

## MARYLAND HEALTHY WORKING FAMILIES ACT

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### *Frequently Asked Questions (FAQs) - Updated March 9, 2018*

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These FAQs are preliminary responses to questions about the Maryland Healthy Working Families Act and may be subject to change. Please note that the department cannot provide legal advice regarding specific employer leave policies or employee exemptions under the law. These FAQs are for informational purposes and are intended to provide general guidance to employers and employees about the requirements of the law. If you have questions or comments about these FAQs please email [small.business@maryland.gov](mailto:small.business@maryland.gov).

### I. Applicability and Eligibility

#### 1. When does an employer have to start complying with the Maryland Healthy Working Families Act?

Employers must begin complying with the Maryland Healthy Working Families Act on February 11, 2018.

#### 2. Why does the law say that it became effective on January 1, 2018 but your guidance says that it became effective on February 11, 2018?

\*NEW\* House Bill 1, the Maryland Healthy Working Families Act, was introduced during the 2017 session of the Maryland General Assembly. As drafted, the bill provided that the law

became effective January 1, 2018. The General Assembly voted to pass the bill but the Governor vetoed it. When the General Assembly came back into session in January of 2018, it voted to override the Governor's veto. The law became effective 30 days after the General Assembly voted to override the veto.

### **3. Which employers are required to provide earned sick and safe leave?**

All employers with employees whose primary work location is in Maryland are required to provide earned sick and safe leave, regardless of where the employer is located. Employers who employ 15 or more employees are required to provide paid earned safe and sick leave. Employers with 14 or fewer employees are required to provide unpaid earned sick and safe leave.

### **4. Who is entitled to accrue earned sick and safe leave?**

All employees whose primary work location is in Maryland are entitled to accrue sick and safe leave unless they are exempt from coverage under the law.

### **5. How does leave accrue?**

Leave accrues at the rate of one hour for every thirty hours that an employee works. An employee is not entitled to accrue sick and safe leave during (1) a 2 week pay period in which the employee worked fewer than 24 total hours; (2) a 1 week pay period if the employee worked fewer than a combined total of 24 hours in the current and immediately preceding pay period; or (3) a pay period in which the employee is paid twice per month and worked fewer than 26 hours in the pay period. The leave hours provided for under the law are the minimum number of hours an employee is entitled to earn and accrue. An employer may provide more leave for its employees.

### **6. What is the maximum amount of leave that an employee can accrue and carry over?**

An employee is entitled to accrue 40 hours of sick and safe leave in a year regardless of the number of hours worked. An employee is entitled to carry over up to 40 hours of earned but unused sick and safe leave from one year to the next unless it would provide the employee with more than 64 hours of total accrued leave. Additionally, if the employer awards employees the full amount of sick and safe leave at the beginning of the year, the employer may elect to not allow the carryover of unused leave.

### **7. Are any employees exempt from accruing earned sick and safe leave?**

The following types of employees are exempt from the requirements of the law:

1. Employees who regularly work less than 12 hours a week;
2. Certain independent contractors;

3. Certain associate real estate brokers and real estate salespersons;
4. Individuals who are younger than 18 years of age before the beginning of the year;
5. Individuals employed in the agricultural sector in certain agricultural operations as defined in §5-403 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code.;
6. Certain construction workers covered by a collective bargaining agreement;
7. Certain employees working on an as-needed basis in a health or human service industry; and,
8. Certain employees of a temporary services agency.

**8. Does the Maryland Healthy Working Families Act preempt local county paid sick leave laws?**

The Act preempts local paid sick and safe leave laws enacted on or after January 1, 2017. Only Montgomery County enacted a sick and safe leave law prior to January 1, 2017.

**9. What is the construction exemption and who is covered by it?**

**\*REVISED\*** If an employee is employed in the construction industry and is covered by a bona fide collective bargaining agreement that was entered into on or after June 1, 2017, the employee is covered under the earned sick and safe leave law unless the collective bargaining agreement contains terms which clearly and expressly waive the requirements of the Maryland earned sick and safe leave law. The parties to the collective bargaining agreement will have to determine the appropriate process for including the required waiver language in the agreement. In terms of what “construction” means, the law does not define “construction” so the Department would consider the parties to the collective bargaining agreement as well as the everyday meaning of the term “construction.” The law does provide that the following types of employees would not be considered construction industry employees: (1) janitors; (2) building cleaners; (3) building security officers; (4) concierges; (5) building doorpersons; (6) handypersons; and (7) building superintendents.

**10. If a collective bargaining agreement was entered into before June 1, 2017, does the law apply to the employees covered by that agreement?**

**\*NEW\*** No. The law provides that the earned sick and safe leave law will not apply to any bona fide collective bargaining agreement that was entered into before June 1, 2017 for the duration of the contract term excluding any extensions, options to extend or renewals of the term of the original agreement.

## II. Calculation of the 15 Employee Threshold

### 1. Does an employer include full-time, part-time, temporary, and seasonal employees in calculating the 15 employee threshold?

Yes. An employer is required to include all employees in determining whether the employer has met the 15 employee threshold, including full-time, part-time, temporary and seasonal employees. All employees working in Maryland are included in the threshold determination regardless of whether they would be eligible for sick and safe leave benefits under the law.

### 2. If an employee is under the age of 18 and is not required by law to receive paid sick and safe leave, are they still counted toward the employee threshold?

Yes. Although an employer is not required to provide sick and safe leave for employees under the age of 18, the employer must include them in the threshold determination.

### 3. In calculating the 15 employee threshold, does an employer include employees that work in Maryland as well as employees that the employer employs in other states?

The Commissioner will consider only those employees employed in Maryland. All employees of the employer working in Maryland will be considered in determining the 15 employee threshold, including part time, seasonal and temporary employees.

### 4. Does this law apply to an employer who is based out of state and has employees who work in Maryland? What about a Maryland employer who has employees who live and work in another state?

The law applies to employers with employees whose primary work location is in Maryland even if the employer is located out of state. Employees whose primary work location is in Maryland are entitled to accrue leave under the Act. If a Maryland company has an employee who lives and works exclusively in another state, the employer could, but would not be required to provide sick and safe leave to that employee.

### 5. If an employer has multiple businesses in the State, is each company looked at separately in calculating the 15 employee threshold?

The Commissioner suggests that an employer consult with a financial or legal advisor with regard to whether each business entity would be considered a separate employer. If the Commissioner received a complaint that required consideration of this issue, the Commissioner would take into account whether each entity was considered a separate employer for other legal purposes including taxes, unemployment insurance and workers' compensation coverage as well as the relationship between the entities.

**6. How does an employer calculate the average number of employees?**

In determining whether the employer is required to provide paid or unpaid earned sick and safe leave, the employer must calculate the average monthly number of employees employed by the employer during the immediately preceding year. An employer would take the total number of employees working in each month of the preceding year, add the numbers together, and divide by 12.

**7. What if the number of employees an employer has fluctuates around 15? How does the employer make a determination? For example, what if the number of employees in the immediately preceding year is 13 but during the following year the number of employees increases to 16?**

The law provides that the number of employees is determined by “calculating the average monthly number of employees employed by the employer in the immediately preceding year.” Temporary, part-time and seasonal employees are also included in this calculation, even if they would not otherwise be entitled to benefits under the law. Once an employer establishes its immediately preceding year and calculates the average number of employees, if there are less than 15 employees in that year, the employees would accrue unpaid sick and safe leave for that year even if the number of employees subsequently goes over the 15 employee threshold in that year.

**8. Are the officers of a close corporation considered employees for purposes of determining the threshold number of employees?**

The Commissioner suggests that the employer consult with a financial or legal advisor with regard to this issue. Whether officers of a close corporation are considered employees will likely depend on whether they are treated as employees for other legal purposes. For example, if they are treated as employees for purposes of taxes, unemployment insurance and workers’ compensation coverage, then it is likely that they would be considered employees for purposes of this law.

**9. If an employer employs less than 15 employees, are they exempt from the requirements of this law?**

If the employer’s average monthly number of employees for the preceding year is less than 15, the employer may, but is not required to, provide paid sick and safe leave. However, the employer would be required to provide **unpaid** sick and safe leave and follow the same tracking and employee notification requirements that employers with 15 or more must follow.

### III. Sick Leave Accrual and Tracking Requirements

- 1. Can an employer front load earned sick and safe leave at the beginning of the year, and if so, what are the implications for leave carryover? What happens if an employer does not front load earned sick and safe leave?**

An employer may elect to award forty (40) hours of paid/unpaid earned sick and safe leave at the beginning of the year. The employer designates when the year starts and ends. If an employer front loads the leave, the employer may establish a policy whereby the employee is not permitted to carry over any unused leave at the end of the year. Alternatively, an employee can accrue earned sick and safe leave at the rate of at least one hour for every 30 hours the employee works. Under the latter approach, employees are permitted to carry over earned sick and safe leave up to a maximum of 40 hours and up to a maximum total accrual amount of 64 hours.

- 2. Can an employer provide for different methods of accrual for different types of employees?**

*\*REVISED\** Yes. An employer could front load leave to full time employees but provide that part-time employees earn leave on an accrual basis. The Department recommends that such a policy be in writing, clearly communicated to employees, and applied consistently with regard to each type of employee.

- 3. If an employer already has a paid leave policy for vacation time, for example, can that leave count toward earned sick and safe leave?**

If an employer has an existing leave policy that provides leave benefits that are equivalent to or greater than those provided under the earned sick and safe leave law, the employer does not need to provide additional leave. The Commissioner recommends consulting with a legal or financial advisor to ensure that an employer's policy provides benefits that are equal to or greater than those provided under the law. If an employer has an existing policy that provides for paid leave that is equal to or greater than that provided by the law, the Commissioner suggests that the employer refer to the leave as "Paid Time Off ("PTO") and have a written policy that clearly communicates to the employees that they are permitted to use PTO for any of the reasons and under the same conditions that are set forth in the earned sick and safe leave law. It is also suggested that the employer advise employees that it will not be providing any additional leave above and beyond what is provided, assuming it equals or exceeds any leave that the employees would otherwise be entitled to under the earned sick and safe leave law.

- 4. Under the earned sick and safe leave law, an employer may not be required to allow an employee to use more than 64 hours of earned sick and safe leave in a year. If an employer currently provides employees with 10 days of paid time off, can the employer limit employee usage of time off under the earned sick and safe leave law to 40 hours, or must an employer lift that to 64 hours?**

If an employer has a paid time off policy that provides for paid time off in an amount equal to or greater than the leave that an employee would otherwise be entitled to under the law, the employer does not need to provide additional leave. Under the law, if an employer “front loads” the earned sick and safe leave, the employer is not required to allow the employee to carry over the leave. If an employer provides more leave than is otherwise required by law (10 days in this example), provided employees have at least 40 hours of that leave available for immediate use at the beginning of the year under the same conditions as those set forth in the law, the employer can limit the use of any remaining paid leave above the 40 hours consistent with the employer’s policies on leave use.

- 5. If employees work an average of 9 hours a day, is an employer required to compensate the employee for the number of hours they would have worked in the day?**

Under the law, an employee accrues one hour of sick and safe leave for every 30 hours that the employee works. Unless an employer “front loads” the leave at the beginning of the year, an employee may only use the number of paid sick and safe leave hours that the employee has accrued. Thus, if an employee has only accrued 4 hours of sick and safe leave, the employee is only entitled to use 4 hours of leave regardless of the number of established hours in the work day. If an employer has a 9-hour work day and the employee has accrued 9 or more hours of sick and safe leave, the employee would be permitted to use the leave for the duration of the shift.

- 6. If an employer has only part time employees who work a limited number of hours, are they entitled to accrue earned sick and safe leave?**

Part-time employees count toward the 15 employee threshold for determining whether employees are entitled to paid or unpaid sick and safe leave. As to accrual, an employer is not required to provide sick and safe leave for employees who regularly work less than 12 hours per week. Additionally, an employer is not required to provide sick and safe leave during (1) a 2 week pay period in which the employee worked fewer than 24 total hours; (2) a 1 week pay period if the employee worked fewer than a combined total of 24 hours in the current and immediately preceding pay period; or (3) a pay period in which the employee is paid twice per month and worked fewer than 26 hours in the pay period.

**7. Can an employer count paid holidays toward earned sick and safe leave? Does an employee accrue earned sick and safe leave while using PTO?**

*\*NEW\** In general, if an employer's business does not operate on certain holidays and the employer provides paid time off for those holidays, the employer cannot deduct those holiday hours from an employee's earned sick and safe leave. If an employer's business operates on holidays and employees can work or are expected to work on the holiday, the employer may deduct from the employee's leave accrual if the employee uses earned sick and safe leave rather than work on the holiday. Whether an employee accrues sick and safe leave while on paid time off status depends on the employer's policy. The law does not require that an employee accrue sick and safe leave while using paid time off.

**8. What does "regularly" works less than 12 hours per week mean and what happens in weeks where an employee works less than 12 hours?**

*\*REVISED\** The law does not define "regularly." While the word is not defined in the law, the Commissioner suggests using the everyday meaning of the word which is "normal or customary." Thus, an employee who normally or customarily works less than 12 hours per week would not be covered by the law. If an employee normally or customarily works 12 or more hours per week but the employee works less than 12 hours in an isolated week, those hours in the isolated week would still count toward the employee's sick and safe leave accrual.

**9. An employee eligible for earned sick and safe leave accrues leave at the rate of one hour for every 30 hours worked. Do all the hours need to be worked in Maryland?**

The hours do not need to be worked in a specific place in order for the employee to be eligible to accrue leave. If the employer has employees in several states, the law would only apply to employees whose primary work location is Maryland. An employee whose primary work location is in Maryland but performs some work outside the State would be entitled to accrue leave for the time spent working in other states.

**10. What about seasonal employees? Are they covered by the law?**

Seasonal employees are included in determining whether an employer has met the 15 employee threshold. Assuming they meet all the other requirements of the law, seasonal employees would be entitled to accrue leave at the rate of one hour for every thirty hours worked. However, under the law, an employer is not required to permit an employee to use any accrued leave for the first 106 days (15 weeks) of employment. If an employee is reinstated by an employer within 37 weeks of being separated, the employee is entitled to have any earned and unused sick leave reinstated.

**11. Is there a suggested method to determine the number of hours earned per employee?**

The employer may use any method provided the employer complies with the law. Below is a chart of hypothetical employee hours worked and the number of paid sick leave hours that would accrue in that same time period.

*Hypothetical Employee Accrual Chart*

Day	Week	12 Hours	15 Hours	20 Hours	30 Hours	40 Hours
7	1	0.4	0.5	0.7	1.0	1.3
35	5	2.0	2.5	3.3	5.0	6.7
70	10	4.0	5.0	6.7	10.0	13.3
105	15	6.0	7.5	10.0	15.0	20.0
140	20	8.0	10.0	13.3	20.0	26.7
175	25	10.0	12.5	16.7	25.0	33.3
210	30	12.0	15.0	20.0	30.0	40.0
245	35	14.0	17.5	23.3	35.0	40.0
280	40	16.0	20.0	26.7	40.0	40.0
315	45	18.0	22.5	30.0	40.0	40.0
365	52	20.8	26.0	34.7	40.0	40.0

**12. What are the requirements for tracking earned sick and safe leave?**

The law does not require that an employer track employee leave in a specific manner. An employer is required to provide to each employee a statement of used and available paid and unpaid leave with each pay period. This requirement can be satisfied with an online system to which employees have access. Additionally, if an employee files a complaint, the employer must be able to demonstrate to the Commissioner how many hours the employee worked, how much sick and safe leave the employee accrued and how much sick and safe leave the employee was permitted to use.

**13. How does an employer handle the accrual of earned sick and safe leave if the employer front loads leave and the employee is not hired at the beginning of the designated benefit year?**

*\*NEW\** If an employer's benefit year begins on January 1st and the employer front loads earned sick and safe leave on that date, for an employee who is hired on any other date throughout the year, the employer will need to ensure that the employee earns sick and safe leave in an amount equal to or greater than the leave provided for under the earned sick and safe leave law until the beginning of the next benefit year.

**14. Does earned sick and safe leave count toward the fringe benefit amount on a Maryland prevailing wage project? What about on a Davis Bacon project?**

*\*NEW\** Paid sick and safe leave, like other paid leave such as vacation time, may be credited toward the fringe benefit requirement on a Maryland Prevailing Wage project. Unpaid sick and safe leave would not be credited toward the fringe benefit requirement. In terms of the Davis Bacon Act, the Commissioner suggests that an employer contact the U.S. Department of Labor for guidance since that is the agency that administers the Davis Bacon law.

**15. If an employee is performing work on a Maryland Prevailing Wage project, at what rate should the employee be compensated when using earned sick and safe leave?**

*\*NEW\** Earned sick and safe leave, like other paid fringe benefits, should be compensated at the employee's standard rate of pay. An employer should compensate an employee for earned sick and safe leave at the same rate that the employer compensates employees for other paid fringe benefits.

**16. Can an employer have a policy that provides that an employee will be paid out for any unused earned sick and safe leave at the end of the year rather than allowing the employee to roll it over to the next year?**

The law provides that an employee may carry over the balance of earned sick and safe leave to the following year (subject to the limitation that an employee may not accrue a total of more than 64 hours at any time). Based on this language, an employer would be required to give an employee the option of carrying over the balance of earned sick and safe leave or paying out the balance of unused earned sick and safe leave at the end of the year.

**17. What is the relationship between the Maryland Healthy Working Families Act and the Family Medical Leave Act?**

The Maryland Healthy Working Families Act does not impact an employee's rights under the Family Medical Leave Act (FMLA). The FMLA is a federal law that the Department does not

administer. For questions related to the FMLA, an employee or an employer may wish to contact the U.S. Department of Labor or a legal advisor.

#### IV. Permissible Uses of Earned Sick and Safe Leave

##### 1. **When can employees start using earned sick and safe leave?**

For employees who have been employed for at least 106 days before February 11, 2018, they may use leave as it is accrued. Employees who are employed less than 106 days prior to February 11, 2018 as well as new employees hired on or after February 11, 2018 must wait 106 days from their date of hire to begin using earned sick and safe leave.

##### 2. **In what increments can an employee use earned sick and safe leave?**

The law provides that an employer may establish a minimum increment for leave use but that increment cannot exceed 4 hours. Thus, an employer may allow an employee to use leave in any increment provided that the employer does not have a policy that requires employees to use leave in increments greater than four hours.

##### 3. **What can an employee use earned sick and safe leave for?**

Earned sick and safe leave may be used for the following:

- (1) To care for or treat the employee's mental or physical illness, injury or condition;
- (2) To obtain preventative medical care for the employee or the employee's family member;
- (3) To care for a family member with a mental or physical illness, injury or condition;
- (4) For maternity or paternity leave; or
- (5) For an absence due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member under certain circumstances.

#### V. Employer Verification of Sick and Safe Leave Use

##### 1. **When can an employer require verification of an employee's use of earned sick and safe leave?**

An employer may require verification for use of earned sick and safe leave if the employee (1) used sick and safe leave for more than two consecutive scheduled shifts or (2) the employee used the leave during the period between the first 107 and 120 calendar days of employment and the employee and employer agreed to the verification at the time of hire. An employee is required to provide reasonable advance notice of leave use if foreseeable. If the need to use leave is not foreseeable, then the employee must provide notice as soon as practicable. An employer is

permitted to deny a request to take earned sick and safe leave if the employee fails to provide notice and the employee's absence will cause a disruption to the employer.

**2. Is an employee required to give notice before using earned sick and safe leave? Can an employer deny a request to use earned sick and safe leave?**

*\*NEW\** If an employee's need to use sick and safe leave is foreseeable, the employer may require that the employee provide reasonable advance notice of not more than 7 days before the date the employee intends to use the leave. If the need to use leave is not foreseeable, the employee must provide notice as soon as practicable. An employer may deny a request to use earned sick and safe leave if the employee failed to provide notice and the employee's absence will cause a disruption to the employer.

**3. What happens if an employee uses earned leave between the first 107 and 120 calendar days of employment, the employer requests verification, and the employee fails to provide the requested documentation?**

The law provides that an employer may require an employee to provide verification if the employee wants to use leave between the first 107 and 120 days that the employee was employed by the employer if the employee agreed at the time of hire to provide the verification under mutually agreeable terms. The law further provides that if these requirements are met and an employee refuses to provide verification, the employer may deny a subsequent request to use leave "for the same reason." If the Commissioner received a complaint, the Commissioner would have to consider the facts of the particular case to determine whether the request to use leave was "for the same reason."

**4. If an employer has an attendance point system for situations that involve call offs and tardiness, what impact does the earned sick and safe leave law have on such a policy?**

The earned sick and safe leave law provides that an employer cannot apply an absence control policy to earned sick and safe leave use if it could lead to or result in adverse action being taken against the employee. After an employee has exhausted all of the leave that he or she is entitled to use under the earned sick and safe leave law, then an employer could apply its normal attendance policies to any absences taken after the leave has been exhausted.

## VI. Rehire Requirements

### 1. What happens to the earned sick and safe leave of an employee who separates from employment but is later rehired?

The law requires that if an employee is separated for less than 37 weeks and returns to work for the employer, the employer has to reinstate any earned but unused sick and safe leave (whether paid or unpaid).

### 2. For an employer who offers paid time off, how does the employer determine the portion of the paid time off that was considered sick leave versus vacation or personal leave when the employee is rehired?

If an employer rehires an employee within 37 weeks of separation, the employer could satisfy this requirement by reinstating any unused paid time off that the employee had available at the time of separation, assuming the amount of paid time off is equivalent to or greater than the amount of leave the employee would otherwise have been entitled to under the Act unless the employer had already paid the employee for all earned but unused leave at the time of separation.

## VII. Specific Categories of Employees

### 1. How does an employer provide earned sick and safe leave for commission-only employees who are not normally eligible for any paid time off?

Commission-only employees are not exempt from the earned sick and safe leave law. The law provides that an employer does not need to modify an existing paid leave policy if it does not reduce an employee's compensation for an absence due to earned sick or safe leave. If an employee would not incur any loss of pay as a result of absences for reasons permitted under the law and they are permitted to use earned sick and safe leave for the reasons set forth in the law, an employer may not need to modify its policy. However, an employer may want to consult with a legal or financial advisor to ensure that the employer has adequate documentation to demonstrate that a commission-only employee was provided earned safe and sick leave that was equivalent to or greater than that required under the law and did not incur a reduction in pay. Alternatively, an employer with commission-only employees could impute an average hourly wage to each employee based on commissions earned during a fixed period of time (for example the previous six months) and pay the employee at that rate for absences due to sick and safe leave use.

**2. If a restaurant does not have set shifts and employees are sent home when business slows down how does it determine the number of hours to pay someone who takes leave when they don't have fixed working hours?**

If a restaurant employee requests to take earned sick and safe leave and does not wish to work an equivalent shift in the same or the following pay period, the employer must pay the employee the current minimum wage for the hours that the employee seeks to use earned sick and safe leave. If the restaurant employer does not have regular shifts and sends employees home when work is slow, the Department suggests that the employer consult with an advisor and develop a reasonable policy for tipped employees who wish to use earned and accrued sick and safe leave during a regularly scheduled shift. For example, the employer could promulgate a policy whereby it will consider the average number of hours worked by the employee for each shift in the preceding pay period. Thus, an employee would be entitled to use the average number of hours per shift that the employee worked in the preceding pay period, assuming the employee has accrued a sufficient number of sick and safe leave hours. The Department suggests that such a policy be in writing and clearly communicated to employees.