MARYLAND
Chamber of Commerce

LEGISLATIVE POSITION:
UNFAVORABLE
Senate Bill 486
Labor and Employment-Employment Standards During an Emergency (Maryland Essential Workers' Protection Act)
Senate Finance Committee

Thursday, February 11, 2021

Dear Chairwoman Kelley and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 5,000 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

Senate Bill 486 would create a number of new programs and employer mandates, and resulting costs, during a declared state of emergency. These include: 1) an additional $3/hour of hazard pay, 2) employer reimbursement of healthcare costs, 3) a new leave program for bereavement and health leave, 4) employee right to refuse work, 5) workplace safety standards, and 6) health emergency preparedness plans.

To say that COVID-19 has had a tremendous, far-reaching, and extremely detrimental impact on Maryland's economy would be a gross understatement. Employment, retail sales, and many other economic indicators continue to move in the wrong direction as the virus rages on throughout our State, with no clear end in sight. As a result, Maryland's job creators continue to struggle to survive and maintain operations, with the Comptroller's Office previously estimating that approximately 30,000 Maryland businesses have closed or will close permanently as a direct result of the pandemic. Indeed, the economic impact of COVID-19 is unprecedented.

Simply put, the requirements and associated costs in this bill would be devastating to Maryland's job creators, who are already struggling with a global pandemic and compounding financial implications of other state mandates such as increased minimum wage and paid sick and safe leave.

Even more concerning, the definitions of "emergency," "essential employer," and "essential employee" contained within the bill are extremely broad and overly ambiguous. They go well beyond the scope of the public health emergency we are currently navigating as a result of COVID-19. Nearly every type of employer in Maryland is included in the scope of the legislation,

regardless of risk profile. In this regard, some 15 industry sectors containing a combined total of 76 categories of businesses are defined as essential.

Maryland's job creators cannot reasonably be expected to comply with the overly broad and unwell-defined mandates contained within Senate Bill 486, especially now, as they struggle to juggle previously passed employer mandates and the operational and economic implications of COVID-19.

Throughout the duration of the pandemic, the Chamber and our 5,000 business and federated partners have remained committed to doing our part to mitigate the impact of COVID-19. The health and safety of our members, their employees, and the general public remains our top priority. We look forward to working with the bill sponsors, Maryland General Assembly, and other stakeholders toward policy outcomes that balance health and safety with the operational and economic realities that Maryland job creators are managing at this time.

For these reasons and based on the comprehensive list of concerns outlined below, the Maryland Chamber of Commerce respectfully requests an **UNFAVORABLE REPORT** on SB 486.

Insurance Article
Section 31-108: Special Enrollment Period
This section requires Maryland Health Benefits Exchange to provide a "special enrollment period" ("SEP") during an "emergency" for "essential workers" who are not insured under a group health benefit plan sponsored by the employer.

Federal rules (45 C.F.R. §155.420(d)(9)) already delegate broad discretion to the MHBE to create an SEP under "exceptional circumstances," such as a state or national emergency. The MHBE has appropriate exercised this authority during the COVID-19 emergency, and it created an SEP in March 2020 which continues at present.

The MHBE is in the best position to determine whether an SEP is necessary on a case-by-case basis, and to execute this process through existing state regulatory channels. For this reason, we believe this section of the bill should be struck in its entirety.

Labor and Employment Article
Section 3-1601: Definition of Emergency
The definition of "emergency" as contained in the bill is overly broad, ambiguous, and extends far beyond the scope of the pandemic and public health emergency that we are presently navigating as a result of COVID-19. Based on this definition, a snowstorm, a day of high winds, a ransomware attack, or even a stock market crash could be interpreted as an "emergency," unduly subjecting all employers defined as essential to the rest of the provisions contained

within the bill. Such a definition is subjective and can be interpreted many different ways, something that the General Assembly has always avoided in drafting state statutes.

We believe that the definition of "emergency" needs to be narrowed, refined, and made more objective.

Section 3-1602: Definition of Essential Employer/Essential Worker
Similarly, the definitions of "essential employer" and "essential worker" are overly broad, ambiguous and extend far beyond the scope of the pandemic and public health emergency we are presently navigating. These definitions do not appear to be tied to any existing federal or state guidance or definitions of "essential," nor do they consider the risk-profile or threshold of the various business industry sectors.

The bill fails to consider that not every employee who works in an essential industry performs an essential function. Moreover, there is no differentiation among essential workers who are entitled to hazard pay, as outlined in Section 3-1609. As a result, lower exposure risk positions such as an administrative assistant working at an auto dealership or a landscaper working on a construction crew would earn the same hazard pay as higher exposure risk positions within that employer.

In addition, we note that an "essential employer" is one that "employs" an "essential worker," but "essential worker" is defined to include a contractor or subcontractor, who are not employed by the essential employer. This is but one example of the definitions being inconsistent and leading to confusion. Further, inclusion of contractors and independent contractors is overreaching and thus unduly burdensome. In the case of staffing firms, for example, both types of contractors could have inconsistent protocols and duplicative obligations.

We believe the definitions of "essential employer" and "essential worker" need to be narrowed and refined. Further, we believe that the definition of "essential" should be tied to a mechanism or state or local agency that is able to periodically review and amend said definition to better reflect the circumstances of a specific situation or emergency, rather than utilizing static definitions that are locked in statute.

We also note that many of the industries subject to this legislation are already subject to the regulatory authority of State agencies, often with enhanced authority during emergencies. For example, the Maryland Insurance Administration may adopt emergency regulations germane to the insurance industry that may be applied when (1) the Governor has declared a state of emergency for the State or an area within the State under § 14-107 of the Public Safety Article; or (2) the President of the United States has issued a major disaster or emergency declaration for the State or an area within the State under the federal Stafford Act.

Section 3-1603: Role of Maryland Emergency Management Agency (MEMA)
In this section, the role of the Maryland Emergency Management Agency is undefined and unclear. For example, this section could be interpreted such that MEMA has the authority to issue a state of emergency without oversight, and it is not clear how that authority intersects with that of the governor or with local emergency management agencies. Could MEMA issue a state of emergency unilaterally, or in opposition to the Governor's wishes, or in conflict with an action taken by a local emergency management agency? Further, it is unclear why an agency would be responsible for evaluating whether an emergency "has occurred."

We believe that this language needs a complete overhaul to explain the interrelationship between the Governor and all such agencies, and further, to clarify that emergencies cannot be declared retroactively.

Section 3-1604: Working Conditions and Personal Protective Equipment (PPE)
This section of the bill introduces undefined terms that are either difficult to define, subject to differing interpretation, or exist on a spectrum. For example, it is unclear what is meant by "physical harm," "mental distress," and "physical health and safety."

It is unreasonable to hold an employer accountable for the "mental distress" of an employee, as "mental distress" exists on a spectrum and is highly subjective. Further, there is no mechanism for proving or verifying that the "mental distress" occurred at the workplace and/or is related to the emergency. Employees experience "mental distress" both in workplace and non-workplace settings, and with or without regard to a specific emergency.

There is also no definition provided for "physical health and safety," and no acknowledgement that there is some risk to physical health and safety at all times for all people. Further, there are certain sectors where the potential for physical harm is greater and is accepted as part of the job (police and firefighters, for example), which is not currently addressed in the bill. Once again, there is no mechanism for proving that the threat to "physical health and safety" is related to the emergency.

This section of the bill also includes a provision which requires employers to provide personal protective equipment (PPE) to workers at no cost. Again, this section lacks clarity in its definitions and results in many open questions. For example, what does "necessary amount" mean and who determines that? Who determines what PPE is necessary based on the definition of the declared emergency? For example, PPE necessary for a public health emergency will be different than that needed for a flood, hurricane, or other legitimate emergency. In addition, OSHA recently issued stronger COVID-19 workplace guidance on January 29, 2021, with which Maryland employers will have to comply. There is a possibility that this legislation will contain inconsistent standards from that which OSHA just issued, thereby creating practical and legal confusion for employers.

In the beginning of the COVID-19 pandemic, PPE was challenging to procure as manufacturers scrambled to produce enough supply. As a result, we believe that language needs to be added to this section to clarify that PPE is procured and provided to essential workers subject to availability, and in accordance with market and other supply considerations.

Section 3-1605: Unsafe Work Environment and Right to Refuse Work
This section of the bill introduces more undefined terms and concepts that cause confusion and inconsistency. For example, what is meant by "unsanitary conditions"? What constitutes a "reasonable threat"? The examples provided are inconsistent with the definition. Unsanitary conditions do not render an employee unable to work, for example.

Moreover, the definition of "unsafe" is unclear in this context. We believe that "unsafe" should be clearly defined to be directly related to the declared emergency, not just a general code or other violation, which are already governed by existing state/federal laws and regulations.

Further, we are concerned by the requirement in subsection (V) regarding notification, and its intersection with existing federal and state law. We are concerned that this provision may conflict with HIPAA and/or ADA.

This section of the bill also includes a provision which affords an essential worker the right to refuse work. It provides this decision-making power to the employee, in the moment, and without review. This is problematic for many reasons, not the least of which is the potential for abuse without verification. Beyond this, the reasonableness requirement is dropped for an employee refusing to work. As drafted, fear need not even be reasonable despite substantive requirements applying to reasonable threats. These provisions are wholly unworkable in any Maryland workplace.

Section 3-1606: Health Emergency Preparedness Plans
Some Chamber members are concerned about the burden this provision might place on small businesses, as they are less likely to have the in-house resources or expertise to comply.

In addition, this section requires "mechanisms for notifying essential workers of positive test results for illness," yet it does not specify what type of illness. For example, are employers to be required to issue such notification for the flu or a common cold?

Section 3-1607: Infectious Disease Transmission
This section is only applicable in a public health emergency, but not in all "emergencies" as presently defined in the legislation.

In addition, Subsection (a) provides that during an emergency, if an essential worker or any other worker has contracted an infectious disease at the worksite, the employer must take proactive steps to minimize the risk of transmission. As drafted, this applies to any emergency, but would not make sense in non-health related emergencies. Further, infectious disease is not defined, therefore these requirements could be triggered by any contagious disease, including the common cold.

The evacuation requirement outlined in this section is overbroad, as not all infectious disease would require evacuation or significant sanitization. Moreover, it is not made clear that the infectious disease must be connected to the declared state of emergency. For example, as presently drafted, if an employee contracted HIV during the COVID-19 pandemic, the employer would need to evacuate its premises.

Lastly, Subsection (c) requires each essential employer to report all positive test results to the Maryland Department of Health. We are concerned that this requirement ignores all existing reporting requirements and would result in duplication of these requirements. For example, if the employer utilizes an urgent care center for testing, it is our understanding that the urgent care center is also required to report the outcome of the test. This could result in duplication, overreporting and misleading data results.

Section 3-1608: New Program for Bereavement and Health Leave
This section creates a new leave program for bereavement and health leave. First, it is entirely unclear whether this new leave is intended to be paid or unpaid. How might this intersect with the Maryland Healthy Working Families Act (MHWFA)? How might this intersect with existing employer leave programs? How does it intersect with FLMA leave?

Further, if it is intended to be unpaid leave, that should made clear. If not, and the leave is paid, is hazard pay (addressed below) to be provided as part of the leave?

Again, the definitions in this section are problematic and inconsistent because they apply equally to both bereavement and health leave. In addition, there is no mechanism for proving that the illness triggering the health leave was acquired at the workplace as part of the declared emergency.

At a minimum, notice and documentation requirements, similar to MHWFA, must be added to this section.

Section 3-1609: Hazard Pay & Financial Assistance for Unreimbursed Healthcare Costs
This provision requires employers to provide hazard pay for each pay period that the essential worker works at a rate of $3/hour.

First, as to hazard pay, there is confusion in the bill language regarding how this provision is to be applied. The bill is intended to apply prospectively (Section 2), yet there is a provision in this section that states that an essential worker is eligible for hazard pay dating back to the start of the emergency. Legislation that is both retroactive and prospective as to the same provision cannot be complied with and is wholly unworkable. Small businesses, who have no notice, and limited or no capacity to pay such wages, are not equipped to provide hazard pay. Such a provision constitutes unfair surprise, lack of due process, and an unconstitutional taking without just compensation. Depending on the size of the employer and its workforce, this requirement could wipe out numerous Maryland employers, and place undue burdens on others during the most difficult economic times they have ever faced.

Further, the threshold that triggers hazard pay is very high in that an individual earning up to $100,000 is eligible. In addition, there is no scale or table for the amount of provided hazard pay based on industry-sector or specific job.

This section would also require employers to provide financial assistance for unreimbursed healthcare costs including co-pays, insurance premiums and out of pocket costs for healthcare or transportation.

It is unreasonable for employers to be compelled to pay for healthcare costs for undefined illnesses that are not likely to have been contracted in the workplace. Further, it is not clear that this provision would not also apply to teleworking employees.

We are unclear on the intent of this provision, as it appears that it is meant to result in employers paying 100% of insurance premiums and all healthcare costs for all employees, without a mechanism for verification or process for dispute.

Again, simply put, the cost implications of this provision alone would be devastating to Maryland's job creators, who are already struggling with a global pandemic and compounding financial implications of other state mandates, including increased minimum wage and paid sick and safe leave.