

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

House Bill 1072
Economic Matters

(Delegate W. Miller, *et al.*)

Labor and Employment - Discrimination Based on Engagement in Lawful
Activities - Prohibition

This bill prohibits an employer, including the State and local governments, from discharging, failing or refusing to hire, or otherwise discriminating against an applicant or employee based on the applicant or employee engaging in a lawful activity off the employer's premises during nonworking hours that does not or will not adversely affect an applicant's or employee's safety, job performance, or ability to properly fulfill employment responsibilities.

The bill takes effect July 1, 2015. It applies prospectively and may not be applied to or interpreted to have any effect on or application to any cause of action arising before its effective date.

Fiscal Summary

State Effect: State expenditures (all funds) increase – potentially significantly – due to no longer discriminating against certain individuals, like smokers, in terms of health care. The Office of the Attorney General has no enforcement role in the bill; any increased activity for the office would involve defending the State against claims from its own employees. The number of such cases is not expected to require additional resources. Revenues are not affected.

Local Effect: Many local jurisdictions do not discriminate against an employee or applicant for lawful activities off the employer's premises during nonworking hours in terms of employment decisions. However, expenditures could increase to update discrimination policies, train employees on the new policies, and no longer discriminate against certain individuals, like smokers, in terms of health care.

Small Business Effect: Potential meaningful. Employers who discriminate against applicants or employees for lawful activities performed off the employers' premises during nonworking hours are affected.

Analysis

Bill Summary: The bill's prohibition does not apply if the lawful activity is:

- related to a bona fide occupational requirement;
- part of an executive compensation package negotiated with the employee or prospective employee;
- part of a compensation package negotiated with a professional actor, actress, or sports figure;
- part of a collective agreement under which an employee is covered; or
- necessary to avoid a conflict of interest, or appearance of one, with any responsibilities to the employer.

An applicant or employee may bring a civil action against the employer for a violation of the bill, but must do so within one year from the date of the alleged violation, to (1) recover wages or benefits lost as result of the violation; (2) obtain an order of reinstatement without loss of position, seniority, or benefits; or (3) obtain an order directing the employer to offer employment to the applicant. The court may award reasonable costs, including court costs and attorney's fees, to the prevailing party in an action.

Current Law: Discrimination in public accommodations, labor and employment, and housing on the basis of race, sex, age, creed, color, religion, national origin, marital status, disability, gender identity, and sexual orientation is prohibited.

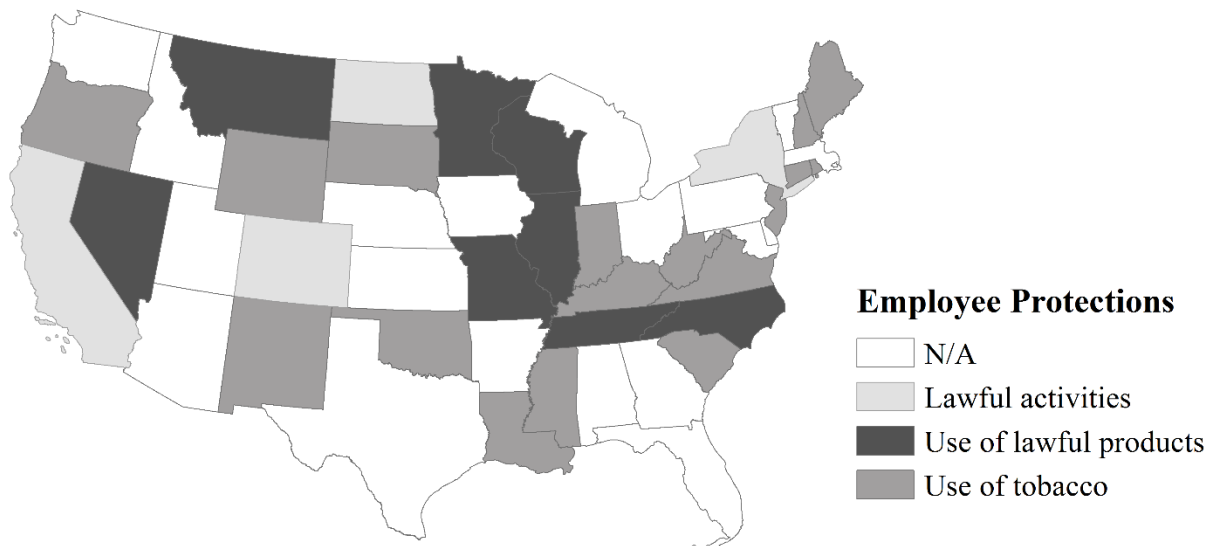
The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If

EEOC finds that discrimination has occurred, it will try to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination. There is no federal or State protection against employment discrimination based on smoking during nonworking hours.

Background: Exhibit 1 shows that 29 states and the District of Columbia have laws that protect employees from adverse employment actions based on their off-duty activities. Eighteen of these states only protect tobacco users, eight states protect employees from discrimination if they use lawful consumable products, and four states bar discrimination against employees who engage in lawful activities outside of work, as does the bill. Of those four states, California only protects against demotion, suspension, or discharge from employment; Colorado only protects against termination. North Dakota and New York have more broad terms of protections, prohibiting discrimination in hiring, firing, and other forms of discrimination.

Exhibit 1 Discrimination Laws Regarding Off-duty Conduct



Source: National Conference of State Legislatures

State Expenditures: The Department of Labor, Licensing, and Regulation (DLLR) anticipates most cases of violations relating to the bill's provisions to be resolved through
HB 1072/ Page 3

an applicant or employee bringing a civil action against the employer. Thus, DLLR can address any complaints or inquiries with existing resources.

The State implemented a new wellness program in 2015 under the State Employee and Retiree Health and Welfare Benefits Program. The wellness program offers benefits to employees, retirees, and enrolled spouses who complete healthy activities throughout the calendar year and imposes penalties for those who do not meet the healthy activities requirements. Participants with specified chronic conditions, like chronic obstructive pulmonary disease, may be required to participate in the disease management program, in which the participant must engage with the plan's nurse and follow the recommended treatment plan or else be penalized with a surcharge of \$250 in 2017. Since smokers may face the disease management surcharge in 2017, the Department of Budget and Management (DBM) may have to stop administering the wellness program or remove provisions in the plan that could be construed as adverse actions for tobacco users. DBM advises that the wellness program is estimated to save the State \$4 billion over 10 years, so the bill could jeopardize all or a portion of these savings.

Local Expenditures: Local jurisdictions may incur additional legal costs relating to litigation authorized under the bill. Additionally, local jurisdictions may incur additional costs to update discrimination policies and train employees. The Town of Leonardtown reports it incurs \$500 of legal services expenses to revise its personnel manual. Salisbury notes expenditures increase by \$2,000 to update discrimination policies and train employees on the new policy.

Harford County advises that it is considering a health insurance program that would charge higher premium rates for tobacco users, so if it were to implement that program, the county might be affected.

Small Business Effect: Small businesses that discriminate against an applicant or employee based on the applicant or employee engaging in a lawful activity off the employer's premises during nonworking hours are negatively affected by the bill.

A recent study from Ohio State University found that a smoker, on average, costs an employer \$5,816 per year through absenteeism, reduced productivity, smoke breaks, and health care costs. Thus, a small business that would otherwise not hire smokers may incur additional costs for employing smokers. Additionally, smokers, on average, make 15.6% less than nonsmokers.

Additional Information

Prior Introductions: None.

Cross File: SB 784 (Senator Conway) - Finance.

Information Source(s): Kent, Montgomery, Washington, and Worcester counties; Town of Leonardtown; City of Salisbury; Office of the Attorney General; Department of Budget and Management; Governor's Office; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; University System of Maryland; National Conference of State Legislatures; Forbes; Department of Legislative Services

Fiscal Note History: First Reader - March 5, 2015
min/mcr

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