

General Assembly Passes Modifications to the Time to Care Act

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In 2022, the Maryland Legislature passed the Time to Care Act (TCA), which affects every Maryland employee and requires contributions from almost all Maryland employers with 15 or more employees, overriding then-Governor Hogan's veto. The TCA will give Maryland workers access to paid family and medical leave through a state-administered fund financed by employee and employer contributions. To view our 2022 Article on the TCA, click [here](#).

During the 2023 legislative session, Maryland lawmakers addressed some issues left unresolved by the TCA. Although much of the act was left untouched, the General Assembly did make some notable modifications.

Delayed Start Dates

Employer and employee contributions to the fund were initially scheduled to begin on October 1, 2023. That date has now been pushed back a year, to October 1, 2024. Similarly, the start date for employees to begin receiving benefit payments was pushed back one year from January 1, 2025 to January 1, 2026. Finally, the date by which the Secretary of Labor is required to adopt regulations implementing the TCA has been pushed back six months, from June 1, 2023 to January 1, 2024.

"Family Member" Further Expanded

As originally enacted, the TCA already had a broader definition of "family member" than the federal Family and Medical Leave Act (FMLA), additionally including biological, step and foster parents-in-law, grandparents, grandchildren and siblings. The 2023 TCA amendments further expanded that definition to include "domestic partners". The amendments, however, do not specify who will be considered a "domestic partner." Hopefully, the Maryland Department of Labor ("MDOL") will provide clarification when it issues regulations.

Adoption/Foster Care/Kinship Care Expanded

The TCA covered leave to care for a child after the placement of the child through foster care, kinship care or adoption. The amendments expand the basis of leave to also include the period “during the process” prior to placement. Additionally, while the TCA provides up to 12 weeks leave to “care for” a child during first year after birth – the 2023 amendments clarify that the available leave includes time to “bond.”

Rate of Contribution

The TCA requires the Secretary of Labor to set an initial contribution rate that will apply to all “wages” up to and including the Social Security wage base. A definition added by the 2023 TCA amendments specifies that “wages” includes hourly wages or salary, commissions, compensatory pay, severance pay, holiday/vacation pay, any other type of employer-paid leave, and tips or gratuities.

The contribution rate must be set by the MDOL by October 1, 2023 and cannot exceed 1.2 % of an employee’s covered wages up to the Social Security wage base. The designated contribution rate will remain in place from October 1, 2024 through June 30, 2026. Thereafter, MDOL is required to conduct an annual cost analysis of the program and determine whether there will be any adjustment to the rate of contribution. The contribution rate must be subsequently set by MDOL on or before February 1 each year, starting with 2026, for the 12-month period beginning on the following July 1.

The amendments also set the cost-sharing ratio that will be applied to the required contributions. For the period starting October 1, 2024, 50% of the contributions must be paid by the employer and 50% by each employee, although employers may elect to cover some or all of their employees’ shares.

Benefits Cap

The 2023 TCA amendments prohibit workers from collecting more than 100% of an individual employee’s average weekly wage. This cap applies whether an individual is receiving benefits only under the TCA or a combination of the TCA and employer-provided leave benefits.

Interaction Between TCA and FMLA

In many (but not all) cases, an employee may be eligible for leave under both the TCA and FMLA. The TCA initially provided that TCA leave would run concurrently with federal FMLA leave. As amended, however, the MDOL may choose to count an employee's federal FMLA leave time against an employee's available benefits under the TCA if:

- the leave is taken for the same purpose;
- the employee is eligible for benefits under both federal FMLA and the TCA;
- the employer designates the leave period as FMLA leave;
- the employer informs the employee of their eligibility for benefits under the TCA; and
- the employee declines to apply for benefits under the TCA.

The amendment does not indicate how MDOL will find out if the employee is eligible for but declined TCA leave or what criteria MDOL will use to determine whether to count the leave against the employee's TCA balance.

Exhaustion of Employer Provided Leave

The TCA provided that an employee must exhaust all employer-provided leave before receiving benefits under the TCA. The amendments reverse course and provide that an employer may not require an employee to use or exhaust their paid vacation, paid sick leave, or other paid time off before or while receiving paid leave under the TCA.

The rule against requiring employees to use their employer provide leave comes with two exceptions. First, an employee and an employer may agree to allow the employee to use employer-provided leave benefits to supplement the TCA benefits, so that the employee may receive up to 100% of the employee's average weekly wages while on leave. Second, an employer can require that TCA benefits be made concurrently with leave under an employer plan if leave is for: i) parental care; ii) family care; iii) military leave, or iv) leave under a disability policy. That exception is not applicable when the employee takes leave for their own medical condition.

Community Provider Reimbursement

The TCA provided that it was “the intent” of the General Assembly that the state pay the required contributions for some community providers serving those with developmental, mental health and substance disorders. The amendments clarify that eligible employers will receive reimbursement from the Department of Health for some or all of their employer contributions. Reimbursement is to be made on at least a quarterly basis.

The amendments specify several types of providers that will be eligible for reimbursement of some employer contributions to the TCA fund:

- Community providers licensed or certified under Title 7 (Developmental Disabilities Law) will be reimbursed for 100% of their contributions for those employees who manage or provide services under Title 7.
- Community providers licensed or certified under Title 7.5 (Behavioral Health Administration) of the Health-General Article will be reimbursed a percentage of the employer contribution for those employees who manage or provide services under Title 7.5 equal to the percentage of revenue that is attributable to federal and state Medicaid funding and other state funding received by the community provider.
- Providers of nursing home services, medical day care services, private duty nursing services, personal care services, home- and community-based services, and services provided through the Community First Choice program, will be reimbursed a percentage of the employer contribution equal to the percentage of revenue attributable to federal and state Medicaid and other state funding received by the provider.

The amendments do not define what entities qualify as a “community provider” or what will be included in “revenue” to make these reimbursement determinations. Regulations to be issued by MDOL may address these issues.

Private Employer Plans

The TCA provides that employers may choose to opt-out of the state-administered fund by providing coverage through a private plan consisting of employer-provided benefits, insurance, or a combination of both. To the

extent an employer utilizes insurance to fund a private plan, the 2023 TCA amendments require that the insurance must be procured through an insurer certified by the Maryland Insurance Commissioner. Employers utilizing private plans are also restricted from deducting more from an employee's wages than the maximum rate set by the MDOL, even if the employer plan provides benefits higher than benefits allowed under the TCA.

Timing: Employee Application for Benefits

The amendments provide that an individual may file an application for benefits not earlier than 60 days prior to the anticipated start of the leave, but not later than 60 days after the start date of the leave. The MDOL may waive the filing deadline for "good cause" and may delay or deny benefits if the applicant cannot show "good cause" for the failing to submit a complete application on time.

Conclusion

The 2023 TCA Amendments resolved some of the issues left open in 2022 , however, some questions were left unanswered and new questions were created. Although the start dates for contributions and benefits have been delayed, employers should begin planning to implement the TCA in their workplace. In particular, employers should consider whether they will use a private plan to fund TCA leave benefits and how they will incorporate TCA leave in their existing program.

If you need further information about or assistance with implementation of the Time to Care Act, contact:

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