

LOCAL EVERYWHERE

Leave Law Lab: From FMLI to WARNing Signs Across the DMV

Untangling Paid Leave, Protected Rights, and
Compliance Pitfalls in Maryland, DC, and
Virginia

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Three Regions, Three Standards

Leave Law by Location

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Paid Leaves of Absence

MD

- FMLI Program
- Maryland Healthy Working Families Act
- Montgomery County Earned Sick and Safe Leave Law

DC

- DC Accrued Sick and Safe Leave Act
- Universal Paid Leave Act

VA

- Gov. vetoed a paid family and medical leave bill
- Virginia law does not generally address paid sick leave for private sector employees.
- However, certain home health workers must receive paid sick leave.

MD: Family and Medical Leave Insurance Program (FAMLI)

- The FAMLI Program will provide:
 - Up to 12 weeks of paid family and medical leave
 - Job protection
 - Up to \$1000 a week
- The FAMLI Program applies to all employers, regardless of payroll size.
- Any employee who works at least 680 hours in a position based in Maryland over the previous four reported calendar quarters will be eligible for benefits.

MD: FMLI Program Key Milestones

- Given funding considerations, implementation has been delayed
- **January 1, 2027:** State Plan contribution period begins
- **January 3, 2028:** Benefits begin
- ***Contributions are based upon “qualified employment”:***
 - All wages paid for qualified employment are subject to contributions up to the Social Security wage base. Employment is qualified if: (1) the employer pays unemployment insurance (UI) contributions to Maryland for that employee, or (2) the employer does not pay UI anywhere else *and* the employment is performed either wholly or partly in Maryland where (a) employment performed outside Maryland is “incidental” to the employee’s Maryland employment, (b) employment performed in Maryland is not incidental to out-of-state work and the base of operations or the place from which the employment is controlled or directed is in Maryland, or (c) the employment is performed by a resident of Maryland and not in a state in which employment is controlled or directed or where the base of operations is located.

MD: Employers: What Is My Contribution?

**Employers with
15 or more
employees**

Contribute
0.45% of wages

**Employers with
14 or fewer
employees**

Exempt from
paying 0.45%
of wages

**Self-employed
individuals**

Participation is
optional at 0.9%
of wages

**All Maryland
employees**

Contribute
0.45% of wages

MD: Leave Coordination

- Employers cannot require workers to use employer-provided time off before or while using paid family and medical leave.
- **Exception:** An employer and worker can agree to use employer provided time off to “top off” the FAMLI benefit.
- **Exception:** If an employer provides parental leave, which the FAMLI Division refers to as Alternative FAMLI Purpose Leave (“AFPL”), then the employer can require employees to take AFPL concurrently with FAMLI leave.

MD: Private Plans

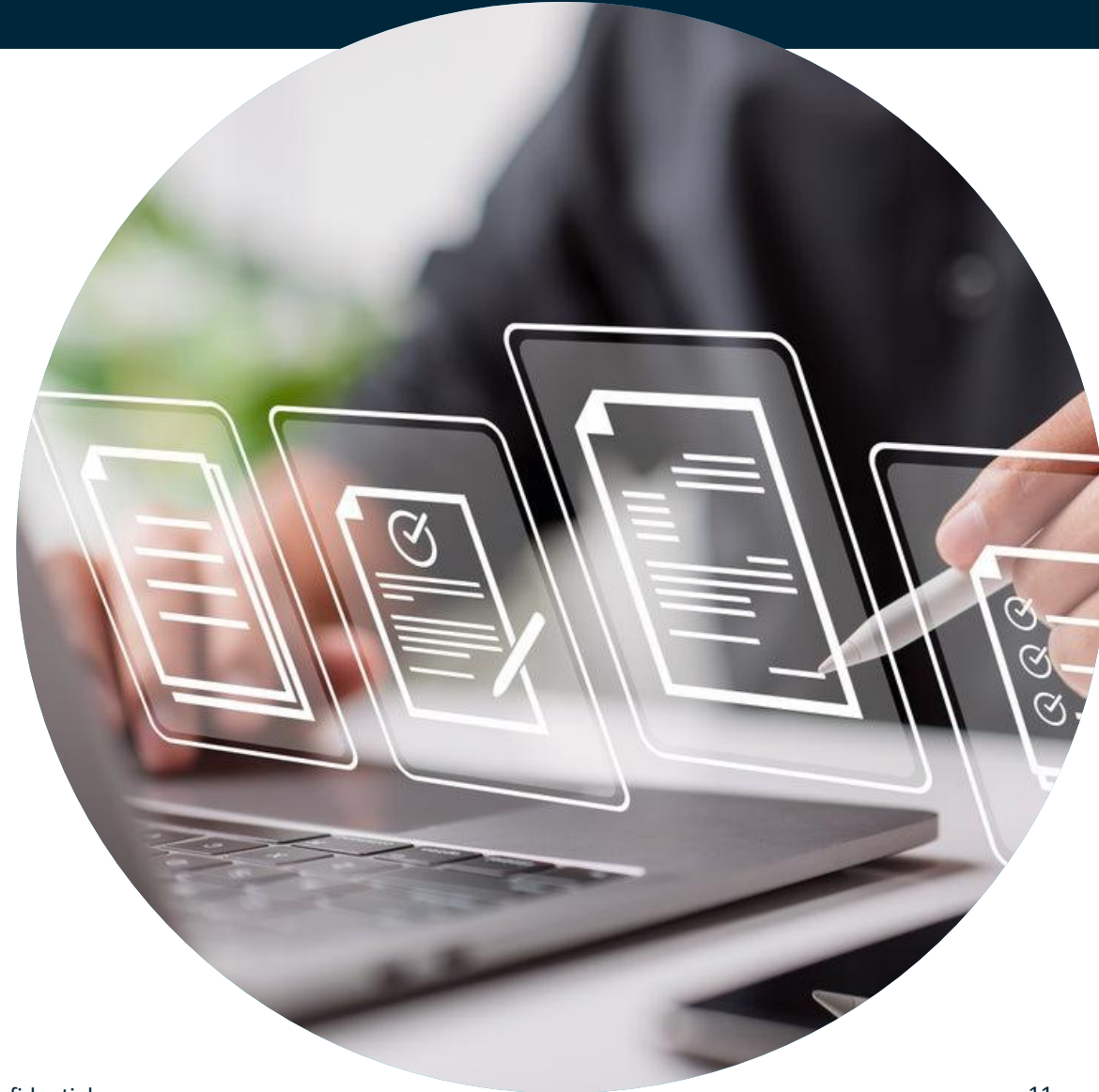
- Employers can seek approval for a **commercial** or **self-insured** plan
 - Plans must offer benefits and protections that are the same as or better than the State Plan
 - The Department can set reasonable fees for employers seeking private plans
 - Requirement to submit quarterly wage and hour reports and claim data to the State

DC: Universal Paid Leave Law

- Current maximum leave within 52-week period is:
 - 12 workweeks of parental leave;
 - 12 workweeks of family leave;
 - 12 workweeks of medical leave; and
 - 2 workweeks of pre-natal leave (can stack with parental leave).
- DC passed a measure [prohibiting](#) private disability insurance providers from reducing short-term disability benefits based on actual or estimated paid leave benefits.
- Updated posting issued with new maximum weekly benefit (\$1,153)
- Employer contribution remains at 0.75%

DC: Universal Paid Leave Law

- Which Employers are Covered Under the Law?
 - Under the UPLA, a covered employer is anyone who controls the wages, hours, or working conditions of a worker and is required to pay Unemployment Insurance (UI) tax in DC for its workers



MD: Sick Leave

- 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.
 - **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.

DC: Paid Sick Leave

- In the District of Columbia, an "**employer**" under the Accrued Sick and Safe Leave Act (ASSLA) is defined as any legal entity (including a for-profit or nonprofit firm, partnership, proprietorship, etc.) or any receiver or trustee of an entity who directly or indirectly employs or exercises control over an employee's wages, hours, or working conditions.
- An "**employee**" is defined as someone who works more than 50% of their working time in the District of Columbia or a substantial amount of time working the District and not more than 50% of the time working in another jurisdiction.

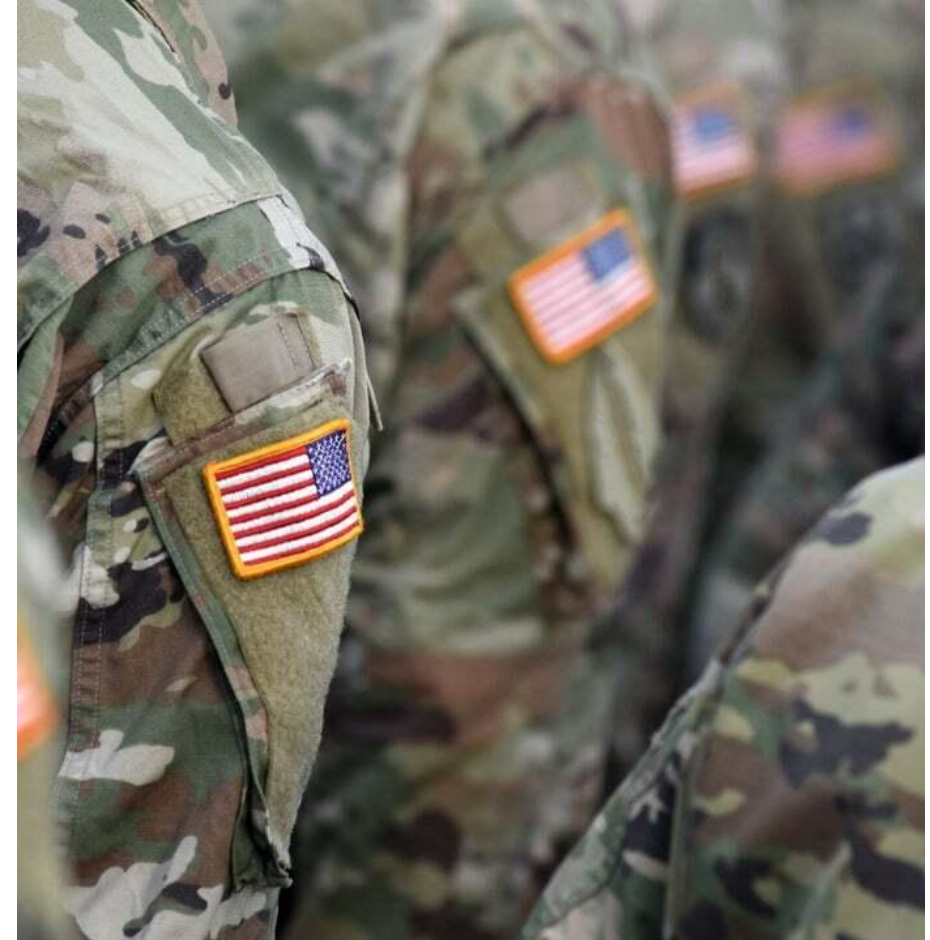
Thorns in the Vines

USERRA, WARN & Other Leave Law
Landmines

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- Applies to all employers, regardless of size.
- Applies to employees who take leave for service in the uniformed services.
- Provides an employee with the right to take a leave of absence for **up to 5 years** of military service, employment reinstatement rights following completion of a period of service, and protection from discrimination based on military service.



What are the Uniformed Services?

- The Armed Forces (Army, Navy, Air Force, Marines, Coast Guard, Space Force);
- The Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty;
- The Commissioned Corps of the Public Health Service;
- The commissioned officer corps of the National Oceanic and Atmospheric Administration, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act;
- Intermittent personnel who are appointed into Federal Emergency Management Agency service under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)) or to train for such service; and
- Any other category of persons designated by the President in time of war or national emergency.

What is Service in the Uniformed Services?

The performance of duty, *on a voluntary or involuntary basis*, in a uniformed service under competent authority and includes:

active duty, active duty for training, initial active duty for training, and inactive duty training;

full-time National Guard duty;

State active duty for a period of 14 days or more;

State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.);

State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170);

a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty,

a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act;

a period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)); and

a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

Employee Obligations Under USERRA

USERRA imposes **4 basic obligations** on employees who take leave for service in the uniformed services and seek reinstatement:

1. The employee must provide proper notice (verbal notice sufficient);
2. The cumulative total of the employee's service periods does not exceed 5 years, except as otherwise permitted by USERRA;
3. The employee seeks reinstatement within the timeframes outlined by USERRA; and
4. The employee is discharged from service in the uniformed services in a manner that does not disqualify the employee from USERRA's protections.

Employer Obligations Under USERRA

- Employer must “promptly” reemploy upon return or reapplication.
- “Promptly” depends on the length of the service period, but no more than **2 weeks**, absent unusual circumstances.
- A returning service member is required to be reemployed in the position they **would have attained** “with reasonable certainty” had they remained continuously employed.
- This does not always mean the same position or a promotion.
- It could apply to layoffs or reductions in force, but be wary of position eliminations in non-seniority-based environments.

USERRA Reinstatement Rights

- Vary depending on length of service;
- If on leave 90 days or less, then return to position member would have attained with reasonable certainty had they remained continuously employed, or the closest approximation to that position, or pre-service position.
- If on leave 91 days or more, then return to position member would have attained with reasonable certainty had they remained continuously employed or position of “like” seniority/status/pay or pre-service position or position of “like” seniority/status/pay.

USERRA Reinstatement Rights

- If returning service member is entitled to position currently held by someone else, the employer must displace the employee who holds that position.
- An employee need not be fully qualified for the position they may be entitled to under USERRA. If not fully qualified, the employer must reinstate to that position and make reasonable efforts to qualify the person for the position over time.
- **Key Takeaway:** Broad reinstatement rights that require employers to consider more options than under other leave laws.
- **Practice Tip:** Consider possible advancement opportunities for service members on extended leaves.

- Applies to employers with 100 or more full-time employees when there is a **plant closing** resulting in loss of employment for 50 or more employees or **mass layoff at a single site for employees**, during a 30-day period for either:
 - 50 or more employees AND greater than 33% at the site OR
 - 500 or more employees
- Connected smaller layoffs at different sites within a 90-day period may trigger WARN.
- **How to Count Traveling or Remote Workers?**
 - Assign a home office, location from which work is assigned, or location to which employee reports.
 - For remote workers, could treat home as “single site of employment” so there is never a WARN triggering event which applies to them.

Federal WARN: Notice Requirements

- Written notice must be provided **at least 60 calendar days** in advance of date employee will be terminated.
- Employer must provide notice **to affected employees, unions, state dislocated worker unit and chief elected official of local government within which RIF occurred.**
- **Exceptions:** Faltering company, unforeseen business circumstances, or natural disaster, but notice must be given ASAP with explanation for not giving notice of 60 calendar days
- Back pay & benefits to affected employees for period of violation up to 60 days; civil penalties of up to \$500 per day

Payment in Lieu of WARN Notice?

Pay and benefits

- The benefits challenge
- 60 workdays pay for hourly in Third Circuit (*North Star*)
- Doesn't work in MD or NJ

Non-compliance with WARN – civil liability for non-compliance

Payment within 3 weeks deflects \$500 daily penalty

Must be “free and clear” of any other obligation or condition

- No Release!
- Separate from any severance pay plan or policy
- Can not integrate or offset severance pay plan or obligation

- Applies to employers with **50 or more employees within Maryland** and triggered by reduction in operations.
 - Relocation of part of operations reduces number of employees by the greater of at least **25% or 15 employees**; OR
 - Shutdown of workplace or portion of operations reduces number of employees by the greater of at least **25% or 15 employees** over a 3-month period
- **Exemptions:** labor disputes, construction sites, temporary or seasonal work, and employer's bankruptcy, natural disaster

Maryland WARN: Notice Requirements

- 60-day written notice **to all employees at affected workplace, unions, state Dislocated Worker Unit and chief elected official of local government where workplace is located.**
- Notice must include name and address of affected workplace; contact information for company official; whether the change is temporary or permanent and if the workplace will close; and the expected start date of the RIF.
- Violation can result in civil penalty of up to \$10,000 per day (up to \$600,000 for full 60-day period).
- No private right of action.

Pregnancy Disclosure

- Pregnant Workers Fairness Act (PWFA)
- Virginia Human Rights Act (VHRA)
- Maryland Fair Employment Practices Act (FEPA)
- D.C. Protecting Pregnant Workers Fairness Act (PPWFA)



Pregnancy Disclosure

- What can employer do if an employee becomes pregnant shortly after hire or did not disclose pregnancy during the hiring process?
- FMLA leave applies to employees who employees who: (1) have worked for the Company for a total of at least 12 months; (2) have worked at least 1,250 hours over the previous 12 months as of the start of the leave; and (3) work at a location where at least 50 employees are employed by the Company within 75 miles, as of the date the leave is requested.

Pregnant Workers Fairness Act

- Applies to employers with at least 15 employees
- Requires the Company make reasonable accommodations for known physical or mental limitations related to the pregnancy, childbirth or related medical conditions (whether or not such conditions meet the definition of disability under the ADA) of a qualified **applicant** or **employee**, unless the accommodation would impose an undue hardship on the operation of the Company's business
- Four specific accommodations are de facto reasonable, referring to these as "predictable assessments":
 1. Allowing an employee to carry or keep water and drink, as needed, in or nearby the employee's work area;
 2. Allowing an employee to take additional restroom breaks, as needed;
 3. Allowing an employee whose work requires standing to sit, and vice versa, as needed;
 4. Allowing an employee to take breaks, as needed, to eat and drink.

PWFA: Qualified Employees

- An employee or applicant shall be considered qualified if:
 - Any inability to perform an essential function is for a temporary period;
 - The essential function could be performed in the near future; *and*
 - The inability to perform the essential function can be reasonably accommodated.
- PWFA does not disqualify those who temporarily cannot perform one or more essential job functions, if (i) they expect to be able to perform them in the near future and (ii) the temporary inability can be reasonably accommodated.
- “in the near future” = generally 40 weeks with respect to a current pregnancy; and case by case analysis with respect to childbirth and other related conditions

Defining “Pregnancy, Childbirth and Related Conditions”

Current Pregnancy

Past Pregnancy

Potential
Pregnancy

Lactation including
breastfeeding or
pumping

Contraception

Menstruation

Infertility and
Fertility Treatment

Endometriosis

Miscarriage

Stillbirth

Abortion

Leave as an ADA Accommodation



- Even when there is no job protected leave left under FMLA or state law, you may be required to accommodate with unpaid leave of absence under the ADA.
- Typically applies when medical provider says employee can return to work in several weeks or months. Indefinite leaves of absence do not have to be accommodated.
- **Undue Hardship** – “an action requiring significant difficulty or expense” by the employer –i.e., unduly costly, extensive, substantial, disruptive, or would fundamentally change nature or operation. Often very difficult for an employer of significant size or scale to establish, and inconvenience lands far from meeting this standard.

Short-Term Disability & ADA Accommodations

- Short-term disability often runs concurrent with FMLA or other paid or protected leaves of absence, including workers' compensation.
- Depending on plan documents, employee is required to prove a certain degree of disability to qualify for the benefit.
- May be fully-funded by the employer or through contributions by the employee.
- If fully-funded by the employer, consider whether you may be entitled to offsets in workers' compensation and other paid leave benefits.
- Still required to accommodate employee if they are a qualified individual who can perform job with or without reasonable accommodation.

Workers' Compensation



- Where applicable, a best practice is to run FMLA leave concurrent with absence related to work injury.
- Do not forget about the ADA and consider whether you can accommodate the employee's work restrictions just as you would any other employee seeking accommodation for a condition unrelated to workplace injury.
- Automatic terminations following a defined period out of work may violate ADA.
- Be mindful of state workers' compensation retaliation laws.

Top Scenarios

Practical Takeaways for
Regional Employers

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Hybrid Workers

- Which law applies?
- Where is the worker's home office?
- Where do they perform their remote work?
- Does the worker perform half their work in D.C.?

Termination During Leave

- FMLA
- Pregnancy or ADA Leave of Absence
- USERRA
- Can the employee on leave be treated more favorably in a RIF than employees not on leaves of absence?

Termination During Military Leave

- In what situations can an employee be terminated during military leave?
- Reinstatement rights vary depending on length of service.
- Defenses to reemployment claims are very limited in scope. Have to show:
 - “Impossible or unreasonable” to reemploy based on changed circumstances.
 - Undue hardship.
 - Employment was only for “brief/non-recurrent period” with no reasonable expectation of continued employment.
 - Employer has burden of proving them.

Termination Protection After Reinstatement

- ❑ Employee returning from military leave is protected from termination, except for “cause”:
 - ❑ Service Period of 31-180 Days: Six months of protection.
 - ❑ Service Period of 181 or more days: 1 year of protection.
- ❑ “Cause” is defined based on whether the termination is a due to conduct or a RIF.
 - ❑ Conduct: Employer must prove that it was reasonable to discharge employee for conduct and that the employee had express or implied notice that such conduct could lead to termination.
 - ❑ RIF: Employer must prove legitimate, non-discriminatory reason for including employee’s position in RIF.

Leave and Contract Endings

- Consider whether there are other contracts available for reassignment.
- Do exceptions to WARN and USERRA reinstatement rights apply?
- Does undue hardship analysis apply?
- Would severance agreements mitigate legal exposure?

Government Contractor Constraints

- What if the client requests removal of the employee from the project?
 - Ensure no discriminatory/retaliatory motive.
 - Consider placement on other assignments.
- Loss of a contract or funding may cause undue hardship and/or excuse obligations under FMLA, USERRA, or WARN.



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

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