Inside 2Q2022

2 ...... A Professional Network: Value Beyond the Obvious, Value Throughout Your Career

3 ...... All That's Left is the Contract: How the Great Resignation Could Mean More Litigation, and What to Do About It

5 ...... Companies Should Know Benefits and Risks of ESG Reporting

6 ...... 2022 Maryland General Assembly Employment Law Update

9 ...... Board Leadership

FOCUS

President's Message

Kimberly Neal

Dear ACC-Baltimore Chapter,

Our 25th anniversary year has gotten off to an excellent start – with a new logo to commemorate the occasion! We started the year with strong virtual programming and social opportunities, including a Gratitude Happy Hour designed to both remind current members of the value of this chapter and to encourage new faces to formally become members. We also worked together to gear up for in-person events in the warmer months of Q2, surveying our membership to consider the best locations and times – which may be different from prior years – to ensure that members feel comfortable attending. Through this collaboration, our Golf/ Spa (rebranded a bit as Golf/ Wine) event returned to the Spring, we found opportunities for in-person luncheons in restaurants not otherwise open for lunch to the general public, and our members have continued to take extra precautions to respect each other's health and safety as we happily come back together.

We also recognize that this year presents different challenges than we have ever faced. Some members have returned to the office full-time while others remain virtual or hybrid. Like other chapters across the country, we have had lower than normal registrations for some events and have made decisions to reschedule. I am proud of how our chapter and sponsors have pivoted and remained strong in our goals of providing valuable education and networking. The words "grace" and "perseverance" come to mind: we have displayed both.

Our board said goodbye to a few members due to relocation and other unforeseen reasons, but we have happily welcomed two new members: Laurice Royal, VP of Talent and Inclusion at Impact Justice, and Nathan Willner, Government Relations Director with the National Creditors Bar Association. Both Laurice and Nathan have been engaged members and enthusiastically accepted positions on the board. They are ready to help lead our chapter, and we are fortunate to have them!

We look forward to seeing you at our social with Womble, Bond, Dickinson on August 18 (details soon) and at a luncheon with Nelson Mullins to be held in August (details soon). And, we have a full roster of luncheons scheduled through the end of the year and a few more socials as well!

I wish everyone a safe, healthy, and fun summer, while w everyone takes time to focus on vacations and much-needed breaks. Stay tuned for exciting things to come as we continue to celebrate the chapter's 25th anniversary!

All my best,
Kimberly Neal

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

Kimberly Neal
President

Board Members:

Taren Butcher
President elect

Dan Smith
Immediate Past President

Kristin Stortini
Secretary

Raissa Kirk
Communications Chair

Matthew Wingerter
Program Chair

Tyree Ayers

Cory Blumberg

Dee Drummond

Shawn McGruder

Danielle Noe

Shane Riley

Laurice Royal

Michael Wentworth

Nathan Wilner

Lynne Durbin
Chapter Administrator

Member Administrator
Andrew Lapayowker

A Professional Network: Value Beyond the Obvious, Value Throughout Your Career

By Meredith Ainbinder, Vice President and General Counsel

For many in-house lawyers who spent time in private practice, one of the greatest perks of the transition to in-house practice is the elimination of the business development responsibility. Not having to worry about where to find clients, how to cultivate contacts, and whether we are playing the long-game with prospects or just giving out a bit too much free advice, is a great relief. Putting the stress aside, it also means a retreat from the dreaded networking events and awkward pseudo-social interactions.

Or does it?

The value of a professional network cannot be overstated and is an essential part of career growth and assistance throughout one's career. As someone who "grew up" as a lawyer attending bar association events and has been known to serve on a law school reunion planning committee or two, I have learned to appreciate the opportunity to get to know and learn from other attorneys.

I was fortunate because, in my law firm days, I was encouraged to get involved in activities that interested me rather than those someone else thought would be beneficial. This meant I was able to enjoy the work and find meaning in it and, in turn, make genuine connections with those outside the workplace. Then, as now, I find these relationships not merely helpful but sustaining.

Professional networks provide work-related resources

Putting aside the personal element, many organized (as well as informal) groups provide excellent referral sources, model documents, and job postings. In addition, having a reliable network allows you to stay on top of best practices in your industry and across different business types.

By having credible information about how other organizations address

common issues, we are better resourced internally. Although we want to be innovative and cutting-edge, sometimes we are asked by our internal clients to provide a middle ground or to help them avoid taking an outsized risk. Adopting a guideline provided by someone from a network can be a time-saving solution. For example, during the pandemic, we have been asked to provide information about how others are handling issues such as return-to-work, vaccines, and safety.

When things are their worst at work, knowing you are not just part of your organization but part of a legal community, alongside other honorable lawyers, can be what keeps you in practice and gives you hope for a new opportunity that will be fulfilling.

A network can be a sounding board

When thinking about how we manage our careers, a professional network provides a sounding board. Having trusted colleagues outside of your organization can be a way to get advice on how to negotiate your compensation, how and when to make a career move, and whether the experiences you have in the workplace are common.

Being a lawyer can be draining and frustrating. When things are their worst at work, knowing you are not just part of your organization but part of a legal community, alongside other honorable lawyers, can be what keeps you in practice and gives you hope for a new opportunity that will be fulfilling.

Choose or build a network that includes peers, role models, and mentees

Many lawyers gravitate toward others at their practice level and build their networks laterally. And there are so many benefits to having a network with a number of peers. You may be at similar levels of expertise and have common concerns about your career trajectory.

You may also be going through lifecycle events at the same time and it may be helpful to find out what resources are available for professionals balancing work with child or elder care.

It's also critically important to reach out to those in different spots in their careers. Network members may be able to provide you with perspectives that help you do everything from find a new position to be a better supervisor.

continued on page 3

continued from page 2

By volunteering in a professional organization, you are able to demonstrate your attitude, reliability, and competence. In turn, other volunteers get to know your work ethic and may provide a reference for you or have you top of mind when they learn of an employment opportunity. Also, it can be very satisfying to help others connect with potential employers finding ways to promote more junior lawyers.

It's never too late to build or expand a network

Many lawyers realize they need resources later in their careers. Perhaps when they are facing a professional crisis, their companies are sold, or they find themselves in a new industry or geographic location. The unknown can be overwhelming. You've toiled away at your desk for years and now you are starting at square one. The good news is that whether it is ACC, your law school, or another organization, you will not be turned away.

You can find opportunities that match your personality, expertise, and availability. Whether you are most comfortable giving a speech, writing an article, mentoring a junior lawyer, developing a library of model materials, or mingling at a social event, there is some way to connect. Find the activities and people who reflect your interests and values. From there, you will be best able to position yourself for success.

As we work to build relationships in the legal profession, we make our practices more collegial and more productive.

In turn, the voice of the bar is stronger and we are better counselors to our clients and role models in our community.

As we work to build relationships in the legal profession, we make our practices more collegial and more productive. In turn, the voice of the bar is stronger and we are better counselors to our clients and role models in our community. Take the time to invest in your own connections; it will pay dividends for you and others.

All That's Left is the Contract: How the Great Resignation Could Mean More Litigation, and What to Do About It

By Jordan D. Rosenfeld, Esq. Saul Ewing Arnstein & Lehr LLP

The Great Resignation, also known as the "Big Quit," has been giving companies fits for a little over a year now.[1] Once seen as a trend among low-wage workers that some called a "general strike,"[2] it wasn't long before salaried employees started making lateral moves *en masse*, buoyed by a burgeoning job market. Companies in every industry are grappling with the consequences, and the costs of getting and retaining talent are up.[3]

One of the biggest costs of the turnover may be loss of institutional knowledge. Departing employees leave with working knowledge of ongoing deals and projects that even the most talented replacements lack. That vacuum might create a hole in your business relationship. Sure, most sophisticated business-to-business transactions are governed by a written agreement. But how often has your company let a key aspect of a business relationship go unwritten? It's easy to draft less instead of more when there's an "understanding" between the parties; when both sides of the table know what the terms of your contract mean and what it's meant to accomplish. But what happens when that institutional knowledge—on either side—leaves for greener pastures? The Great Resignation could well become the Great Litigation as the people who know these unwritten rules of your business relationships walk right out the door.

A Cautionary Tale From Government

The public sector provides a helpful analogy for companies facing unprecedented turnover. Whereas companies rarely confront departures of all their top managers at once, in government, it's a way of life. New administrations at the local, state, and federal level consistently bring in all new agency heads, who typically bring with them brand new deputies responsible for high-level decision-making. It doesn't take a K Street lobbyist to tell you this often spells the end of the pet projects and priorities of the prior administration. But what about the already-negotiated contracts that a new administration inherits?

Maryland law is packed with examples of new administrations having new interpretations of old contracts—with costly results. Take the onerously named *Maryland Transp. Auth. v. Maryland Transp. Auth. Police Lodge No. 34 of Fraternal Ord. of Police*, 420 Md. 141 (2011). In that case, the Maryland Transportation Authority Police Lodge # 34 of the Fraternal Order of Police, Inc. ("FOP") and the Maryland Transportation Authority ("MdTA") struck a bargain over a take-home vehicle program for officers.[4] The agreement was negotiated in the last year of a gubernatorial administration, and the final agreement provided broad strokes[5]: at the MdTA's request, the FOP, which had worked with members of the legislature to introduce collective bargaining legislation covering MdTA officers, would have the legislation withdrawn or otherwise defeated. In exchange, the MdTA would fund a three-year phase-in of a take home vehicle program, with approximately $3.82 million promised for the first year,

continued on page 4

continued from page 3

but no written obligation as to the amount in subsequent years.[6] The parties, in other words, had an understanding about what performance under the contract would look like in years two and three, and did not commit all of it to writing.

Thereafter, the FOP held up its end of the arrangement, killing the legislation that would have given its members the right to collectively bargain.[7] The MdTA began ordering take-home vehicles consistent with the parties' understanding of what was called for under the agreement.[8] But less than a year later, a new gubernatorial administration took office.[9] The newly-constituted leadership of the MdTA looked at the bare bones written agreement and decided it was too vague to impose obligations on the MdTA past the first year.[10] The understanding between the parties about the terms of their agreement essentially went out the door with the outgoing administration, and the new key decision makers had different priorities. The FOP sued, and the FOP and MdTA would be locked in litigation for four years before they had an answer about the MdTA's obligations.[11]

Whether your company is the FOP or the MdTA of this scenario, it's a bad outcome. A deal struck between key parties, covered by a written contract, and backed up by performance on both sides was scuttled by turnover of key personnel who saw the contract differently. Litigation ensues, and drags on and on.

Preventing the Great Litigation

Like all other aspects of the "new normal," companies can adjust to the Great Resignation. Smart contract drafting cant account for regular employee turnover, even among key decision makers. Here are some guiding principles to keep your company's name out of court filings:

There are no Handshake Deals. Sure, this is a basic one for us attorneys, but it can be anathema to your salespeople and dealmakers. You must not only be firm, but persistent with them: if a term is not in writing and fully explained, you cannot count on it being enforceable. However reasonable the other side may seem, assume they will be replaced one day by surly successors. And while the law of oral contract is still alive in Maryland, please save my contact info if you're counting on that (you're going to need it).

Embrace Tiered Dispute Resolution. Remember, government has a lot to teach us about constant turnover among key personnel. A common feature of many government contracts is what I call "tiered dispute resolution." Baked into the contract for at least certain categories of disputes are two or more levels of dispute resolution, usually graduating from less formal to more formal. Parties may, for instance, be required to enter into a several-week negotiation period once a dispute arises. If that fails to resolve the issue, parties may appeal informally to a neutral decisionmaker. If the disagreement continues, a formal mediation may be next. Only if these resolution tactics fail will the parties reach the last step: a formal court proceeding or binding arbitration. Tiered dispute resolution keeps the temperature from getting too hot right away. Giving yourself one or more chances to resolve a dispute before the litigators get involved gives you a better shot at saving the business relationship.

If Times Are Good, Amend. If your company presently has a good business relationship based on a less-than-detailed contract, congratulations. Now quick, amend! When you have reasonable negotiating partners, it's the best time to negotiate. Now is the time to work together on more detailed contract language. I grant that context is important and this may not be an answer for everyone. Certainly this can be a delicate conversation not only with the other side, but with your own executives. But remember that a fully detailed contract is the most protective outcome for *both sides*. No matter how your company is structured, everyone is at risk of turnover on the other side of the negotiating table.

We haven't reached the end of the pandemic job market. Every company is going to experience turnover, and with that turnover, there will be costs. But increased litigation doesn't have to be one of them.

Author:

Jordan Rosenfeld

Jordan Rosenfeld assists clients with complex commercial litigation, particularly in disputes involving real estate development and projects built through public-private partnerships. Jordan's other experience includes representing colleges and universities, Fortune 100 companies, small businesses, and individuals in various forums in different states, and before the federal government.

---

[1]Lisa Curtis. *Why The Big Quit Is Happening And Why Every Boss Should Embrace It*. Forbes.com (June 30, 2021), https://www.forbes.com/sites/lisacurtis/2021/06/30/why-the-big-quit-is-happening-and-why-every-boss-should-embrace-it/?sh=70616ca8601c.

[2]Lindsey Jacobson. *The 'Great Resignation' is a reaction to 'brutal' U.S. Capitalism: Robert Reich*. CNBC.com (Feb. 4, 2022), https://www.cnbc.com/2022/02/04/robert-reich-great-resignation-general-strike-health-care-childcare.html.

[3]Greg Rosalsky. *The Great Resignation? More like the Great Renegotiation*. NPR.com (Jan. 25, 2022), https://www.npr.org/sections/money/2022/01/25/1075115539/the-great-resignation-more-like-the-great-renegotiation.

[4]*Id*. at 143-44.

[5]There was some dispute, but the FOP argued the agreement incorporated a more detailed proposal by reference. *Id*. at 145.

[6]*Id*. at 144-45.

[7]*Id*. at 145

[8]*Id*.

[9]*Id*. at 146.

[10]*Id*.

[11]The MdTA won at the trial court, lost at the Court of Special Appeals, but was ultimately victorious at the Court of Appeals on the grounds that the prior MdTA leadership had exceeded its authority by signing the contract. *Id*. at 147-48, 166-69.

Companies Should Know Benefits and Risks of ESG Reporting

By Van P. Hilderbrand, Jr, Miles and Stockbridge

You may have heard the term "ESG" before. It has been used with increasing frequency for a few years, but the term and ESG-minded business practices have gained more traction over the last year or so. ESG stands for three factors—environmental, social, and governance. The ESG factors can be broken down to a set of non-financial metrics and standards that a company's operations try to achieve and that socially conscious investors use as a framework to identify material risks and growth opportunities, and to screen potential investments based on sustainability and ethical practices. After many recent years of environmental disasters, corporate scandals, and public health concerns, achieving ESG metrics is now a critical and expected piece of corporate performance and responsibility.

ESG metrics are often interconnected across the three factors, and there is no single, agreed upon list. Many can be measured either monetarily or in other ways, while others cannot. Below are just some examples of the metrics that investors and other stakeholders are taking into consideration today.

- **Environmental** (Is the company a good steward of the environment regarding compliance with environmental regulations, natural resource conservation, climate change and carbon emissions, air and water pollution, deforestation, energy efficiency, waste management, water scarcity and conservation, and ethical treatment of animals?)
- **Social** (How does the company manage its business relationships, customer satisfaction, data protection and privacy, work place policies, gender and diversity inclusion, employee engagement, community engagement and service, volunteer work and donations, human rights, labor standards, and employee health and safety?)
- **Governance** (How does the company handle its transparency, leadership structure, internal controls, executive pay, lobbying, political contributions, whistleblower schemes, board composition, and shareholder rights?)

These metrics are constantly evolving, and it is increasingly crucial for companies to adapt their thinking, their operations, and their outreach to address each. It is also imperative that companies get ahead of the curve and begin to create their own metrics, those that will drive their performance and social responsibility.

Why Should Companies Focus on ESGs?

ESG metrics began as a way for investors to align their investments with their values. While this is still true, many investors are beginning to recognize that ESG metrics have another purpose—helping maximize their investment profitability by avoiding investing in companies whose practices pose an unacceptable risk. Many point to several examples of events that resulted in billions of dollars of losses for companies and severe declines in stock prices. If ESG metrics had been evaluated, many believe that maybe these risks could have been identified and mitigated.

Investors are also looking to ESG-minded companies because investors feel that factoring in these metrics is simply the right thing to do and that these companies have stronger leadership. Investors believe that leaders who prioritize ESG risks are also likely to manage these risks better and deliver greater long-term shareholder value. There is even a growing body of data showing that the stocks of ESG-minded companies are performing as well as or better than companies that don't make ESG a priority. All of these represent a competitive strength to investors.

Outside the world of shareholders and investments, other stakeholders are also considering ESG in their decision making. Current and potential employees, participants in the supply chain, and members of the community are also asking how companies are measuring and addressing these factors. Just like access to capital, these stakeholders can have an impact on a company's performance and bottom-line.

What Are the Risks of Reporting ESGs?

ESG investing is growing exponentially. Once thought to be solely the investing approach by younger investors, many more participants in the market are looking to ESG metrics for guidance. Because of this, publically traded companies are facing increased pressure not only to develop ESG measurable scoring metrics and achieve these milestones, but also to publish those goals.

But beware, there are no universal reporting requirements or standards at this time, although they may be on the horizon. ESG metrics are currently not included in mandatory financial reporting, but many organizations and institutions are working to formalize disclosures. There was even an effort in Congress last year to require the Securities and Exchange Commission (the "SEC") to formalize a framework. Although the Corporate Governance Improvement and Investor Protection Act (H.R. 1187) passed the House of Representatives in June 2021, it hasn't made much headway in the Senate.

Despite a lack of a mandate from Congress, the latest step to ensure greater consistency and comparability was taken by the SEC last month. On March 21, 2022, the SEC proposed a set of long-anticipated regulations that would require publically-traded companies to make new climate-related disclosures and evaluate associated business risks and impacts. According to the regulation, companies may be required to disclose material physical risks to their business from climate-related events. Companies may also be required to disclose risks associated with the company's transition to a lower-carbon future. Finally, companies may be required to disclose direct greenhouse gas emissions from their operations and indirect emissions from their energy use and from a company's supply chain and customers who use the products, if they are deemed meaningful to investors and to the company's financial performance.

continued on page 6

continued from page 5

This final category of emissions has caused some debate in the industry as stakeholders evaluate the difficulty to collect and measure these emissions.

The proposed regulations will be subject to public comment through May 20, 2022 and will most certainly face legal challenges if approved. Thus, it is unknown when the SEC regulations will be finalized and whether the regulations will be substantially revised due to public comment, but companies should begin to develop internal processes to understand, collect, and measure their ESG data and risks. Until the regulations are finalized, there are many third parties that have filled the gap to provide guidelines; however, without a universal and formalized framework, it is difficult for investors and for companies to compare metrics and performance.

Despite the lack of conformity, many companies track ESG metrics and include ESG disclosures in their annual report and SEC filings or in an independent ESG report. Since no mandatory disclosure requirements exist, companies must carefully evaluate these disclosures to determine whether the benefit of the disclosure outweighs the potential risk. Companies must be careful to understand and use widely accepted standards and be cautious not to make inaccurate statements. There is a developing litigation trend where consumers and shareholders are challenging a company's ESG statements as misrepresentations, unfair and deceptive trade practices, and securities fraud. Companies need to be extra vigilant that they are making accurate and supportable statements regarding their ESG disclosures.

Conclusion

Establishing, tracking, and reporting ESG goals and metrics will soon be the norm for companies, if it is not already. Investors are regularly looking for these measures and incorporating them into their investing strategies. Companies, however, should not make these disclosures lightly and should establish the correct internal controls and reporting standards.

If you need assistance with establishing ESG initiatives or reporting ESG metrics, or if you need assistance defending your ESG reporting, please contact any of the attorneys on this post. We're working alongside our clients as they navigate sustainability and ESG challenges, serving as their trusted business advisor and helping them uncover opportunities they have to make change, all the while remaining equally committed to further developing our own internal programs.

We understand that clients operating in different industries face unique sustainability and ESG opportunities and challenges. Our proactive, industry-focused approach is intended to assist clients as they navigate the myriad of sustainability and ESG topics impacting their businesses. Future blog posts will dig deeper into these industry-specific issues, and we welcome your feedback as we continue to develop this series.

Author:

Van P. Hilderbrand, Jr.

Van P. Hilderbrand, Jr. is a principal in the Environment and Energy Practice Group of Miles & Stockbridge who helps clients across a wide range of industries navigate the increasingly critical intersection of business, law and sustainability.

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or ACC.

2022 Maryland General Assembly Employment Law Update

By Chelsea L. Hartnett and Clifford B. Glover III, Jackson Lewis

Among the legislation the Maryland General Assembly passed during its most recent session are some that may significantly affect employers across the state for years to come. Summarized below is what corporate counsel in Maryland should know about the new Family and Medical Leave Insurance Program and two potential expansions of the Maryland Fair Employment Practices Act (FEPA).

Maryland Family and Medical Leave Insurance Program

On April 9, 2022, the Maryland legislature overrode Governor Larry Hogan's veto and passed Senate Bill 275 (Time to Care Act of 2022). Maryland joins nine states and the District of Columbia that already have paid family and medical leave (PFL). The new law will establish a family and medical leave insurance program that will be funded by contributions from employees, employers, and self-employed individuals.

Benefits: Covered employees will be entitled to up to 12 weeks annually of paid, protected time off to care for a child,[1] their own serious health condition, or a family member's[2] serious health condition, to care for a service member who is next of kin, or qualifying exigency related to military deployment of a family member. A parent may be eligible for up to 24 weeks of medical leave if needed during pregnancy followed by parental leave after childbirth. Employees may use paid leave intermittently in increments of at least 4 hours. PFL will run concurrently with eligible leave under the Family and Medical Leave Act (FMLA) and, likely, Maryland's Parental Leave Law.

The reasons in which employees may take leave generally mirror those provided in federal FMLA, with some differences, such as a broader definition of family member.

continued on page 7

continued from page 6

The weekly benefit amount ranges from $50 to $1,000 per week, depending on the employee's average weekly wage.

Employees must use all employer-provided leave benefits (i.e., paid time off or paid parental leave) before receiving PFL benefits. The law does not expressly address whether an employer may force the use of sick leave before the use of PFL.

Finally, during PFL leave, employers must continue to provide health insurance benefits as required under the FMLA.

Covered Employees: Employees who work 680 hours in the prior 12 months (approximately 13 hours per week) are eligible for benefits. The law does not explain whether the 680 hours must be worked exclusively in Maryland or if all hours must be worked for the same employer. Therefore, it is possible that PFL may function like unemployment, in that all employees who meet the hours worked requirement will be covered no matter how long they have been employed by their employer.

Covered Employers: Employers[3] with one or more employees in Maryland must provide protected leave to covered employees. However, employers with fewer than 15 employees are not required to contribute to the fund. Additionally, the state will pay the employer contribution for employers that are community-based agencies or programs serving individuals with mental disabilities or disorders, substance-related disorders, or developmental disabilities.

Contributions: Employers will be responsible for deducting employee contributions through wage deductions. On June 1, 2023, the Maryland Department of Labor, Licensing and Regulation (DLLR or Department) will establish the contribution rates and the cost-sharing formula, which will fluctuate between 75% paid by employers or 25% paid by employees or vice versa. Alternatively, with DLLR's approval, employers may implement a private plan consisting of employer-provided benefits, insurance, or a combination of both that would meet or exceed the benefits and protections under the law.

Job Protected Leave: An employee may be terminated only for cause while on PFL. However, the law does not define "cause," therefore, it is unclear what constitutes "cause."

Employees must be restored to an equivalent position upon return from PFL. An employer may deny restoration to equivalent position only if (1) the "denial is necessary to prevent substantial and grievous economic injury to the operations of the employer"; (2) the employer notifies employee of this intent at the time the employer determines the injury; and, (3) if the leave has already begun, the employee *elects* not to return to employment after receiving notice. This provision also leaves unanswered questions. For example, must an employer that plans to initiate a reduction in force notify employees on PFL that their positions may be eliminated when the employer determines the economic injury, but before the employer notifies impacted employees not on PFL? Forthcoming regulations may address this question, as well as some of the other uncertainties outlined above.

Notice Requirements:

- **Employees:** Employees needing leave must provide their employer with 30 calendar days advance notice if the need for leave is foreseeable. If the need for leave is not foreseeable, employees must provide notice as soon as practicable and generally comply with an employer's notice requirements for requesting other leave, if possible.
- **Employers:** Employers must provide notice to employees of their rights under the PFL program (1) at the time of hire, (2) annually, and, (3) upon notice of the need for leave, the employer must provide notice of eligibility within five business days. The DLLR will develop a standard notice, which will include the employee's rights to benefits and job protections under the PFL program, the procedure for filing a claim for benefits, responsibilities for providing notice of the need for leave, and the right and procedure to file a complaint for alleged violations.
- **DLLR:** The Department will notify employers of an employee filing a claim for PFL benefits within 5 business days of the employee's filing. Within 10 business days of the employee's filing, the Department will approve or deny the claim and notify the covered individual and employer. The Department will issue the first payment to the employee within 5 business days after the employee's claim is approved and make subsequent payments every two weeks for the remainder of the benefit period
- **Important Dates:** The law will take effect on June 1, 2022. The DLLR will publish regulations by June 1, 2023. The DLLR will establish the contribution rates by June 1, 2023, and those contributions will begin on October 1, 2023. Employees can take leave and request benefits beginning January 1, 2025.

Penalties/Enforcement: Employers cannot discharge, demote, or otherwise discriminate or take adverse action against an individual who has filed for, applied for, or received PFL benefits under the Program, asked about their rights and responsibilities under the law, communicated their intent to file a claim, complaint or appeal, or testified (or plans to testify) in a proceeding related to PFL benefits. The DLLR is authorized to investigate potential violations of the law upon a written complaint or upon its own initiative. The DLLR will first attempt to resolve the issue through mediation. If mediation is unsuccessful and the DLLR finds a violation, the Secretary of Labor will issue an order for the recovery of lost wages and liquidated damages, seek reinstatement or the hiring of employees with or without back pay, or assess a civil penalty of up to $1,000 for each employee affected. After the issuance of such order, an employer will have 30 days to comply. If the employer fails to comply, the Secretary of Labor or employee may commence a civil action to enforce the order. An employee may not bring an action unless an order has been issued.

continued on page 8

continued from page 7

If an employee prevails, the court may award three times the employee's lost wages and damages, uncapped punitive damages, reasonable attorney's fees and other costs, injunctive relief, and any other relief deemed appropriate.

Potential Expansions of the Fair Employment Practices Act

On April 11, 2022, the General Assembly passed Senate Bill 450 and Senate Bill 451, expanding FEPA's employee protections by:

- Removing the "severe or pervasive" standard from definitions of "harassment" and "sexual harassment"; and
- Tolling the timeframe for unlawful employment practice claims while administrative charges are pending under agency investigation.

The bills will go into effect on October 1, 2022.

Maryland joins California, New York, and Montgomery County, Maryland, in eliminating the "severe or pervasive" standard. Additionally, many states have extended the statute of limitations for harassment claims in response to the #MeToo movement.

S.B. 450

S.B. 450 amends FEPA's current definitions of "harassment" and "sexual harassment" to eliminate the long-standing Maryland requirement that the offending conduct be "severe or pervasive." Currently, courts applying Maryland and federal anti-discrimination law analyze the following factors to determine whether the conduct in question was "severe or pervasive:" "the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Magee v. Dansources Tech. Servs., 137 Md.App. 527, 561 (2001) (quoting Manhiki v. Mass. Transit Admin., 360 Md. 333, 348-49 (2000) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (internal quotation marks omitted)). An isolated comment often is insufficient for a plaintiff to meet their burden of proof. This may be subject to change with the proposed amendment.

Maryland employers can anticipate that more employees will assert claims of harassment. It also will be more challenging to secure agency dismissals and to prevail on summary judgment, thus driving up defense and settlement costs. To prepare for this potential change, employers should review their anti-discrimination and harassment policies and training materials.

S.B. 451

S.B. 451 tolls the limitations period for unlawful employment practice claims while an administrative charge of discrimination or other complaint is pending before the Equal Employment Opportunity Commission (EEOC), Maryland Commission on Civil Rights (MCCR), or a similar local agency.

The current limitations period is two years after the alleged unlawful employment practice occurred or three years if the complaint alleges harassment. Interestingly, this bill does not explicitly add the new "sexual harassment" definition under S.B. 450 to the three-year limitation period. This arguably means that sexual harassment claims have a two-year limitations period.

As a result of S.B. 451, employers may find themselves defending older claims in court. Therefore, it will be more important than ever for employers to have well-crafted documentation of employment decisions because it may be more likely that key decision makers will no longer be employed by the company at the time of litigation. This may be particularly true as Americans (particularly millennials and generation Z) are less likely to desire long-term employment.

Employers should also review their document retention policies and may consider extending document retention schedules as the EEOC and MCCR can take more than a year to process charges.

Chelsea L. Hartnett

Clifford B. Glover III

[1]An employee may submit a claim for benefits to care for "a newborn child or a child newly placed for adoption, foster care, or kinship care with the covered individual during the first year after the birth, adoption, or placement."

[2]Family member is defined as "(1) a biological child, an adopted child, a foster child, or a stepchild of the covered individual (covered employee or self-employed individual); (2) a child for whom the covered individual has legal or physical custody or guardianship; (3) a child for who the covered individual stands *in loco parentis*, regardless of the child's age; (4) a biological parent, an adoptive parent, a foster parent, or a stepparent of the covered individual or of the covered individual's spouse; (5) the legal guardian of the covered individual or the ward of the covered individual or of the covered individual's spouse; (6) an individual who acted as a parent or stood *in loco parentis*; (7) the spouse of the covered individual; (8) a biological grandparent, an adopted grandparent, a foster grandparent, or a stepgrandparent of the covered individual; (9) a biological grandchild, an adopted grandchild a foster grandchild, or a stepgrandchild of the covered individual; or (10) a biological sibling, an adopted sibling, a foster sibling, or a stepsibling of the covered individual."

[3]Employer is defined as a "person or governmental entity that employs at least on individual in the State." The definition excludes self-employed individuals.

Board Leadership

President
Kimberly Neal
General Counsel
Harford County Public Schools

President Elect
Taren Butcher
Allegis Group
tbutcher@allegisgroup.com

Immediate Past President
Dan Smith
Under Armour
daniel.smith@underarmour.com

Secretary
Kristin Stortini
Assistant General Counsel
Baltimore Ravens

Communications Chair
Raissa Kirk
Senior Associate General Counsel
The Johns Hopkins University
Applied Physics Laboratory

Program Chair
Matthew Wingerter
Catholic Relief Services
matthew.wingerter@crs.org

Board Members
Tyree Ayers
Cory Blumberg
Taren Butcher
Dee Drummond
Raissa Kirk
Shawn McGruder
Kimberly Neal
Danielle Noe
Shane Riley
Laurice Royal
Dan Smith
Kristin Stortini
Michael Wentworth
Nathan Wilner
Matthew Wingerter

Past Presidents Advisory Board
Larry Venturelli
Prabir Chakrabarty
Karen Gouline
Melisse Ader-Duncan
Frank J. Aquino
Ward Classen
Maureen Dry-Wasson
Lynne M. Durbin
Lynne Kane-Van Reenan
Andrew Lapayowker
William E. Maseth, Jr.
Christine Poulon
Dawn M. B. Resh
Mike Sawicki

Chapter Administrator
Lynne Durbin
ldurbin@inlinellc.net