

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

Senate Bill 688
 Finance

(Senator Benson)

Labor and Employment - Fair Scheduling Act

This bill requires an employer to provide each employee with an initial work schedule at least 21 days before the first day the employee is scheduled to work; notify an employee of any subsequent changes made to the employee’s initial work schedule; and within 24 hours after making a change to an employee’s work schedule, provide the employee with a revised work schedule. An employer must post the work schedule of all employees’ shifts at the work site within 21 days of the start of each work week. An employer generally may not change an employee’s work schedule, unless a change is requested by an employee or is mutually agreed to by the employer and the employee. If the employer changes an employee’s work schedule under specified circumstances, the employer must pay the employee one hour of predictability pay. The Commissioner of Labor and Industry may adopt regulations to implement the bill and must enforce its provisions.

Fiscal Summary

State Effect: General fund expenditures increase by \$392,900 in FY 2016 due to additional staffing needs for the Department of Labor, Licensing, and Regulation (DLLR) to enforce the bill. Out-year expenditures reflect annualization, elimination of one-time start-up costs, and inflation. The bill does not apply to the State as an employer. The bill does not have a material effect on State income tax revenues.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	392,900	484,400	506,000	528,700	552,400
Net Effect	(\$392,900)	(\$484,400)	(\$506,000)	(\$528,700)	(\$552,400)

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

Local Effect: The bill does not apply to local governments as employers. The bill does not have a material effect on local income tax revenues.

Small Business Effect: Meaningful.

Analysis

Bill Summary: An employee does not include an independent contractor, as defined by the bill.

The bill does not (1) discourage or prohibit an employer from adopting or retaining policies that are more beneficial to employees; (2) diminish an employer's obligation to comply with a contract, an employment benefit plan, or any other agreement that establishes beneficial policies to an employee; or (3) preempt, limit, or otherwise affect the applicability of any other law, policy, or standard establishing scheduling policies that provide additional employee rights or protections.

At least 21 days prior to the start of each work week, an employer must post a written work schedule of the shifts of all employees at the work site. An employer must post an updated schedule within 24 hours of any change made to a previously posted work schedule.

An employee's work schedule must begin on the same day of the week each work week unless an employer provides 21 days' advance written notice of a change. An employer may not require an employee to work hours not included in an initial work schedule, unless the employee provides written consent; nor may an employer require an employee to find another employee to cover hours during which the employee is unable to work a scheduled shift.

An employee may provide input regarding his or her work schedule and request that the employer change the employee's work schedule and limit the employee's availability for work to hours specified by the employee.

Prior to 24 hours before a shift is scheduled to begin but within 21 days of the first scheduled hour of a shift, an employer may reduce, cancel, or change a scheduled shift if the change does not alter the total hours of scheduled work during a work week. During this timeframe, an employer may reduce the length of a shift to no less than four hours, change the start and end time of a shift if the change does not alter the total number of hours in a shift, and add hours to an employee's work schedule if the employee provides written consent. The employer may also reduce the lengths of a shift, cancel a shift, or change the start or end time of a shift if these changes do not alter the total hours worked in a work week. If an employer makes one of these changes to an employee's work schedule during this timeframe, the employer must pay the employee one hour of predictability pay, which is the employee's usual hourly wage, for each shift that is

changed. Predictability pay is in addition to any other wages required to be paid to the employee.

Regardless of actual hours worked, an employer must pay an employee for the lesser of four hours of work or the number of hours in the employee's scheduled shift at the employee's usual hourly rate for specified shift cancellations or reductions.

An employer must keep specified records for at least two years in a specified location, make the records available for inspection by the Commissioner of Labor and Industry on request, and allow an employee to inspect the employee's record at any reasonable time and place. Each day an employer fails to keep a record, falsifies a record, or otherwise violates provisions of the bill constitute a separate violation.

The commissioner must enforce the bill and may investigate whether the bill's provisions have been violated on the commissioner's own initiative or by an employee's written complaint. The commissioner must enter a place of employment to question employees, inspect and copy records, and require an employer to attest to the truthfulness of records or, at the option of the employer, to submit a written statement. Any record or statement that the commissioner or authorized representative of the commissioner obtains is confidential and may be shown only to the commissioner or a court.

An employer may not take adverse action against an employee for exercising or attempting to exercise the employee's rights under the bill.

When the commissioner has determined that a provision of the bill has been violated, the commissioner may try to resolve any issue informally by mediation or ask the Attorney General to bring an action on behalf of the employee. Likewise, an employee may bring an action against the employer for a violation of the bill.

If the court finds that an employer violated the bill's provisions, the court may award the employee (1) any wages and predictability pay owed to the employee; (2) damages of \$100 for each work week in which the employer violated the bill's provisions, up to \$2,500; and (3) reasonable attorney's fees and other costs.

Current Law: The Maryland Wage and Hour Law is the State complement to the federal Fair Labor Standards Act (FLSA) of 1938. 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 \$8.00 per hour. Under Chapter 262 of 2014, the State minimum wage is scheduled to increase on an incremental basis over four years to:

- \$8.25 per hour as of July 1, 2015;
- \$8.75 per hour as of July 1, 2016;
- \$9.25 per hour as of July 1, 2017; and
- \$10.10 per hour as of July 1, 2018.

However, an employer may pay an employee a wage that equals 85% of the State minimum wage for the first six months that the employee is employed if the employee is younger than age 20. Additionally, an employer of an amusement or a recreational establishment, including a swimming pool, that meets specified conditions may pay an employee a wage that equals the greater of \$7.25 or 85% of the State minimum wage. Exceptions to the minimum wage requirement also exist for training wages and disabled employees of a sheltered workshop. The State and local governments are considered employers under the Wage and Hour Law.

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. 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. An employer has to compute the wage for overtime on the basis of each hour over 40 hours that an employee works during one work week. 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.

Involuntary Overtime Prohibition for Nurses

Generally, an employer may not require a nurse to work more than the regularly scheduled hours according to a predetermined work schedule. However, a nurse may be required to work overtime if:

- the work is due to an emergency situation that could not have been reasonably anticipated;
- the emergency situation is nonrecurring and not caused by an employer's lack of reasonable contingency planning;
- the employer has exhausted all good-faith reasonable attempts to procure voluntary workers for the subsequent shifts;
- the nurse has critical skills and expertise that are required for the work;
- the standard of care requires continuity through completion of a case, treatment, or procedure; and
- the employer informed the nurse of the basis for the mandate and that basis satisfies other specified requirements.

A nurse may also be required to work overtime if employment requires on-call rotation or the nurse works in community-based care. A nurse may not be considered responsible for a patient's care beyond the nurse's predetermined work schedule if the nurse has notified another appropriate nurse of the patient's status and has transferred responsibility for the patient's care to another appropriate nurse or properly designated individual. The employer must exhaust all good-faith reasonable attempts to ensure that appropriate staff is available to accept responsibility of a patient's care beyond a nurse's predetermined work schedule.

Day of Rest Available to Certain Retail Employees

An employee in a retail establishment may choose a day of rest unless the employee is a managerial, professional, or part-time employee. An employee who desires a day of rest must provide the employer with written notice. While employed, the individual may change the day of rest by giving written notice to the employer at least 30 days prior to its effective date. If an employer compels an employee to work on his or her day of rest, the

employee is entitled to bring a civil action against the employer to recover three times the regular rate of pay for the hours worked on that day.

An employer may not discharge, discipline, discriminate against, or otherwise penalize an employee who chooses a day of rest. An employer also may not require an applicant who seeks a work week of at least 25 hours to answer any question that identifies the applicant's desired day of rest. Wicomico County allows part-time employees to choose a day of rest.

An employer who violates the day of rest provisions is guilty of a misdemeanor and is subject to a fine of between \$250 and \$500. In Wicomico County, an offender is fined \$500 for the first offense and \$1,000 for each subsequent offense.

Fair Labor Standards Act

With some exceptions, similar to State law, FLSA requires that a worker be paid a minimum hourly wage and that overtime compensation be paid to employees who work more than 40 hours in a week. FLSA has no provisions regarding the scheduling of employees, except for specified child labor provisions. There are two ways in which an employee can be covered by FLSA: "enterprise coverage" and "individual coverage."

Enterprise Coverage: Employees who work for certain businesses or organizations are covered by FLSA. These enterprises, which must have at least two employees, are (1) those that have an annual dollar volume of sales or business done of at least \$500,000 or (2) hospitals, businesses that provide medical or nursing care, schools and preschools, and government agencies.

Individual Coverage: Even where there is no enterprise coverage, employees may be covered by FLSA if their work regularly involves them in interstate commerce. FLSA covers individual workers who are engaged in commerce or in the production of goods for commerce. Examples of employees who are involved in interstate commerce include those who (1) produce goods that will be sent out of state; (2) regularly make telephone calls to persons located in other states; (3) handle records of interstate transactions; (4) travel to other states for work; or (5) perform janitorial work where goods are produced for shipment to another state. Also, domestic service workers (*i.e.*, housekeepers, full-time baby sitters, and cooks) are normally covered by FLSA. However, many agricultural workers are not subject to FLSA minimum wage and overtime standards.

State Revenues: General fund tax revenues increase minimally from employers paying employees predictability pay under specified circumstances. To the extent that predictability pay boosts the purchasing power of workers and generates new consumer spending, general fund sales tax revenues increase minimally. However, to the extent that payroll spending for employers increases, general fund tax revenues from employers may

decrease as they can deduct payroll from taxable income. Regardless, the bill does not have a material effect on State income tax revenues.

State Expenditures: The Commissioner of Labor and Industry Employment Standards Service unit currently handles inquiries regarding scheduling issues and cancellation of shifts. By creating the Fair Scheduling Act, which applies to almost all private-sector employers, including those exempt from FLSA and the Maryland Wage and Hour Law, the bill creates additional enforcement responsibilities for DLLR’s Division of Labor and Industry. DLLR cannot absorb the additional workload within existing resources and requires additional staffing to respond to the increase in inquiries and complaints prompted by the Fair Scheduling Act.

The regular staff needed to respond to and manage the additional workload created by the bill includes an assistant Attorney General, an administrator, four wage and hour investigators, and one administrative specialist. DLLR advises that inquiries into the Fair Scheduling Act violations are expected to increase significantly because the State has never had such a policy before and because of its broad application. DLLR estimates it could receive a significant number of inquiries and as many as 800 complaints alleging violations.

In addition to conducting investigations at worksites, interviewing employers and employees, and processing complaints, DLLR advises that the additional staff must develop employee notification materials of the Fair Scheduling Act and conduct an employer and employee outreach program. Additional administrative support is needed to assist in responding to phone and email inquiries and manage complaint files. Legal staff is needed to provide advice, draft regulations, review court actions, and plead cases.

General fund expenditures increase for DLLR by \$392,943 in fiscal 2016, which accounts for the bill’s October 1, 2015 effective date. This estimate reflects the cost of hiring four wage and hour investigators, an administrative specialist, and an assistant Attorney General as well as an administrator to investigate complaints and enforce the State’s Fair Scheduling Act. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	7
Salaries and Fringe Benefits	\$324,435
One-time Start-up Costs	37,115
Operating Expenses	<u>31,393</u>
Total FY 2016 State Expenditures	\$392,943

Future year expenditures reflect annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Local Revenues: Local income tax revenues may increase minimally from employers paying employees predictability pay under specified circumstances. However, to the extent that payroll spending for employers increases, local income tax revenues from employers may decrease minimally as they can deduct payroll from taxable income. The Department of Legislative Services assumes the net effect does not have a material effect on local income tax revenues.

Small Business Effect: The bill has a significant impact on small businesses. An employer must provide each employee with an initial work schedule at least 21 days prior to an employee working. An employer must post the work schedule of all employees' shifts at the work site. An employer generally may not change an employee's work schedule. An employer may not require an employee to find another employee to cover hours during which the employee is unable to work a scheduled shift. An employer must pay an employee predictability pay or specified wages when specified schedule changes occur. This places a tremendous administrative burden on small businesses, especially those with salaried employees accustomed to working flexible hours, and could have a significant negative impact on an employer's ability to meet operational needs.

However, to the extent that employees have more certainty regarding their work schedules, worker morale could increase and employee turnover and absenteeism could decrease.

Additional Information

Prior Introductions: None.

Cross File: HB 969 (Delegate Hixson, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Legislative Services

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