

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1040 (Delegate Stewart, *et al.*)
 Economic Matters

Labor and Employment - Exemptions From Overtime Pay - Administrative, Executive, or Professional Capacity (Overtime Modernization Act of 2019)

This bill alters an exemption for specified executive, administrative, or professional (EAP) employees from the Maryland Wage and Hour Law, resulting in more workers being eligible for overtime pay.

Fiscal Summary

State Effect: General fund expenditures increase by \$317,300 in FY 2020 for enforcement; out-year expenditures reflect annualization and the elimination of contractual staff and one-time start-up costs. No effect on State compensation for employees as the overtime provision of the Maryland Wage and Hour Law does not apply to the State as an employer (see Additional Comments below). General fund revenues increase minimally.

| (in dollars) | FY 2020 | FY 2021 | FY 2022 | FY 2023 | FY 2024 |
|----------------|-------------|-------------|-------------|-------------|-------------|
| GF Revenue | - | - | - | - | - |
| GF Expenditure | \$317,300 | \$323,900 | \$334,100 | \$345,000 | \$356,200 |
| Net Effect | (\$317,300) | (\$323,900) | (\$334,100) | (\$345,000) | (\$356,200) |

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

Local Effect: The bill does not materially affect local governments. The overtime provision of the Maryland Wage and Hour Law does not apply to local governments as employers (see Additional Comments below). The bill does not have a material effect on local income tax revenues. The circuit courts can likely handle any increase in litigation with existing resources.

Small Business Effect: Meaningful.

Analysis

Bill Summary: To be exempt from the law's overtime requirements as an EAP employee, the individual must be compensated on a salary basis at an amount per week, exclusive of board, lodging, or other facilities, of at least \$900. The required amount of compensation per week may be paid on a fee basis for an individual employed in an administrative or professional capacity, or translated into equivalent amounts for periods of time longer than one week. The Commissioner of Labor and Industry may adopt regulations to implement the bill.

Current Law: The Maryland Wage and Hour Law does not apply to an individual who is employed in a capacity that the Commissioner of Labor and Industry defines by regulation to be EAP. State regulation defines EAP capacity as the meaning provided under the federal regulation of the Fair Labor Standards Act (FLSA).

Maryland Wage and Hour Law

The Maryland Wage and Hour Law is the State complement to FLSA. State law sets minimum wage standards to provide a maintenance level consistent with the needs of the population. State law specifies that an employee must be paid the greater of the federal minimum wage (which is currently \$7.25 per hour) or \$10.10 per hour.

The Maryland Wage and Hour Law, and minimum wage requirements, do not apply to certain categories of employees, including those defined as administrative, executive, or professional; certain seasonal employees; part-time employees younger than age 16; salesmen and those who work on commission; an employer's immediate family; drive-in theater employees; employees training in a special education program in a public school; employees of an establishment that sells food and drink for on-premises consumption and has an annual gross income of \$400,000 or less; employees employed by an employer who is engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, poultry, or seafood; and certain farm workers.

An employer is required to pay an overtime wage of at least 1.5 times the usual hourly wage for each hour over 40 hours that an employee works during one work week. This requirement does not apply to an employer that is subject to federal rail laws; a nonprofit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or specified amusement or recreational establishments. It also does not apply to an employee for whom the U.S. Secretary of Transportation sets qualifications and maximum hours of service under federal law; a mechanic, parts person, or salesperson, under certain conditions; a driver employed by a taxicab operator; or specified air carrier employees under certain conditions. Also, specific exemptions apply for farm work, bowling establishments, and infirmaries.

If an employer pays less than the wages required, the employee may bring an action against the employer to recover (1) the difference between the wage paid to the employee and the wage required; (2) an additional amount equal to the difference as liquidated damages; and (3) legal fees. The court must award these differences in wages, damages, and counsel fees if the court determines that an employee is entitled to recovery. However, if an employer shows to the satisfaction of the court that the employer acted in good faith and reasonably believed that the wages paid to the employee were not less than the required wages, then the court must award liquidated damages of an amount less than the difference in wages or no liquidated damages.

A person who violates the State's Wage and Hour Law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

Background: The [U.S. Department of Labor](#) (DOL) issued revised regulations under FLSA to set the standard salary level for exempt EAP employees at the fortieth percentile of weekly earnings of full-time salaried workers in the lowest wage census region and automatically update the standard salary level every three years beginning January 1, 2020, among other provisions. This rule would increase the minimum salary level for exempt employees from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually), based on data from the fourth quarter of 2015 for the lowest wage census region. The regulations were set to become effective on December 1, 2016, but a federal judge issued a nationwide injunction on the regulation in November 2016, and in August 2017 the court held that the final rule's salary level exceeded DOL's authority and concluded that the final rule is invalid. In October 2017, the U.S. Department of Justice, on behalf of DOL, filed a notice to appeal this decision to the U.S. Court of Appeals for the Fifth Circuit. In light of the pending litigation, DOL issued a [request for information](#) and held public listening sessions to gather views on overtime regulations rather than proceeding immediately to a notice of proposed rulemaking. Thus, the minimum salary level for exempt EAP employees remains at \$455 per week, or \$23,660 annually.

State Revenues: General fund revenues increase minimally from existing penalties imposed on employers or employees violating the bill. To the extent that workers' weekly earnings rise, sales and income tax revenues may increase, but the additional revenue may be offset by businesses deducting more payroll expenses and, thus, paying lower taxes. Any change in general fund tax revenues to the State cannot be reliably projected but is expected to be minimal.

State Expenditures: The overtime provisions of the Maryland Wage and Hour Law do not apply to the State as an employer.

The bill creates additional responsibilities for the Division of Labor and Industry (within the Department of Labor, Licensing, and Regulation (DLLR)) by expanding the number of

employees who are eligible to receive overtime pay. 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.

The regular staff needed to respond to and manage the additional workload created by the bill includes an assistant Attorney General and four wage and hour investigators. DLLR estimates it could receive 350 cases alleging violations annually. DLLR advises that the existing wage and hour investigators are fully extended and cannot take on any additional cases.

Accordingly, general fund expenditures increase for DLLR by \$317,272 in fiscal 2020, which reflects the bill's October 1, 2019 effective date. This estimate reflects the cost of hiring the five regular staff noted above. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

| | |
|---|------------------|
| Positions | 5.0 |
| Salaries and Fringe Benefits | \$227,633 |
| One-time Start-up Costs | 69,350 |
| Operating Expenses | <u>20,289</u> |
| Total FY 2020 State Expenditures | \$317,272 |

Future year expenditures reflect full salaries with annual increases and employee turnover, and ongoing operating expenses.

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

Small Business Effect: Small businesses in the State that employ salaried EAP employees who work overtime and earn between \$23,660 and \$46,800 annually experience significant increases in their labor costs due to the bill.

DOL analyzed the costs to small businesses for implementing the federal regulations that are similar to the bill. DOL estimates that, for workers who are newly overtime eligible and who work regular overtime, weekly earnings are expected to rise on average 2.8%. The average total cost per affected business is approximately \$3,265, and the range of total costs per affected business is between \$847 and \$75,059. For affected businesses, the additional overtime costs make up 0.87% of payroll costs and 0.14% of profit. The three industries with the highest total number of affected workers in small establishments are professional and technical services, health care services except hospitals, and retail trade. The largest impact as a share of payroll is projected to be in the food services and drinking places industries.

Additional Comments: This analysis assumes that public-sector employees are not affected by the bill because, based on longstanding case law, State and local governmental employers are exempt from the overtime and many other provisions of the Maryland Wage and Hour Law (those that do not specifically define “employer” to include the State and local governments). The Department of Budget and Management concurs with this assessment. However, public-sector employees are covered by FLSA, and the Maryland Wage and Hour Law states the subtitle does not diminish a right that is granted under FLSA. Furthermore, State regulations define EAP employees as having the meaning under FLSA. Thus, DLLR advises that public-sector employees would be affected by the bill. The Department of Legislative Services suggests that an amendment is needed to clarify whether the bill applies to public-sector employers.

Additional Information

Prior Introductions: HB 974 of 2018 received an unfavorable report from the House Economic Matters Committee.

Cross File: None.

Information Source(s): Office of the Attorney General; University System of Maryland; Department of Budget and Management; Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; U.S. Department of Labor; Department of Legislative Services

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mm/mcr

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