

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 377
 Finance

(Senator Lee, *et al.*)

Labor and Employment - Pay Scales and Wage History Information

This bill requires an employer to provide the pay scale for a position to a job applicant on request. An employer may not rely on an applicant’s wage history for screening or considering the applicant for employment or in determining the wages for the applicant. An employer may not rely on the wage history of an employee when considering the employee for a new position, including a promotion, or in determining the wages for the employee. An employer may not seek the wage history information for any employee or applicant from a former (or current) employer. However, an employer may rely on wage history under specified circumstances. **The bill takes effect January 1, 2019.**

Fiscal Summary

State Effect: General fund expenditures increase by \$231,900 in FY 2019. Out-year expenditures reflect annualization and the phased elimination of contractual staff and one-time start-up costs. Additionally, the bill may have a fiscal impact on recruiting, hiring, and promoting State employees. General fund revenues increase modestly from penalties.

(in dollars)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
GF Revenue	-	-	-	-	-
GF Expenditure	\$231,900	\$262,700	\$230,400	\$197,000	\$202,200
Net Effect	(\$231,900)	(\$262,700)	(\$230,400)	(\$197,000)	(\$202,200)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Minimal. Local governments are restricted from seeking or providing wage history or generally relying on wage history when considering an applicant or employee for a new position or in determining wages.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: An employer may rely on wage history after the employer makes an offer of employment or a new position specifying compensation, and the applicant or employee voluntarily provides his or her wage history to negotiate a higher wage. An employer may also rely on an employee's wage history with the employer if the employer is using it to support paying the employee a higher wage.

An applicant or an employee is not prohibited from voluntarily sharing salary history information with an employer.

An employer may not retaliate against an employee or applicant for not providing wage history. The Commissioner of Labor and Industry may bring an action for injunctive relief and damages against a person who does so.

If an employer knew or reasonably should have known that the employer's action violates specified wage disclosure provisions or provisions of the bill, an affected employee or applicant may bring an action against the employer for injunctive relief and to recover actual damages, an additional equal amount as liquidated damages, and special damages of up to \$10,000.

An employer who interferes with the commissioner's enforcement of the bill is guilty of a misdemeanor and subject to a fine of up to \$300. If the commissioner determines that an employer has violated the bill, the commissioner must issue an order compelling compliance. The commissioner may, in the commissioner's discretion, assess a civil penalty of up to \$1,000 for each applicant or employee for whom the employer is not in compliance and up to \$5,000 for each applicant or employee for a second violation within three years. The commissioner must consider specified items when determining the amount of the penalty, and assessment of the penalty is subject to specified notice and hearing requirements.

Current Law: Regardless of employer size, an employer may not prohibit an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee or requesting that the employer provide a reason for why the employee's wages are a condition of employment. An employer may not require an employee to sign a waiver or any other document to deny the employee the right to disclose or discuss the employee's wages. An employer may not take any adverse employment actions against an employee for specified actions regarding wages or exercising specified rights.

An employer may, in a written policy provided to each employee, establish reasonable workday limitations on the time, place, and manner for inquiries relating to employee wages so long as it is consistent with standards adopted by the Commissioner of Labor and

Industry and all other State and federal laws. If an employee does not adhere to these limitations, and the employer acted because of the employee's failure to adhere to the limitations, an employer may have an affirmative defense for taking adverse employment action. A limitation may include prohibiting an employee from discussing or disclosing another employee's wages without that employee's prior permission, except in specified instances for an employee who has access to other employees' wage information as a part of the employee's essential job functions.

These provisions do not (1) require an employee to disclose the employee's wages; (2) diminish employee rights to negotiate the terms and conditions of employment or otherwise limit employee rights; (3) limit the rights of an employee provided under any other provision of law or collective bargaining agreement; (4) create an obligation on an employer or employee to disclose wages; (5) permit an employee, without an employer's written consent, to disclose proprietary information, trade secret information, or information that is a legal privilege or protected by law; or (6) permit an employee to disclose wage information to an employer's competitor.

State law generally prohibits an employer with at least 15 employees from discharging, failing or refusing to hire, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability. The State and local governments are considered employers. Regardless of employer size, under the State's Equal Pay for Equal Work law, an employer may not discriminate between employees in any occupation by (1) 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 or (2) providing less favorable employment opportunities based on sex or gender identity. However, a variation in a wage based on specified systems or factors is generally not prohibited.

When the Commissioner of Labor and Industry has determined that the State's Equal Pay for Equal Work law has been violated, the commissioner must (1) try to resolve any issue informally by mediation or (2) ask the Attorney General to bring an action on behalf of the employee. The Attorney General may bring an action in the county where the violation allegedly occurred for injunctive relief, damages, or other relief.

If an employer knew or reasonably should have known that the employer's action violates Equal Pay for Equal Work provisions, an affected employee may bring an action against the employer for injunctive relief and to recover the difference between the wages paid to employees of one sex or gender identity who do the same type work and an additional equal amount as liquidated damages. If an employer knew or reasonably should have known that

the employer's action violates specified wage disclosure provisions, an affected employee may bring an action against the employer for injunctive relief and to recover actual damages and an additional equal amount as liquidated damages.

An employee may bring an action on behalf of the employee and other employees similarly affected; that action must be filed within three years after the employee receives from the employer the wages paid on the termination of employment.

If a court determines that an employee is entitled to judgment in an action, the court must allow against the employer reasonable counsel fees and other costs of the action, as well as prejudgment interest in accordance with the Maryland Rules.

An employer who violates certain provisions of the Equal Pay for Equal Work law is guilty of a misdemeanor and subject to a fine of up to \$300.

State Revenues: General fund revenues increase modestly from penalties. The Commissioner of Labor and Industry has discretion to assess a civil penalty of up to \$1,000 for each applicant or employee for whom the employer is not in compliance and up to \$5,000 for each applicant or employee for a second offense within three years. *For illustrative purposes only*, if the commissioner assesses an average fine of \$500 to 30 employers, general fund revenues increase by \$15,000 annually.

State Expenditures: The bill creates additional responsibilities for the Division of Labor and Industry within the Department of Labor, Licensing, and Regulation (DLLR) by expanding the Equal Pay for Equal Work law to prohibit employers from seeking or relying on the wage history of applicants or employees. DLLR cannot absorb the additional workload within existing resources and requires additional staff to respond to the increase in inquiries and complaints prompted by the bill.

DLLR estimates it could receive as many as 400 complaints alleging violations annually and, therefore, estimates needing four regular staff and two contractual employees to implement the bill. However, the Department of Legislative Services anticipates fewer complaints and, therefore, anticipates DLLR only needing one wage and hour investigator, one assistant Attorney General, and two contractual wage and hour investigators to respond to and manage the additional workload created by the bill. Over time, it is anticipated that employer familiarity and compliance with the bill's provisions increase, thereby reducing the need for the contractual employees by fiscal 2022 and allowing DLLR to respond to inquiries and enforce the bill with the two permanent positions.

Accordingly, general fund expenditures increase for DLLR by \$231,946 in fiscal 2019, which reflects the bill's January 1, 2019 effective date. This estimate reflects the cost of hiring one regular and two contractual wage and hour investigators and one assistant

Attorney General to investigate and process complaints. It includes salaries, fringe benefits, one-time start-up costs (which include changes to the management information system), and ongoing operating expenses.

Regular Positions	2.0
Contractual Positions	2.0
Regular Salary and Fringe Benefits	\$67,359
Contractual Salary and Fringe Benefits	35,380
One-time Start-up Costs	116,521
Operating Expenses	<u>12,686</u>
Total FY 2019 State Expenditures	\$231,946

Future year expenditures reflect the phased elimination of the contractual positions, full salaries with annual increases and employee turnover, and ongoing operating expenses. If the volume of inquiries or complaints exceeds expectations, one or both of the contractual positions could be extended or converted to regular status.

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State's implementation of the federal Patient Protection and Affordable Care Act.

The Office of the Attorney General and the Office of Administrative Hearings can process cases with existing resources.

The bill has an operational impact, and potentially a fiscal impact, on recruiting, hiring, and promoting State employees. Currently, if an applicant or current State employee applying for a new position requests a salary above the base salary due to the applicant's salary history, proof of the salary is requested. Under the bill, the State is prohibited from seeking the wage history information from an employer, so the State is unable to verify the wage history, if provided, of an applicant or employee to support paying a higher wage. Without being able to verify the salary information, the State may have to offer the lowest salary in the salary grade or offer a higher than justifiable wage. The bill may hinder the ability of State agencies to hire the most qualified candidates.

Local Expenditures: Local governments are restricted from seeking or providing wage history or generally relying on wage history when considering an applicant or employee for a new position or in determining wages. Thus, the bill has an operational impact, and potentially a fiscal impact, on recruiting, hiring, and promoting local government employees.

Small Business Effect: An employer must provide a pay scale for a position to job applicants upon request. The bill generally prohibits employers from relying on the wage

history of an applicant or seeking an applicant's wage history information, so employers may have to alter job applications and refrain from asking wage history questions during interviews and from an applicant's former employer.

An employer is also prohibited from relying on an employee's wage history when considering or determining the wages of the employee for a new position, including a promotion. DLLR advises that any promotion or raise by a small business owner may expose the employer to a potential accusation that the employer used an employee's wage as a factor in determining the new wage.

An employer that violates the bill may be liable for actual damages, liquidated damages, special damages up to \$10,000, court costs, and legal fees for defense counsel if an action is brought against the employer. An employer in violation of the bill may also be assessed civil penalties of \$1,000 for each violation per applicant or employee and up to \$5,000 for each second offense within three years. While an employer may appeal the penalty, the bill does not grant the employer the right to appeal an order compelling compliance.

Additional Information

Prior Introductions: None.

Cross File: HB 512 (Delegate K. Young, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; Office of Administrative Hearings; Department of Legislative Services

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