

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 917
Economic Matters

(Delegate Kramer, *et al.*)

Maryland Aviation Administration - Contract Authority - Transportation
Companies

This bill prohibits the Maryland Aviation Administration (MAA) from contracting with a company to provide shared-ride transportation services in specified circumstances unless the contract between MAA and the company meets specified conditions. The bill may not affect or alter any existing contract or obligation.

The bill takes effect July 1, 2014.

Fiscal Summary

State Effect: Transportation Trust Fund revenues may decrease to the extent that competition for MAA shared-ride contracts decreases as a result of the bill. Expenditures are not directly affected.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: MAA may not contract with a company to provide shared-ride transportation services to or from an airport to members of the public unless the contract includes a provision that requires:

- the contractor to negotiate and enter into a contract with organizations that represent, or reasonably seek to represent, the majority of the drivers in the

industry for the purposes of bargaining over the terms or conditions of the drivers' employment or the drivers' provision of services; and

- the contract between the contractor and those organizations to prohibit the organizations from engaging in, encouraging, or ratifying work stoppages with regard to the services provided under the contract with MAA by the contractor or any subcontractor.

The bill only applies to a contract for shared-ride transportation under which MAA receives revenue in the form of percentages or portions of the income, revenue, profits, or other proceeds received by the contractor for the performance of the service.

Current Law:

Maryland Aviation Commission: The Maryland Aviation Commission, which oversees MAA, establishes policies for the Baltimore/Washington International Thurgood Marshall Airport (BWI Marshall) and approves policies and regulations for the operation of Martin State Airport (MTN) and for major capital projects. The commission is under the organizational direction of the Maryland Department of Transportation.

MAA has responsibility for fostering, developing, and regulating aviation activity throughout the State. MAA is responsible for operating, maintaining, and developing the State-owned BWI Marshall Airport as a major center of commercial air carrier service in the State and MTN as a general aviation reliever facility and as a support facility for the Maryland Air National Guard and the Maryland State Police.

MAA may make any contract necessary for or incidental to the performance of its duties and the exercise of its powers. If the planning, acquisition, construction, improvement, maintenance, or operation of any airport facility is financed with federal money, MAA may contract as required by federal authorities acting under federal law.

Workplace Fraud Act: Chapter 188 of 2009 (the Workplace Fraud Act) establishes, for the purpose of enforcement only, a presumption that work performed by an individual paid by an employer creates an employer-employee relationship, subject to specified exemptions. It prohibits construction companies and landscaping businesses from failing to properly classify an individual as an employee and establishes investigation procedures and penalties for noncompliance.

The "ABC test" incorporated in the Workplace Fraud Act is used by the Department of Labor, Licensing, and Regulation (DLLR) to establish whether an employer-employee relationship exists for the purpose of determining whether an employee has been misclassified under the Act. While only used to detect workplace fraud in the specified industries, DLLR is required to use the ABC test in determining whether an individual is

an employee in any industry for the purpose of determining whether the employer should pay unemployment insurance for the individual. The ABC test has three components, all of which must be met to establish that an individual is an independent contractor and not an employee:

- A. the individual is free from control and direction over his or her performance both in fact and under the contract (Alone);
- B. the individual customarily is engaged in an independent business or occupation (Business); and
- C. the work performed is outside the usual course of business, or outside the place of business, of the person for whom work is performed (Control).

Collective Bargaining: It is the policy of the State that negotiation of terms and conditions of employment should result from a voluntary agreement between employees and the employer and, thus, each individual worker must be fully free to associate, organize, and designate a representative for negotiation of terms and conditions of employment. This process must be free from coercion, interference, or restraint by an employer in (1) designation of a representative; (2) self-organization; and (3) other concerted activity for the purpose of collective bargaining or other mutual aid or protection. State law establishes a procedure for certifying a labor organization as the bargaining representative for a workplace, and a majority of employees must vote in favor of joining a union in order for a workplace to unionize.

Background:

Classification of Employees: The U.S. Department of Labor reports that the misclassification of employees presents a serious problem in the nation; misclassified employees are often denied access to benefits and protections such as unemployment insurance, medical leave, overtime, the minimum wage, and the right to unionize. For this reason, the U.S. Department of Labor has established the Misclassification initiative. This initiative is tasked with partnering with states to ensure national and state labor laws are followed appropriately. The initiative has partnered with 15 states, including Maryland.

Super Express, Inc. (Super Shuttle) is currently the organization that provides shared-ride transportation services to MAA. In 2009, DLLR was required to perform an ABC test to determine whether drivers of Super Shuttle were employees for the purpose of determining whether Super Shuttle should pay unemployment insurance for the drivers, because Super Shuttle classifies its drivers as franchisees. First (Alone), DLLR found that drivers were not free from direction and control, as they were required to lease vans from Super Shuttle, adhere to a dress code, and were prohibited from refusing any trip that was dispatched to them. Second (Business), DLLR found that the drivers were not

customarily engaged in independent shuttle services as the required franchise agreement prohibited drivers from using the leased van to provide services to any other transportation company. And third (Control), DLLR found that the driver services were integrated into Super Shuttle’s business and performed at Super Shuttle’s place of business. As such, DLLR found that Super Shuttle drivers were employees, and that Super Shuttle was and is required to pay unemployment insurance for its drivers. However, this decision has been appealed.

In 2011, the National Labor Relations Board (NLRB) branch in Denver, held that Super Shuttle drivers in that region are employees and not independent contractors; therefore, the drivers had a right to collective bargaining. This decision was based, in part, on the fact that the employer put restrictions on the drivers, such as uniform requirements and, most important, that franchisees were not authorized to transfer their franchise with Super Shuttle’s approval. In contrast, the NLRB branch in Baltimore held in 2013 that Super Shuttle drivers at BWI Marshall could be considered independent contractors and did not have the right to collective bargaining, in part due to a driver’s ability to act as a supervisor and hire and fire relief drivers. Both NLRB decisions have been appealed.

Collective Bargaining in the State: According to the U.S. Bureau of Labor Statistics, 11.6% of employees in Maryland were *members of* unions and 13.1% of employees in Maryland were *represented by* unions (which include those paying service fees) in 2013. These percentages are slightly higher than the national average of 11.3% and 12.4%, respectively. **Exhibit 1** shows the percentage of union members and workers represented by unions in Maryland and its surrounding states, including the District of Columbia.

Exhibit 1
Union Participation Rates in Maryland and Surrounding States
2013

	<u>Union Members</u>	<u>Represented by Unions</u>
Delaware	10.3%	11.0%
District of Columbia	9.3%	11.0%
Maryland	11.6%	13.1%
Pennsylvania	12.7%	13.7%
Virginia	5.0%	6.4%
West Virginia	12.7%	13.5%

Source: U.S. Department of Labor

Additional Comments: MAA advises that the bill may be preempted by federal law. MAA reports that a determination will have to be made by the courts as to whether the bill is attempting to regulate labor relations, which would be preempted by federal law, or if it is attempting to protect a proprietary interest of the State, which would not be preempted by federal law. Based on this uncertainty, MAA is concerned that, if adopted, the bill may be challenged in court.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Public Service Commission, Maryland Department of Transportation, U.S. Department of Labor, National Labor Relations Board, U.S. Bureau of Labor Statistics, Department of Legislative Services

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