

DELEGATE DERECK DAVIS
25th Legislative District
Prince George's County

Chair
Economic Matters Committee



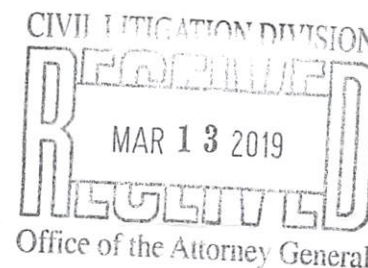
The Maryland House of Delegates
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The Maryland House of Delegates

ANNAPOLIS, MARYLAND 21401

March 11, 2019

The Honorable Brian Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202



Dear Attorney General Frosh:

I write to respectfully request a formal Opinion of the Attorney General on whether the Maryland Healthy Working Families Act, *See* Md. Code Ann. Labor & Empl. (“LE”) §§3-1301 to 3-1311 (“The Act”), authorizes an employer that has an existing paid leave program meeting certain criteria to apply an absence control policy in order to curtail abuse of “sick and safe” leave taken under The Act. An opinion is necessary in light of ambiguities in The Act, and in light of conflicting interpretations of The Act that became apparent during the hearing before the Maryland House of Delegates Economic Matters Committee on proposed House Bill 686, held on February 21, 2019.

On the one hand, The Act allows employers to adopt and enforce absence management policies to prevent abuse of “sick and safe” leave under The Act. It states, “[t]his subtitle may not be construed to . . . prohibit an employer from adopting and enforcing a policy that prohibits the improper use of earned sick and safe leave, including prohibiting a pattern of abuse of earned sick and safe leave.” *Id.* §3-1302(B)(5). The Act also allows employers, under certain circumstances, to ask for verification that sick and safe leave was used appropriately. *Id.* §3-1305(G)(1).

On the other hand, The Act states, “[a]n employer may not (1) take adverse action or discriminate against an employee because the employee exercises in good faith the rights protected under this subtitle; (2) interfere with, restrain, or deny the exercise by an employee of any right provided for under this subtitle; or (3) **apply an absence control policy that includes earned sick and safe leave absences as an absence that may lead to or result in an adverse action being taken against an employee.**” *Id.* §3-1309(C) (emphasis added). “Adverse Action” is defined as including discharge, demotion, threatening the employee with discharge or demotion, and “any other retaliatory action that results in a change to the terms or conditions of employment that would dissuade a reasonable employee from exercising a right under this subtitle.” *Id.* §3-1309(A).

Since The Act took effect on February 11, 2018, Maryland employers have reported a significant spike in unscheduled full and part day absences, particularly on Mondays, Fridays, and days on or flanking holidays. Employers have felt powerless to curb suspected abuse because of the non-retaliation language quoted above. This has caused a particular hardship to employers that depend upon predictability and continuity of care, such as hospitals, and to the individuals that depend on such care.

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At the urging of numerous Maryland employers, Delegate CT Wilson introduced House Bill 686. That bill, in its present form, states that The Act does not prohibit an employer from applying an absence control policy if:

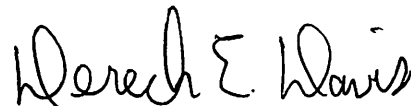
- (1) The employer provides at least 40 hours of paid leave in a year, excluding earned sick and safe leave; and
- (2) The absence control policy:
 - (I) Is uniformly applied to all types of leave offered by the employer;
 - (II) Is provided to an employee in writing;
 - (III) Has a progressive accountability structure; and
 - (IV) Provides a warning to an employee before any possible action against an employee.

On February 21, 2019, proponents of the bill, representing four Maryland hospitals and several other businesses and business organizations, provided testimony before the Economic Matters Committee about the dramatic spike in unscheduled absences that occurred after The Act took effect, and the hardship associated with such absences. A witness for one hospital noted that unscheduled absences increased from 1,016 hours in April of 2018 to 35,047 hours in December of 2018. Proponents explained that absence control policies, under which employees earn points for unscheduled absences on a no-fault basis, which can accumulate to trigger progressive discipline, act as a deterrent to employees who might otherwise abuse sick and safe leave

Some delegates questioned the necessity of House Bill 686 on grounds that §§ 3-1302(B)(5) and 3-1305(G)(1) already give employers tools to curtail abuse of sick and safe leave. They argued that employers are already allowed to adopt policies to prevent abuse and to request verification. Employers are at a loss as to how to curtail abuse of sick and safe leave given the non-retaliation provision in The Act. Employers see no relief in the verification provision, because (a) it only allows for verification if leave was used for more than two consecutive scheduled shifts, and in another narrow circumstance; and (b) the only recourse when an employee fails or refuses to provide verification is to “deny a subsequent request to take earned sick and safe leave for the same reason.” This recourse does not assist with attendance management, as employers are loath to ask employees about the specific reason for an absence, and employees inclined to abuse sick and safe leave are free to cite varying qualifying reasons for the leave. Employer anxiety is heightened by the enforcement provisions set forth in Md. Code Ann. L&E § 3-1308.

To clarify what employers are able to do regarding use of an absence control policy to curtail abuse of sick and safe leave going forward, I respectfully request a formal opinion on this issue.

Sincerely,



Dereck E. Davis

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