 200 employees nationwide, but only seven employees working in Maryland required to comply with the Act? Although the law seems to make no distinction, there are many practical reasons why an employer with fewer employees than fifteen in Maryland (even though it has more employees elsewhere) would be significantly and adversely impacted by having to comply with the law.

\section*{C. The MFLA and “Primary Employment” in Maryland}

The Act provides that it applies to “an employee who is primarily employed in the State.”\footnote{\textit{Id.} at § 3-802(b)(1).} It is not clear what this means. Is an employee required to have his or her workstation in the state? What about an employee who works in an office in Pennsylvania, but who travels to Maryland regularly to conduct business? What will constitute “primary” employment? Should over fifty percent of the employee’s work be conducted in Maryland? What about the employee who does not actually work in Maryland, but whose primary responsibility is to interact with Maryland residents by telephone or computer?

\section*{D. The MFLA and Immediate Family Members}

While the definition of immediate family member seems simple enough (“child, spouse, or parent”), and the definition of child is limited
in the same manner as it is under the FMLA, does the employee need to be the primary care-giver for the immediate family member? Does the child need to live at home?

E. The MFLA and the Potential for Employee Abuse

As with every entitlement statute, the problem does not stem from those employees (and employers) who try to ensure that they follow both the mandate and intent of the law, but those who seek ways to "job" the system. For example, if an employer has a policy that provides an employee may take sick leave for personal illness, and need not provide any doctor's note unless the employee is absent for three days, then the Act requires that the same rule be applied when the employee claims that he or she needs to be absent due to a sick spouse. How can an employer minimize the potential for abuse here, when the real reason the employee took the leave was not because his or her spouse was sick, but rather he or she wanted a long weekend away? Or, what about the employee who is repeatedly absent on Monday or Friday, not for her own illness, but for an unidentified illness of her parent?

F. The MFLA and Employer Over-Reaction

As employers contemplate the hypothetical "parade of horribles" that might arise with employee abuse of the Act, there comes the potential for employer over-reaction. It appears that nothing in the law prohibits an employer from revising its leave policies to make them more restrictive for employees and, by extension, for employees using leave for purposes contemplated under the Act.

G. The MFLA and No-Fault Attendance Policies

Will employers with no-fault attendance policies violate the MFLA if even one of the points accumulated under such a policy is for an MFLA qualifying leave? The Act provides that "[t]he purpose of this section is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee’s own illness." At the same time, "[a]n employer may not discharge, demote, suspend, discipline, or otherwise discriminate against an employee" for exercising specific rights under the Act. If the points accumulated under a no-fault policy lead to discipline due to an

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137 See id. at § 3-802(a)(2) (providing that "[c]hild" means an adopted, biological, or foster child, a stepchild, or a legal ward who is: (i) under the age of 18 years; or (ii) at least 18 years old and incapable of self-care due to a mental or physical disability").

138 Id. at § 3-802(c).

139 Id. at § 3-802(f).
employee’s MFLA leave, will it be sufficient for the employer to demonstrate that it is treating the employee in the same manner as if the employee had been absent for her own illness?

H. The MFLA and Collective Bargaining Agreements

The Act also provides that “an employee of an employer who uses leave under [the MFLA] shall comply with the terms of a collective bargaining agreement or employment policy.”\textsuperscript{140} Additionally, “[i]f the terms of a collective bargaining agreement with an employer or an employment policy of an employer provide a leave with pay benefit that is equal to or greater than the benefit provided under this section, the collective bargaining agreement or employment policy prevails.”\textsuperscript{141} The law, therefore, requires that employers and unions may no longer rely upon negotiated language in a collective bargaining agreement regarding leave if the provisions of the agreement do not comply with the Act.

I. The MFLA and the FMLA

The Act provides that “[t]his section does not: (1) extend the maximum period of leave an employee has under the federal Family and Medical Leave Act of 1993; or (2) limit the period of leave to which an employee is entitled under the federal Family and Medical Leave Act of 1993.”\textsuperscript{142} The MFLA, of course, could not limit the period of FMLA leave available: a state law cannot restrict application of Federal law.\textsuperscript{143}

J. The MFLA and Wrongful Discharge

Since the MFLA does not provide for a private cause of action, it appears that a claim of wrongful discharge, based upon the public policy articulated in the statute, provides the remedy for a violation of the Act. Therefore, Maryland’s three-year general statute of limitations would apply to such a claim.\textsuperscript{144}

V. Conclusion

As illustrated above, the MFLA will present numerous interpretive difficulties for employers and employees alike. Rather than wait for the judiciary to answer these questions, some of these difficulties could be resolved if the DLLR issued interpretive regulations. As there are no plans for such action, and the DLLR has taken the position that it is without authority to promulgate interpretive guidance, employers will

\textsuperscript{140} ld. at § 3-802(e)(2).
\textsuperscript{141} Md. Code Ann., Lab & Empl. § 3-802(e)(3) (Supp. 2009).
\textsuperscript{142} ld. at § 3-802(g).
\textsuperscript{143} U.S. Const. art. VI, cl. 2.
have to use their best judgment in addressing the Act’s gray areas. Whether an employer’s best judgment will coincide with that of a court is anyone’s guess.