February 8, 2022

Chairman and Senator Delores G. Kelley
Senate Finance Committee
3 East, Miller Senate Office Building
Annapolis, Maryland 21401

RE: SB 275 – Family and Medical Leave Insurance Program – Establishment (Time to Care Act of 2022)

Honorable Chair Kelley, Vice Chair Feldman, and Committee Members,

My name is Christine V. Walters, J.D., MAS, SHRM-SCP, SPHR. I am a human resources and employment law consultant with more than 300 clients in and around Maryland. I worked as an in-house HR practitioner for nearly ten years in the health care industry, as an employment law attorney in a law firm for two years, and since 2002 have worked as an independent consultant and sole proprietor, doing business as FiveL Company, "*Helping Leaders Limit their Liability by Learning the Law.*"℠

I am also a member of the Maryland Chamber of Commerce and serve on the Chamber's Labor and Employment Committee. I share many of the Chamber's concerns, which I understand have been provided in writing to you. I am writing to echo some of those concerns, including as shared with me by one or more of my clients, mostly small business employers, and to offer some recommendations. Many of these mirror concerns about which I wrote concerning last year's version of this bill (SB 211) but have not been addressed in SB 275.

As of this writing, at least twelve states and the District of Columbia have enacted a paid family and medical leave law ("PFMLL"). Two of the 12 apply only to the public sector. None of those 12 states border Maryland. In addition, Maryland employers are currently required to provide up to 13 different types of paid and unpaid leave (see page 5 for the full listing).

The Bipartisan Policy Center reports that as of January 13, 2022:

- one of the ten states' PFMLL is an opt-in or voluntary program;
- five of the ten are fully funded by an *employee* payroll tax; and
- the remaining four of the ten exempt small employers from having to pay the tax.

If SB 275 is passed and enacted, **that will make Maryland the only state to impose this type of mandatory payroll tax** on all Maryland employers *and their employees.*

For the following reasons that may not be all-inclusive, I and many of my clients, continue to have serious concerns with this legislation as drafted. I have tried to address our concerns in order as they appear in the bill.

1. **Prohibited From Offsetting the Cost Of This Tax – Section 8.3–202** of the bill reads, "THIS TITLE MAY NOT BE CONSTRUED TO DIMINISH AN EMPLOYER'S OBLIGATION TO COMPLY WITH A COLLECTIVE BARGAINING AGREEMENT OR AN EMPLOYER POLICY THAT ALLOWS AN EMPLOYEE TO TAKE LEAVE FOR A LONGER PERIOD OF TIME THAN THE EMPLOYEE WOULD BE ABLE TO RECEIVE BENEFITS UNDER THIS TITLE." That seems to create and impose a new obligation upon employers. It suggests an employer may not modify any existing leave benefit, paid or unpaid, for any reason, or any time in perpetuity, including to help offset the cost of this tax. I agree this provision might be applicable to the administration of leave as negotiated and as referenced under a collective bargaining agreement for the term of that CBA.

Recommendation. Delete "OR AN EMPLOYER POLICY" from that sentence.

2. **A New Leave Entitlement is Created. Section 8.3–302** requires employers to provide up to 24 weeks of leave in a 12 month period. This is in addition to all the other forms of leave to which an employee may already be entitled, except FMLA leave. It is also more than any of the other ten states' PFMLL provides, except Massachusetts. This Section reads, in part, "THE PURPOSE OF THE PROGRAM IS TO PROVIDE TEMPORARY BENEFITS TO A COVERED INDIVIDUAL WHO IS TAKING LEAVE FROM EMPLOYMENT." But leave is not defined. Absent a definition, this could refer to an existing or a new leave entitlement created by SB 275.

In addition, **Section 8.3 701(B)** reads, "A COVERED INDIVIDUAL MAY TAKE THE LEAVE FOR WHICH THE INDIVIDUAL IS ELIGIBLE FOR BENEFITS UNDER SUBSECTION (A) OF THIS SECTION ON AN INTERMITTENT LEAVE SCHEDULE." This seems to infer that this is a new bank of leave or time off from work, rather than a paid benefit to cover time off from work to which an employee is already entitled.

If the intent behind this bill is to create yet another bank of leave, I believe that is not necessary. As described above, Maryland employers are already required to provide up to 13 types of leave from work, paid and unpaid, depending upon their size and location within the state (see page 5 for the listing). A 14th type of leave is unlikely to remedy whatever problem the preceding 13 did not. If that is the intent behind this bill, I have no recommendation and oppose it wholeheartedly.

Recommendation. If this bill is *not* intended to add an additional bank of leave but to only provide payment for existing leave entitlements that are otherwise unpaid, I recommend leave be defined as only time off from work to which an employee is already entitled under federal, state, or local law, a collective bargaining agreement, or the employer's policy. That should clarify that this bill does *not* require employer to provide additional time off from work.

3. **Regulatory Guidance and Enforcement – Section 8.3-403** directs the Secretary to issue regulations. **Section 404** authorizes the Secretary to enforce the Act. **Section 405** authorizes civil actions against employers. The latter two, however, are not dependent or conditioned upon the preceding. As of this writing, we are just shy of four years since enactment of Maryland's

Healthy Working Families Act. Yet, we still do not have regulations published by the Secretary. SB 275 contains no provision delaying enforcement or imposition of the monetary penalties for non-compliance until such regulations are published

Recommendation. A clause or section should be added to make clear that enforcement and imposition of any penalties, monetary or other, would not take effect until at least 90 days after final, implementing regulations are published. I would also urge that Section 405 be abolished since remedies are provided through the administrative agency process.

4. **Advance Notice to Employers Is *Not* Required**. There is only one sentence that addresses this issue. **Section 8.3-701(B)(3)** applies only to intermittent leave and in that case requires the employee only to notify the employer of "the reason for which intermittent leave is necessary," not to give notice of the need for leave itself.

Recommendation. Consider Connecticut's program that requires the employee to provide written notice to the employer. "As part of the claims process, an employer will be provided an Employment Verification Form (EVF) *by the employee* to complete and verify the wage and schedule/hour information for the employee." (*emphasis added)* Insert this language into SB 275 to include the employer in the paid leave approval process.

5. **Use of Paid Leave (allowed versus required) – Section 8.3–703(A)** of the bill provides that an employer "may allow" an employee to use paid leave. It is a common practice for employers to require employees to exhaust all paid leave before being absent without pay. Without that ability, an individual could receive payment from the state, return to work, and still have a full bank of paid leave to use from the employer. This prevents an employer from being able to reduce its accounts payable liability while having to pay the increased cost of this new payroll tax.

Similarly, **Section 8.3-703(B)** provides that an employer may require a covered individual to use these paid leave benefits concurrently with "family or medical leave benefits provided under an employer policy." But this does not include "benefits" that are provided under any of the 12 other state or local laws in Maryland, like military leave or parental leave. Benefits are also undefined.

Recommendations. I recommend employers be permitted to require employees to exhaust the paid leave that the employer has provided before using paid leave from this state fund. To that end, Section 8.3–703(A) may be modified to read, "An employer *may require...*"

I also recommend Section 8.3-703(B) be modified to read, "An Employer…*may require*…to use those benefits concurrently with any other applicable leave under federal, state or local law, a collective bargaining agreement, or the employer's policy."

6. **No Input from Employers, Section 8.3-704(d).** The Department may grant benefits with no input from the employer. The only notice the Department is required to give an employer is

"within five business days after a covered individual files a claim for benefits." As a mandated and taxed contributor, the employer should at least be invited to provide information, such as if the employee is already receiving any form of paid leave. This is the same process applied when an employee applies for unemployment insurance benefits. This input might prevent misuse of or inadvertent overpayments from this fund, such as where an employee is already or will receive full or partial wage replacement from workers' compensation, a paid disability benefit, or the employer's paid leave program such as vacation, sick leave, PTO, etc.

Recommendation. A subsection should be added to address the Department's duty to invite the employer to provide information regarding the employee's requested leave, including if payment from the employer is available to the employee.

7. **Notice To Employees IS Required (Three Times) – Section 8.3–801** of the bill requires employers to give employees notice of their rights on three separate occasions: (1) at the time of hire; (2) within five days after the employee notifies the employer of the need for covered leave or the employer knows the employee needs leave; and (3) annually. No other leave law in Maryland, paid or unpaid, has a triple notice requirement. None has a double notice requirement, including the Healthy Working Families Act. Only the federal Family and Medical Leave Act requires a second notice. Requiring notice to every employee on at least two and potentially three separation occasions is onerous.

Recommendation. At a minimum, I would ask that Section 8.3-801(A) be modified as follows, "An employer shall provide written notice…at the time of hire ~~and annually thereafter~~."

I would also ask that the third notice requirement be removed by deleting Section 8.3-801(B)(1) and (2).

8. **Delay The Effective Date** - Section 4 accelerates the effective date of this bill to July 1, 2022. Maryland's SAVES Act did not take full effect for five years. One or more other states are facing fiscal and other challenges in funding and/or administering their PFMLL. This is a matter that should not be rushed.

Recommendation. At a minimum, defer the effective date to at least October 1, 2022, like most enacted legislation. Preferably, defer the effective date to at least January 1, 2023.

9. Fiscal Note - As of this writing, the fiscal note (FN) is not available. Last year's FN did not describe when, with what frequency or how the employer was to submit the employer's and employees' portion of the tax to the State. It only indicated that the Treasurer would administer the fund in accordance with regulations the Secretary publishes. As a result, the Fiscal Note did not fully account for all the time and costs imposed on employers. I hope this year's FN will do so.

Last year's FN referenced "Current Law." But it failed to include a number of Maryland leave laws, paid and unpaid, in effect at the time. **Maryland employers are currently covered under up to 13 different federal, state and local leave laws**. The first **11 of the 13 listed below provide leave for one or more of the very same reasons covered in SB 275**:

1. Birth/Adoption Leave under Maryland's Flexible Leave Act
2. Civil Air Patrol Service
3. Family and Medical Leave (federal law)
4. Military Deployment Leave
5. Organ or Bone Marrow Donation, which may *not* run concurrently with federal Family and Medical Leave
6. Parental Leave
7. Sick and Safe Leave, under Maryland's Healthy Working Families Act (HWFA)
8. Sick and Safe Leave, under Montgomery County's HWFA
9. Reasonable Accommodation for Pregnancy-Disability, which may include paid leave
10. Americans with Disabilities Act (ADA), including leave as a reasonable accommodation
11. Uniformed Services Employment and Reemployment Rights Act (USERRA)
12. Jury Duty
13. Voting Leave

I would urge Legislative Services to consider all of these in its analyses.

9. Legislative mandates flatten the market and reduce competition. Many employers provide robust paid leave programs. In fact, at least one employer in Maryland provides unlimited paid leave (aka Results Oriented Work Environment or ROWE). They are proactive and operate above the market. Those practices are great recruiting tools, helping them compete for talent. Those employers lose that competitive edge when laws impose mandates that require all the rest of the employers to do the same.

10. The bill reduces Maryland's competitive edge. None of our surrounding states have a paid family and medical leave mandate. Only the District of Columbia does. When prospective employers shop the economic markets, this bill would be one more reason why employers may decide to open new businesses and take new jobs elsewhere.

11. This bill adds to the patchwork of existing paid leave mandates that employers must navigate. The vast majority of clients I serve employ employees in multiple states. That requires them to comply with not only up to 13 types of leave as a Maryland employer, but the myriad requirements in each and every other state plus local jurisdiction.

12. Updated Study & Research Is Needed. In 2020, the Department of Legislative Services (DLS) issued a report on paid family and medical leave insurance. I recommend that report be updated and considered before we move to pass a legislative proposal that may not have been thoroughly researched.

13. The COVID-19 pandemic has adversely impacted employees and employers across the nation. Imposing a new payroll tax on both is a burden that many will be unable to bear.

14. **Alternatives**. I respectfully suggest the following alternatives to SB 275.

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A. Refer this to summer study.
B. Rather than drafting legislation that imposes mandates or penalties upon employers, we might consider offering employers some carrots, such as a tax incentive or safe harbor for employers that offer paid leave of at least 12 (not 24) work weeks in a 12 month period for the reasons covered in SB 275. This is not a precedential idea; it has been embodied in the 115th U.S. Congress through today in the "Strong Families Act" and in the "Workflex in the 21st Century Act."
C. Make it a 100% employee contribution, mirroring what 50% of the other states with a similar law have done.
D. Make it a voluntary, opt-in program, like Maryland's SAVES Act (See Section 12-402). And, if the fund is not fully funded, I suggest that would be called a clue to the fact that most people, employees and employers, do not want it.
E. Make SB 275 pre-empt all 9 of the 13 existing state and local leave laws that already provide paid leave for one or more of the same reasons as SB 275.

I respectfully request you give SB 275 an unfavorable report and suggest you refer this matter to summer study. This will enable us to better understand the implications, learn from other states' experiences, avoid unintended consequences and consider how to shape this important public policy in a way that balances employers' and employees' needs.

I thank you for your time and consideration. I invite you to contact me if I can provide any more information or answer any questions.

Respectfully submitted,

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