

PJC Written Testimony SB 848-FAV.pdf

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Position: FAV



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SB 848: MARYLAND WAGE AND HOUR LAW AND MARYLAND WAGE PAYMENT AND COLLECTION ACT - REVISIONS (MARYLAND WAGE PROTECTION ACT)

Hearing before the Senate Finance Committee
March 17, 2021

Position: SUPPORT

The Public Justice Center (PJC) is a not-for-profit civil rights and anti-poverty legal services organization that advances social justice, economic and racial equity, and fundamental human rights in Maryland. Our Workplace Justice Project expands and enforces the right of low-wage workers to an honest day's pay for an honest day's work. The PJC **supports SB 848**, which will protect employees from retaliation, prevent misclassification of employees as independent contractors, and guarantee employees access to basic information on their paystubs.

Wage theft – the practice of denying or failing to pay workers their earned minimum, overtime, and other promised wages – is all too common. Low-wage workers nationwide are denied minimum wages to the tune of fifteen billion dollars per year.¹ They lose nearly quarter of their weekly earnings, an average of \$3,300 per year, leaving them to survive on a mere \$10,500 annually. **In Maryland, 580,000 workers are cheated out of a cumulative \$875 million in gross wages each year.**²

Wage theft hurts Maryland families, law-abiding businesses, and government coffers. Nearly a third of workers who suffer minimum wage violations turn to public assistance, leaving taxpayers to subsidize the cheaters; and many families are in poverty as a direct result of not receiving the wages they have earned.³ Moreover, employers who misclassify their employees as independent contractors undercut their law-abiding competitors, who pay more in wages and in workers' compensation premiums and unemployment insurance taxes to cover for the cheaters. Businesses that misclassify employees also do not make unemployment insurance contributions on their behalf, thereby limiting the amounts collected by the state for unemployment funds.

SB 848 is a commonsense solution that will close 3 loopholes. It will:

1. Enable employees to stand up to wage theft by protecting them from retaliation. Employees often forego their hard-earned pay because they fear retaliation. And with good reason: one national study

¹ David Cooper & Teresa Kroeger, Employers Steal Billions from Workers' Paychecks Each Year (Economic Policy Institute, May 10, 2017), <https://www.epi.org/files/pdf/125116.pdf>

² Center for Popular Democracy, Combatting Wage Theft with the Maryland Paystub Transparency Act of 2016 4 (2016), <https://populardemocracy.org/sites/default/files/MD%20Pay%20Stub-web.pdf>

³ Cooper, *supra* n. 1, at 13-15.

found that forty-three percent of respondents who had complained experienced reprisal in the form of firing, suspension, or threats to cut hours or pay or call immigration authorities.⁴ Another twenty percent of workers chose not to complain at all in order to avoid these sorts of retaliatory responses.⁵

Maryland's wage laws provide employees virtually no protection from retaliation. The state Wage and Hour Law theoretically makes theft of minimum and overtime wages a criminal misdemeanor, but prosecutors rarely (if ever) pursue these cases, and the maximum penalty – a \$1,000 fine – does little to deter low-road employers.⁶ Even a successful prosecution offers no relief to a worker who has lost a job or suffered a cut in pay. In the PJC's practice representing low-wage workers throughout the state, we routinely hear from workers who suffer wage theft but opt not to pursue claims because they are fearful of the consequences they will suffer.

2. Prohibit low-road employers' ability to hide wage theft with paystubs that contain vague or misleading information. Maryland law requires employers to record payroll information such as employees' hours, pay rates, deductions, and earned regular and overtime wages, but it does not require businesses to share this information each pay period; current law only requires a statement of gross wages and deductions. Paystubs that lump together all compensation make it nearly impossible to determine how the compensation was calculated or whether an employee has been paid all earned wages, including overtime. In addition, because Maryland law does not require paystubs to include basic identifying information for the issuing business, some employers – particularly those in low-wage industries – omit their address or telephone number, making it difficult for employees to even raise questions about their pay.

With its gaping omissions, **Maryland's paystub requirements are far weaker than those in Alaska, California, Colorado, Delaware, Hawaii, Massachusetts, Maine, Minnesota, New Mexico, Nevada, New York, Pennsylvania, Texas, Vermont, and Washington.**⁷ Virtually all of these jurisdictions require that, in addition to gross wages and deductions, paystubs show hours worked. Majorities also require that paystubs report pay rate(s), net pay, and pay period ranges. Maryland thus lags behind a diverse array of other states in its failure to impose common sense standards to require transparency in paystubs generated within its borders.

3. Clarify what an independent contractor is so that employees are not misclassified and benefit from the protections of our wage laws as intended. Independent contractors are those who control their own work and are truly in business for themselves; a plumber that sets her own rate and schedule when servicing homes is an example. Maryland already has a well-established definition in the unemployment insurance code and Workplace Fraud Act, but that definition is not spelled out in our wage statutes. As a result, too many businesses label their employees independent contractors and deny them protections – such as bedrock rights to minimum wage and overtime – that Maryland's wage laws afford to covered employees. This practice is particularly common in industries dominated by women, such as home health care and domestic services.⁸ Clarifying the definition of "independent contractor" in the wage statutes

⁴ Nat'l Empl. Law Project, Broken Laws, Unprotected Workers 3 (2008), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁵ *Id.*

⁶ Md. Code Ann. Lab. & Empl. § 3-402(b)(1).

⁷ Center for Popular Democracy, *supra* n. 2, at 4.

⁸ U.S. Gov't Accountability Office, GAO-06-656, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification 31 (2006), <https://www.gao.gov/new.items/d06656.pdf>; NELP, Independent Contractor Classification in Home Care (2015), <https://www.nelp.org/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf>.

will promote clarity and consistency, and ensure that employees are not exempt from the wage theft protections of the Wage and Hour and the Wage Payment and Collection Laws.

In sum, the Maryland Wage Protection Act simply closes three loopholes to combat wage theft and level the playing field for law-abiding businesses by:

- **Protecting employees from retaliation** so that victims of wage theft can enforce their right to be paid without fear of being fired, losing hours, being threatened, et cetera;
- **Promoting transparency by requiring that paystubs contain information showing how pay was calculated**, such as hours worked, pay rate, and overtime.
- **Clarifying that employees are broadly protected by wage laws** while independent contractors (people who are in business for themselves) are not, and incorporating the definition of “independent contractor” from the existing Unemployment Insurance law.

In doing so, this legislation takes an important step towards combatting wage theft in Maryland, and ensuring that all workers receive the wages they work hard to earn. **The PJC strongly urges a favorable report.**

For more information contact Monisha Cherayil, whose contact information is on the first page.

BDCBT SB 848 Maryland Wage and Hour Law and Maryla

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Position: FAV



Maryland Senate - Finance Committee

Chair: Delores G. Kelley

Vice Chair: Brian J. Feldman

Senate Bill 848– Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law - Revisions (Maryland Wage Protection Act)

Position: Support

The Baltimore DC Metro Building Trades Council supports SB 848 as we stand in solidarity for all working people. Those without Union representation lack a voice in their workplace. The only way to stop the race to the bottom in wages and standards is for working people of all races, religions and immigration status to stand together and demand an end to policies that put profits over people. The entire workforce suffers when millions struggle to support their families without a way to speak up on the job, and ramping up fear in our workplaces only serves to increase exploitation. Working men and women need to know they can stand up for themselves and not be at the mercy of unscrupulous employers that can arbitrarily cut wages, increase works hours, change schedules and endanger the health and welfare of their employees. Anyone that has the courage to stand up for what they have earned and deserve should not fear retaliation.

We urge the Committee for a favorable report. Thank you.

Sincerely,

Jeffry Guido

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SB 848_Maryland Wage Protection Act_Unfav.pdf

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Position: UNF



MARYLAND
Chamber of Commerce

LEGISLATIVE POSITION:

Unfavorable

Senate Bill 848

Maryland Wage Protection Act

Senate Finance Committee

Wednesday, March 17, 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.

As introduced, SB 848 presents multiple areas of concern for the employer community. This legislation would open new avenues for suit on the employer community while also placing an undue burden of proof requirement on the employer in allegations relating to adverse employee actions.

There are additional concerns with new definitions outlined in this bill, such as the addition of work hour or schedule reductions that are "less favorable to the employee" as an item which qualifies as an adverse action taken on an employee. This new addition, coupled with the new burden of proof requirement, makes a common business practice such as schedule adjustments an adverse action which is interpreted as retaliatory against an employee for an allegation which may not have even been made.

SB 848 would also allow another employee, who may be unaffiliated with an event leading to a discriminatory allegation, the right to bring a complaint against an employer on behalf of another employee.

This legislation creates additional uncertainty in Maryland's business environment. For these reasons, the Maryland Chamber of Commerce respectfully requests an **Unfavorable Report** on **Senate Bill 848**.

MDCHAMBER.ORG

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Position: UNF

March 15, 2021

Senator Delores G. Kelley
Chair, Finance Committee
Maryland State Senate
3 East
Miller Senate Office Building
Annapolis, MD 21401

RE: SB848- Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law – Revisions
Position: OPPOSE

Dear Senator Kelley, Vice Chair Feldman and Members of the Committee:

On behalf of our 500-member businesses and more than 45,000 employees in Montgomery County, The Greater Bethesda Chamber of Commerce is in Opposition to **SB848- Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law – Revisions**.

This legislation requiring that certain employers are required to keep conspicuously posted in certain places of employment include certain antiretaliation provisions; prohibiting certain employers from taking certain actions and that the burden of proof as proved by clear and convincing evidence under certain actions would be on the defendant based on certain actions under certain circumstances; and establishing that a certain employer taking certain actions against an employee within a certain time period creates a rebuttable presumption that the employer retaliated against the employee under certain circumstances.

The bill greatly expands the list of actions by employers which could constitute an “adverse action”. This places an unnecessary burden on employers. There already exists a body of law on what constitutes an “adverse action”. In addition, the bill unnecessarily expands the list of prohibited retaliatory actions (i.e., a reduction in hours or schedule changes). This bill is overkill, makes no sense, particularly during a pandemic and imposes draconian damages on employers

Finally, SB848 bill imposes an unfair standard – “clear and convincing evidence” – on employers.

For these reasons, we ask for an **UNFAVORABLE report on SB848** and thank you for your consideration of our remarks.

Sincerely,



Allie Williams
President & CEO

SB912 & SB848 wmda.pdf

Uploaded by: McCauley, Kirk

Position: UNF



WMDA/CAR Service Station
and Automotive Repair Association

March 15, 2021

Chair: Delores G. Kelly
Members of Finance Committee

RE: SB848 Maryland Wage and Hour Law and Maryland Wage Payment and Collection 3 Law – Revisions 4 (Maryland Wage Protection Act)

SB912 Maryland Wage and Hour Law and Maryland Wage Payment and Collection 3 Law – Antiretaliation Provisions

Position: In Opposition

Both these bills put burdens of proof on employer, have penalties that say shall require penalties that leaves no room for intentions of employer.

Page after page of liquidated damages, fines, requirements, council fees, others cost of actions and 3 years to file a complaint. These are attorney bills plain and simple.

I can not speak for all industry but the industry I represent has done everything it can to keep employees working and off unemployment rolls. Do not complicate owning a business anymore than it already is with more requirements and costly mandates.

Please give SB 848 and SB 912 an unfavorable Report

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SB 848 Maryland Wage and Hour Law and Maryland Wag

Uploaded by: McCulloch, Champe

Position: UNF



SB 848
Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law – Revisions (Maryland Wage Protection Act)
Finance Committee
Position: Unfavorable

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors, both open shop and union. AGC of America is the nation’s largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, including over 6,500 of America’s leading general contractors, and over 9,000 specialty-contracting firms, all through a nationwide network of chapters. Maryland AGC opposes SB 848 and respectfully urges the bill be given an unfavorable report.

SB 848 increases the burden on employers under the Wage and Hour and Wage Payment Laws. Some of the changes are not objectionable: allowing the Commissioner of Labor and Industry to initiate investigations on its own motion or requiring the workplace notice include antiretaliation provisions. However, other provisions of the bill introduce ambiguity regarding the employer’s permissible conduct and so alter the burden of proof in proceedings under the antiretaliation provisions as to remove any pretext of fair and equal treatment of employers and employees.

Because the bill affects both the Wage and Hour and Wage Payment statutes, for ease of analysis, I’ll deal with the Wage and Hour provisions first, but the same objections apply to the portions of the bill dealing with Wage Payment, since lines 23-26 on page 14 incorporate all of the Wage and Hour provisions into the Wage Payment statute. Objectionable provisions include the following:

1. On page 5 in line 17, the bill adds “or on behalf of”, which would result in extending protections to people outside of the employment relation. It is an invitation to free-lance advocates to seek out or foment situations that they can use to their advantage. Employees who feel their employer has taken prohibited adverse action are fully protected and can complain without the need of outside third parties. The language “or on behalf of” should be rejected.
2. On page 5 in lines 19-22, SB 848 creates an opportunity for miscommunication and misunderstanding with potentially serious consequences for employers. The Bill proposes to amend Maryland Labor & Employment Code, Section 3-428(a)(1) [part of the Maryland Wage and Hour Act], to protect a complaint by an employee to “an individual with apparent authority to alter the terms or conditions of employment to the employee.” There is no definition of “apparent authority” in the Bill, which creates ambiguity. Apparent to whom? To the employee, to a reasonable person, or to the employer. We believe that this change is unnecessary and irrelevant. If this individual simply ignores the complaint because he or she has no actual authority to deal with wages, the employer could miss the opportunity to deal with the employee’s complaint, resulting in action by the Commissioner or a lawsuit and consequent damages. Logically, in order to prove retaliation, the employer or its agent(s) [“a supervisor, manager, or foreman”] must have knowledge of the employee’s protected conduct, in this case a complaint. Otherwise, adverse action against the employee cannot possibly be motivated by the unknown or confidential complaint of the employee. Absent such knowledge of the complaint, there can be no retaliatory intent, and thus no causal connection to the adverse action. See, e.g., *Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009). The nebulous concept of a complaint to “an individual with apparent authority” who is not a legal agent of the employer should be rejected.
3. On page 5 in lines 25-26, the bill stretches the three-year statute of limitations by beginning the period to run from the date of the complaint. The relevant and correct point from which limitations should run is the date of the action or giving rise to the complaint. The language proposed in SB 848 would permit an employee to wait for three years minus a day from the prohibited action to file a complaint and then wait an additional three years minus a day before filing suit. Moreover, the language would give SB 848 retroactive effect, allowing employees to file complaints about actions taken three years previously. This section of the bill should be rejected.
4. On page 6 in line 3, the bill expands the meaning of “adverse action” to include the broad and nebulous

undefined term “or otherwise discriminate.” When coupled with §3-428(b)(6), the result is adverse action is simply in the eye of the beholder, i.e., whatever anyone could conceivably think is adverse. That ambiguity puts employers in the impossible position of being exposed to complaints such as from an employee who feels that he or she isn’t being treated nicely by a supervisor or thinks another employee is somehow more favored by a supervisor. The existing language in §3-428(b)(6) wisely refers to changes in the terms or conditions of employment. The ambiguous “or otherwise discriminate” and the changes to §3-428 (b)(6) should be rejected.

5. On page 6, lines 21-23, the bill creates an impossible burden of proof for the employer. An employee only has to claim that some neutral action by the employer, changing a shift assignment, for example, was secretly motivated by the employer’s “suspecting or believing” the employee was going to do something protected by the statute to bring the action under the statute and force the employer to court with the burden of proving the employer’s mental state; this provision should be rejected.

6. On page 7, in line 11, the bill expands the protected class under the bill to include not only employees but also “another individual”, i.e., everyone else in the wide world. Third parties have no rights under the Wage and Hour or Wage Payment Laws, but this language would expand the scope of the bill beyond any limits. Protection of employees is one matter; adding everyone else anywhere in the world is quite another. This language should be rejected.

7. On page 7, beginning in line 27, through page 8 in line 1, SB 848 introduces a manifestly unfair shifting of the burden of proof in lawsuits by an employee seeking redress under §3-428. Whereas an employee complainant could meet his or her burden of proof by “a preponderance of the evidence”, an employer would have to meet the higher standard of meeting the burden of proof by producing “clear and convincing evidence.” There is no justification for such an unequal and unfair rule. Applying the clear and convincing standard is both unfair to the employer and not in accordance with the burdens applicable to retaliation cases brought under federal discrimination statutes. In essence, the bill says employers are inherently dishonest and not to be believed, absent overwhelming evidence in their favor. The burdens of proof should be equal.

8. On page 8, lines 2-9, the bill adopts the standard that employers are guilty until proven innocent. On its face, this is a subversion of justice and American legal standards and should be rejected. It’s worth noting that the bill reinforces the assault on employers by requiring them to prove their innocence not simply by the normal burden of a preponderance of the evidence, but by the higher burden of “clear and convincing.” These lines should be stricken from the bill.

9. On pages 8 and 9, new section 3-428(f) continues the pattern of unequal treatment of employers and employees. Thus, an employee who prevails is entitled to “counsel fees and other costs (not specified), but the bill is silent if it’s the employer who prevails. Likewise, an employer faces a civil penalty of not less than \$10,000 for another violation within 6 years, but employees face no such penalty for a second false accusation. Finally, lines 14-16 on page 9 give courts unlimited discretion to penalize employers in any other manner that comes to mind: perhaps closing their business; imposing a financial penalty of a magnitude that would have the same effect, or ordering the employer to turn over control of the company to employees, etc.

With respect to the provisions dealing with the Wage payment statute, the amendments to §3-504(a) dealing with the specifics of wage payment are unnecessary but unobjectionable. However, the amendments to §3-507.2 are inappropriate and should be rejected.

1. On page 12, lines 7-11, SB 848 allows an employee to recover for insubstantial clerical errors by an employer, such as a missing digit in the employer’s telephone number. While most employees will overlook an innocent error of this type, there will be disgruntled employees who are eager to find any way to strike back at their employers or a disliked supervisor for perceived injustices. At a minimum, there should be a requirement that the errors or omissions be substantial.

2. On page 12, lines 12-18, the bill allows an employee to sue and win the employee’s attorney’s fees and court costs in a case where the court determines wages were withheld as a result of a bona fide dispute. This “heads I win, tails you lose” approach is unjust and encourages and rewards unnecessary litigation. The changes to

the current law should be rejected.

3. On page 14, line 8, the bill repeats the inappropriate expansion against retaliation to include “another individual” addressed above and should be rejected.

Accordingly, Maryland AGC respectfully urges the Committee to give SB 848 an unfavorable report.

Champe C. McCulloch
McCulloch Government Relations, Inc.
Lobbyist for Maryland AGC

SB0848 LOI - 2021.docx.pdf

Uploaded by: Fulginiti, Andrew

Position: INFO

Senate Bill 848

Date: March 17, 2021
Committee: Finance Committee
Bill Title: Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law
- Revisions (Maryland Wage Protection Act)
Re: Letter of Information

SB848 makes substantial changes to multiple sections of the wages and hours & wage payment and collection laws. The changes are significant and will result in many Maryland small businesses being in violation of the law and subject to potential civil penalties, remedies, and even criminal enforcement provisions. Three of the provisions will be particularly impactful and create significant hardship on employers.

This bill broadly expands authority of the Commissioner of Labor and Industry (Commissioner) to investigate an employer under Subtitles 4 & 5. Under this bill the Commissioner is free to conduct a general investigation instead of the existing limitation of investigating whether a violation has occurred. This bill also eliminates the requirement of a written complaint of an employee to conduct an investigation under subtitle 5 to add or "on the Commissioner's own initiative".

The bill changes the definition of an “independent contractor” to the test used in LE § 8-205. LE 8-205 is the definition of an “independent contractor” for purposes of the unemployment insurance law. It is commonly referred to as the “ABC” test.” This is a different standard than Employment Standards Service (ESS) has used in the past. Historically, ESS has used the common law test (also known as the “Economic Realities Test”) as set forth in *Baltimore Harbor Charters v. Ayd*, 134 Md. App. 188 (2000), in analyzing whether a worker is an employee or an independent contractor, the same standard used by the Comptroller and the IRS. It is possible for a worker to be an employee for purposes of the ABC test but not the common law test. This could create difficulties and confusion for employers if ESS uses a different standard than the Comptroller and the IRS.

This bill makes substantial changes to “pay stub” requirements. The provisions of this bill add 8 line items that a pay stub must reflect; adds line items for certain allowances; requires certain employer information. The bill requires employers must provide the information within 30 days of initial employment and for each pay period thereafter. Changing a pay stub requires reprogramming the software used by the employer. Many employers use nationally common payroll systems and custom reprogramming for Maryland law changes will take significant time and potentially large expense. The changes to the minimum wage law in 2019 required changes to the pay stub for restaurant employers and the Department has been working with payroll

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companies for over 9 months to develop regulations that implement the law's changes. It can be assumed that the changes required in this bill will be more complex.

This bill expands the scope of what may be considered a criminal violation to include most of LE § 3-428 and provides that criminal enforcement provisions include civil penalties and remedies provided in LE § 3-428. Some violations of this section could be unintentional, and subjecting the employer to potentially criminal charges has a significant impact on small businesses who may not have the benefit of legal counsel or sophisticated payroll software.

The Department respectfully requests that the Committee consider this information.