

Maryland

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

Fair employment laws have been amended to provide employment discrimination protections for interns. As a result, an employer cannot:

- Fail or refuse to offer an internship, terminate an internship, or otherwise discriminate against an individual with respect to terms, conditions, or privileges of an internship because of his or her race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability unrelated in nature and extent so as to reasonably preclude performance of the internship (i.e., “protected status”);
- Limit, segregate, or classify interns or internship applicants in any way that would actually or tend to deprive them of internship opportunities or otherwise adversely affect the individual’s intern status because of his or her protected status;
- Fail or refuse to make a reasonable accommodation for a qualified intern’s known disability;
- Discriminate or retaliate against interns or internship applicants because they opposed an unlawful fair employment practice, or made a charge, testified, assisted, or participated in any manner in a fair employment law investigation, proceeding, or hearing; or
- Print or cause to be printed or published a notice or advertising relating to an internship indicating a preference, limitation, specification, or discrimination based on a protected classification unless a protected status preference is a bona fide occupational qualification for an internship.

Under the law, an intern is an individual who performs work for an employer for the purpose of training if:

- The employer isn’t committed to hire the individual when the training period ends;
- The employer and individual agree the individual isn’t entitled to wages for work performed; and
- The work performed:
 - Supplements training given in an educational environment that may enhance the individual’s employability;
 - Provides experience for the individual’s benefit;
 - Does not displace regular employees; and
 - Is performed under the close supervision of existing staff.

An intern claiming to be a victim of unlawful discrimination must have access to an employer's internal procedure for resolving complaints of sexual harassment or other discrimination. If no procedure is available, the individual can file a complaint with the Human Right Commission and seek non-monetary administrative remedies (i.e., enjoin employer from committing discriminatory act, reinstatement, other appropriate equitable relief).

Finally, the amendments expressly state they do not, and cannot be construed to, create an employment relationship between the employer and intern for purposes of: a civil lawsuit or monetary damages under the fair employment laws; any provision of the Labor and Employment Article; or any provision the State Personnel and Pensions Article.

Md. STATE GOVERNMENT Code Ann. § 20-610 (10/01/2015).

II. Pre-Employment Inquiry Guidelines

A.

Maryland's new law permits employers to grant a preference in hiring and promotion to:

- eligible veterans;
- spouses of eligible veterans with service-connected disabilities; and
- surviving spouses of deceased eligible veterans.

An eligible veteran is a veteran of any branch of the U.S. armed forces, including the National Guard and military reserves, who has been honorably discharged or has received a certificate of satisfactory completion of military service. Granting this preference will not violate any state or local equal employment opportunity law.

Md. LABOR AND EMPLOYMENT Code Ann. § 3-714 (Effective Date 10/01/2016).

B. Shielded Criminal History Records

Maryland has enacted a new law, the Maryland Second Chance Act of 2015, that impacts criminal background checks. Generally, the law allows a person to petition to have court and/or police records for one or more convictions shielded no earlier than three years after the person satisfies the sentence(s) imposed for all convictions for which shielding is requested, including parole, probation, or mandatory supervision. Having records "shielded" means the court and police records relating to the conviction of a crime are rendered inaccessible by members of the public.

Only certain minor offenses are eligible for shielding. In addition, if a person is ineligible for shielding for one conviction in a unit, s/he is ineligible for shielding for any other conviction in the unit. A unit is two or more convictions that arise from the same incident, transaction, or set of facts.

With respect to shielded convictions, employers are prohibited from requiring a job applicant to disclose shielded information about criminal charges on an application, during an interview, or otherwise. Employers are further prohibited from discharging or refusing to hire a person solely because the person refused to disclose information about criminal charges that have been shielded.

Shielded records remain accessible to certain employers:

- Criminal justice units;

- Employers or licensing agencies subject to a statutory or regulatory requirement that mandates and authorizes criminal background checks;
- A person who uses volunteers to care for or supervise children; and
- A person who attests under penalty of perjury that the person employs or seeks to employ an individual to care for or supervise a minor or vulnerable adult.

Md. CRIMINAL PROCEDURE Code Ann. § 10-302 (Effective 10/01/2015).

III. **Family and Medical Leave**

Maryland has enacted amendments to the Flexible Leave Act. The Act allows an employee to use earned paid leave for the illness of a member of his or her immediate family, defined as a spouse, child or parent of the employee. The Act expressly prohibits an employer from discharging, demoting, suspending, disciplining, or otherwise discriminating against an employee or threatening to take any of these actions against an employee because the employee:

- Takes leave as authorized under the Act;
- Opposes a practice prohibited under the Act; or
- Makes a charge, testifies, assists, or participates in an investigation, proceeding, or hearing related to a violation of the Act.

In addition to these protected actions, the amendments protect an employee from discharge, demotion, suspension, discipline, and discrimination for requesting leave under the Act. The amendments also add a provision prohibiting an employer and an employee from entering into an agreement requiring the employee to waive entitlement to leave under the Act. The amendments specify that any such agreement will be deemed void.

Md. LABOR AND EMPLOYMENT Code Ann. § 3-802 and Md. LABOR AND EMPLOYMENT Code Ann. § 3-802 (f) (Effective Date 10/01/2015).

IV. **Wage and Hour Laws**

Maryland law prohibits employers from paying different wages to employees of different sexes if the employees work in the same establishment and perform comparable work. Employees are deemed to work in the same establishment if they work at workplaces in the same Maryland county. The new amendments to the state's equal pay statute prohibit employers from providing less favorable employment opportunities—in addition to disparate wages—to employees based on the employee's sex or gender identity. The law defines "providing less favorable employment opportunities" as:

1. Assigning or directing the employee into a less favorable career track, if career tracks are offered, or position;
2. Failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; and
3. Limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but for the employee's sex or gender identity.

In short, the law provides that Maryland employers may not discriminate between employees in any occupation by paying a wage to employees of one sex or gender identity at a rate less than the rate paid to employees of another sex or gender identity if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type.

The law as previously enacted provided for exceptions for variation in wages based on: (1) a nondiscriminatory seniority system, (2) a nondiscriminatory merit increase system, (3) jobs requiring different abilities or skills, (4) jobs that require regular performance of different duties or services, and (5) work performed on different shifts or at different times of day. The 2016 amendments expand an employer's defenses to include: (6) a system that measures performance based on quality or quantity of production, or (7) a bona fide factor other than sex or gender identity, including education, training, or experience, if the factor: (a) is not based on or derived from a gender-based differential in compensation; (b) is job-related with respect to the position and consistent with a business necessity; and (c) accounts for the entire differential.

Additionally, the amendments change the enforcement procedures for the equal pay provisions. Employees alleging violations of the law may now seek injunctive relief. The statute of limitations is three years after the employee receives wages paid on termination of employment, rather than within three years of the act on which the action is based. The court may now award prejudgment interest in enforcement suits.

Wage Transparency

The law prohibits an employer from taking an adverse employment action against an employee who inquires about, discusses, or discloses his or her own wages or the wages of another employee, if those wages have been disclosed voluntarily. Employees who have regular access to wage information do not have the protections of this law, unless they obtain the wage information outside of their normal duties. An employer, however, may, in a written policy, establish reasonable workday limitations on the time, place, and manner for inquiries about or the discussion or disclosure of an employee's wages. (The National Labor Relations Act may preempt this section of the law).

Md. LABOR AND EMPLOYMENT Code Ann. § 3-301, Md. LABOR AND EMPLOYMENT Code Ann. § 3-304, Md. LABOR AND EMPLOYMENT Code Ann. § 3-304.1, Md. LABOR AND EMPLOYMENT Code Ann. § 3-306, and Md. LABOR AND EMPLOYMENT Code Ann. § 3-307 (Effective Date 10/01/2016).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Small Business Retirement Savings Program

The new law creates a state-run retirement plan, the Maryland Small Business Retirement Savings Program (“Program”), for workers not already covered by a retirement plan. It also exempts participating employers from Maryland’s \$300 annual business entity filing fee as an incentive for the employer to provide the new retirement plan for its employees.

Covered Employers and Eligible Employees

Private employers that use a payroll system or service and do not already have an employer-offered savings plan are considered covered employers. These employers are eligible to become participating employers in the Program. Employers that do not currently offer a savings plan, but have offered a savings plan at any time during the preceding two calendar years, are not covered employers. In addition, employers that have not continuously been in business during the current and the preceding calendar years are not covered employers. Compliance with the new law and participation in the Program by itself does not impose a fiduciary obligation on an employer with respect to the operation of the Program or funds contributed to the Program.

Covered employees are individuals over age 18 who are employed by covered employers and who are not participating in or eligible to participate in a qualified retirement plan. Employees covered under the federal Railway Labor Act or by a valid collective bargaining agreement that expressly provides for a multi-employer retirement plan are not considered covered employees. Covered employees may opt out of the plan.

Employee Enrollment

Once the Program is open for enrollment, covered employers must establish a payroll deposit retirement savings arrangement so that covered employees may participate. A covered employer must also automatically enroll all covered employees in the Program, unless an employee elects to opt out. The Maryland Small Business Retirement Savings Board, established as a result of the new law, will set and adjust a default contribution for participating employees. The assets in a participating employee’s Program account are considered the property of the participating employee.

Md. CORPORATIONS AND ASSOCIATIONS Code Ann. § 1-203 and Md. LABOR AND EMPLOYMENT Code Ann. § 12-101 to § 12-502 (Effective Date 07/01/2016).

B. National Guard Protections

Maryland law ensures that members of the Maryland National Guard are eligible for the rights, benefits, and protections of the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). The amendments extend these protections to National Guard members of states other than Maryland and National Guard members who are not residents of or employed in Maryland. National Guard members receive USERRA’s protections under Maryland law when ordered to military duty by the chief executive officer of the jurisdiction or under Title 32 of the U.S. Code. Thus, a Maryland employee who is a member of the National Guard of another state is entitled to the employment protections and other benefits afforded under Maryland law.

The amendments also remove reference to the Maryland Defense Force in these sections. Therefore, members of the Maryland Defense Force are not granted employment protections of the Servicemembers Civil Relief Act (SCRA) and USERRA under state law.

C. False Claims Act Retaliation

Maryland has enacted a False Claims Act, which generally prohibits acts relating to making false or fraudulent claim for payment or approval to a governmental agency. Of particular importance to employers is the law's anti-retaliation provision, which prohibits "retaliatory action," i.e., a person cannot discharge, suspend, demote, threaten, harass, or discriminate against an employee, contractor, or grantee because s/he:

- Acts lawfully in furtherance of an action filed under the Act, including an investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under the law;
- Discloses or threatens to disclose to a supervisor or a public body any activity, policy, or practice of the person that the individual reasonably believes violates the law;
- Provides information to, or testifies before, a public body conducting an investigation, hearing, or inquiry into a violation of the law that is allegedly or actually committed by the person; or
- Objects to or refuses to participate in any activity, policy, or practice that the individual reasonable believes violates the law.

An employee, contractor, or grantee can file a civil lawsuit if a person takes unlawful retaliatory action against the individual. The suit must be filed within 6 years after the date the underlying violation occurred or 3 years after the date when material facts concerning the right of action are known or reasonably should have been known by the person filing suit, but in no case more than 10 years after the date of the underlying violation. The remedies available are extensive:

- Injunctive relief to restrain a continuing violation;
- Reinstatement to the same seniority status held before the retaliatory action;
- Reinstatement of full fringe benefits and seniority rights;
- Twice the amount of lost wages, benefits, and other remuneration, including accumulated interest;
- Reasonable attorneys' fees and costs;
- Punitive damages;
- Civil penalties up to \$1,000 for a first violation and up to \$5,000 for each subsequent violation; and
- Other relief necessary to make the individual whole.

The law provides that the aforementioned remedies do not diminish or affect the individual's rights, privileges, or remedies that are available under any other federal or state law, or under a collective bargaining agreement or employee contract. Moreover, the law provides that its remedies are in addition to any other legal or equitable relief provided under any state or federal law.

The Act will only apply prospectively, and cannot be applied or interpreted to have any effect on or apply to any claim made before the law's effective date.

Md. General Provisions Code Ann. § 8-101 through Md. General Provisions Code Ann. § 8-111 (Effective 06/01/2015)

D. Healthcare Reform Alignment

Maryland has amended numerous provisions within its Insurance Article to align requirements with various federal laws, including the federal Patient Protection and Affordable Care Act (ACA) and the federal Mental Health Parity and Addiction Equity Act (MHPAEA). Highlights of the bill's major provisions include the following:

Section of Bill	Summary	Federal Citation
§ 15-137.1 INS	Specifies that ACA prescription drug benefit requirements apply to individual health insurance coverage and health insurance coverage offered in the small group and large group markets; repeals the annual limitation on deductibles for the employer-sponsored plans provision of ACA that applies to health insurance coverage offered in the small group market	45 CFR § 156.122
§ 15-802 INS & § 19-703.1 HG	Conform with provisions of the MHPAEA; repeal the definition of "large employer"; add a definition of "grandfathered health plan coverage"	45 CFR § 146.136 and § 147.140
§ 15-1201 INS	Conforms the definitions of "health benefit plan" and "full-time employee"	45 CFR § 146.145(b); guidance by the Internal Revenue Service (IRS)
§§ 15-1208.1 & 15-1208.2 INS	Conform the special enrollment periods that apply to employees of small employers	45 CFR §§ 155.420 and 155.725
§ 15-1212 INS	Adds definitions of "plan" and "product"; specifies that renewal requirements apply at the product level; establishes a 60-day notice of renewal; establishes new rules regarding uniform modification of coverage; specifies notice requirements for termination of certain coverage	45 CFR § 144.103; § 147.106(c)(1); § 146.152(b) and § 147.106(f)(2); § 147.106(e) and § 146.152
§ 15-1301 INS	Repeals obsolete definitions of "creditable coverage," "high level policy form," and "low level policy form"; adds a definition of "grandfathered health plan coverage"; amends the definition of "health benefit plan"	45 CFR § 147.140; § 148.220
§ 15-1309 INS	Establishes a 60-day notice of renewal or uniform modification; adds requirements regarding uniform modification of coverage; specifies notice requirements for termination of certain coverage	45 CFR § 148.122(i) and § 147.106(f)(1); § 148.122(e)(1) and (g)
§ 15-1310	Repeal provisions regarding how certificates of creditable	45 CFR § 148.124

Tammy D. McCutchen, principal with Littler Mendelson PC, oversaw the firm's review and update of this state employment law workbook addendum.

& § 15-1311 INS	coverage are used to reduce preexisting condition exclusions	
§ 15-1312 INS	Repeals provisions regarding rating limits for high-level policy forms and low-level policy forms, which are no longer permitted under the ACA	No longer permitted
§ 15-1316 INS	Links the annual open enrollment period for the individual health benefit plan market to the open enrollment period adopted by the U.S. Department of Health and Human Services; requires carriers to provide the special enrollment periods specified in federal regulations	45 CFR § 155.420 and § 104(b)(2); § 147.104(b)(2)
§ 15-1318 INS	Defines and clarifies exceptions for student health plans	45 CFR § 147.145
§ 15-1401 INS	Repeals definitions of “affiliation period” and “certificates of creditable coverage,” which are obsolete under the ACA; amends the definition of “health benefit plan” to conform with federal regulations	45 CFR § 148.124; § 146.145(b)
§§ 15-1403 - 15-1405 INS	Repeal provisions regarding how certificates of creditable coverage are used to reduce preexisting condition exclusions	45 CFR § 148.124
§ 15-1408 INS	Specifies that a carrier is not required to renew a group health benefit plan in specified circumstances if notice of nonrenewal is provided at least 90 days prior to termination of coverage	45 CFR § 146.152(b)(5)
§ 15-1409 INS	Defines “product”; specifies that renewal is at the product level; adds uniform modification of coverage requirements	45 CFR § 144.103; § 147.106(c); § 147.106(e)
§§ 15-10A01 & 27-210 INS	Add a new definition of “wellness program” consistent with § 15-509 of the Insurance Article and in conformity with federal regulations; clarify that the wellness benefit applies only to benefits offered extra-contractually (wellness benefits found in health benefit contracts are subject to § 15-509 of the Insurance Article); conform the definition of “adverse decision” accordingly	45 CFR § 146.121
§ 31-101 INS	Conforms the definitions of “full-time employee” regarding seasonal workers and “plan year”; defines “minimum essential coverage” to comply with federal law; amends the definitions of “health benefit plan” and “small employer”	IRS guidance; 25 U.S. Code § 5000A; 45 CFR § 148.220
§ 31-116 INS	Alters the selection of the State benchmark plan used to establish the essential health benefits required to be included in health plans offered in the individual and small group health insurance markets	None applicable

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