SB 486
Labor and Employment - Employment Standards During an Emergency (Maryland Essential Workers' 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 27,000 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 486 and respectfully urges the bill be given an unfavorable report.

SB 486 sets in place a broad set of requirements that employers must implement in the event of a declared emergency. The bill is intended to deal with the current COVID-19 pandemic, but its terms encompass any "emergency" declared by a county organization for emergency management, or the Maryland Emergency Management Agency. "Emergency" is broadly defined. Once an emergency is declared, employers must allow an essential worker to refuse to fulfill work responsibilities; provide health leave and bereavement leave; pay any health insurance costs related to the emergency; and pay $3.00/hour "hazardous duty pay" in addition to normal wages.

By their nature, emergencies produce working conditions that may increase a worker's chance of physical harm and mental distress. Working during an emergency in many cases requires construction workers to work in unsafe work environments. Without their being able to do so, no emergency situation could be addressed. No one seriously opposes requiring employers to take reasonable steps to protect employees at a worksite from unmitigated exposure to the hazards in a work environment. It already is mandated by federal and state laws and regulations. The COVID-19 pandemic only presents a particular variant on the hazards in a worksite, although blood-borne pathogens are a near analog that has been addressed in law and regulation.

However, SB 486 goes far beyond this in three respects. First, it expands coverage to any "emergency", so broadly defined as to encompass any event that a local emergency board might decide to call an emergency. The geographic scope is unaddressed, so that a local agency could declare an emergency when the emergency was restricted to a single building. Undefined in §3-1601(B) are "other health effects", "social or economic disruption", or "environmental degradation." The language stating "the threat or occurrence of social or economic disruption from natural, technological, or human-made causes" covers many events that do not affect the health or safety of "essential workers". Local emergency management agencies are not constituted or staffed to assess such undefined events.

For example, if Russian hackers were to shut down the internet in the United States that "occurrence" would surely create "social or economic disruption" from "technological or human-made causes". The government would undoubtedly declare a state of emergency. However, it is difficult to see how it would directly affect the health or safety of a broad class of essential workers, such that these workers should receive a $3 per hour wage increase in order to perform the duties for which they were hired. Restricting the definition to loss of life, injury, or property damage or destruction affecting a substantial part of the relevant jurisdiction would better match the capabilities of the agencies and the emergency event. The definition of "emergency" must be tied back to some imminent and serious threat to the health and safety of essential workers.

Fortunately, the provisions of SB 486 dealing with creating and maintaining a safe worksite are already dealt with in current law. Unfortunately, the bill duplicates or conflicts with existing Maryland occupational safety and health law in the Labor and Employment Article, Subtitle 5, and the regulations found in COMAR 09, which together already comprehensively address every aspect of SB 486, save for new leave, hazardous duty pay, and health coverage requirements. There is nothing to be gained by creating a parallel universe of rights and duties and much to be lost in terms of understanding and certainty. All of the hazards that this bill addresses already are covered either by MOSH regulations, including where MOSH simply adopts the federal OSHA standard, or the OSHA General Duty Clause.

Simply because it's an emergency doesn't change the employer's obligation to protect workers from risk. A risk is a risk regardless of whether or not it's an emergency. COVID-19 does not present any risk not already addressed by existing law and regulation. There is no reason to establish a new standard and generate conflict with existing law.

SB 486 in §3-1605 gives "essential employees" the unfettered right to refuse work at any time if the employee in his or her judgment finds that "the physical condition of the worksite represents a reasonable threat to a worker's health or safety." This allows an employee to refuse to perform the employee's responsibilities based on a subjective "fear" for the employee's life or health. The employee can wait for three days before notifying the Commissioner of he allegedly unsafe working condition. Section 5(a)(1) of the Occupational Safety and Health Act of 1970, commonly referred to as the General Duty Clause, requires an employer to furnish to its employees: "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." §5-104 of the Labor and Employment Article provides "Each employer shall provide each employee of the employer with employment and a place of employment that are: (1) safe and healthful; and (2) free from each recognized hazard that is causing or likely to cause death or serious physical harm to the employee." A "reasonable threat" is a far cry from "likely to cause death or serious physical harm."

Federal OSHA already provides these types of protection [not limited to declarations of emergency]. The U.S. DOL states:

> You may file a complaint with OSHA concerning a hazardous working condition at any time. However, you should not leave the worksite merely because you have filed a complaint. If the condition clearly presents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and, where possible, you have brought the condition to the attention of your employer, you may have a legal right to refuse to work in a situation in which you would be exposed to the hazard. Your right to refuse to do a task is protected if **all** of the following conditions are met:
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> - Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so; and
> - You refused to work in "good faith." This means that you must genuinely believe that a reasonable apprehension of death or serious injury exists; and
> - **A reasonable person would agree that there is a real danger of death or serious injury**; and
> - **There isn't enough time, due to the urgency of the hazard**, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.[1]

Similarly, the provisions in §3-1605(D) inject unnecessary bureaucracy without improving safety and conflict with long established law and MOSH regulations that address the same subject. See Labor and Employment Article §5-209. Moreover, under COMAR 09.12.20.12, the Commissioner of Labor and Industry already can assess penalties significantly greater than those contained in SB 486 for an employer's failure to correct a hazardous condition reported by an employee.

§3-1606 of SB 486 requires the creation of a health emergency preparedness plan. Because "emergency" is defined so broadly, employers will face a monumental and perhaps unscalable obstacle to imagine every possible sort of emergency and develop a protocol for dealing with their every aspect. The plans do not have to be approved by the Commissioner of Labor and Industry and only will be used in the event of a worker complaint to determine if the employer overlooked the cause of the worker's complaint – a sort of Catch22. In a drafting error, it is worth noting that annual changes have to be sent to the Director of the Maryland Emergency Management Agency, but the original plan does not. Whether there is anything to be gained by having the Director be the repository of thousands, actually tens of thousands of plans, and what use the Director will make of them is questionable.

SB 486 also imposes new out-of-pocket costs on employers already reeling from the effects of the COVID-19 pandemic. §3-1608 make essential workers eligible for two new categories of paid leave – 3-day bereavement leave and 14-day health leave; §3-1609(A) requires "hazardous duty pay" of $3.00/hour for all essential workers paid less than $100,000 per year; and §3-1609(B) requires an employer to reimburse or pay any co–pays, insurance premiums, out–of–pocket costs of medical coverage, or out–of–pocket transportation costs incurred or paid by the essential worker or arrange for insurance coverage if the worker's injury or illness was in any way related to the "emergency".

[1] https://www.osha.gov/right-to-refuse.html#:~:text=If%20the%20condition%20clearly%20presents,be%20exposed%20to%20the%20hazard. See also COMAR Sec. 09.12.20.05.B, Protection of Employees Under §5-604 of the Act

Imposing these burdens on employers who are already in desperate straits is unconscionable. Note that the work performed by an essential worker does not need to be hazardous in any respect, but the worker receives the pay regardless merely because the worker is "essential." It should be noted that it is common in the construction industry for some carpenters, electricians, plumbers, and Haz-Mat workers to earn more than $100,000 a year, which would disqualify them for the bill's hazardous duty pay. In addition, the health coverage language is so broad that an essential worker injured as a result of the worker's own negligence in a motor vehicle accident while commuting to work or falling downstairs at home on the way to a telecommuting work station would be entitled to coverage because the injury was "related to the emergency." See §3-1609(B)(1).

Accordingly, Maryland AGC respectfully urges the committee to give SB 486 an unfavorable report.

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