

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 481
Finance

(Senator Lee, *et al.*)

Economic Matters

Labor and Employment - Equal Pay for Equal Work

This bill expands the Equal Pay for Equal Work law to prohibit wage discrimination based on gender identity, among other provisions relating to the Equal Pay for Equal Work law. Additionally, an employer may not provide less favorable employment opportunities based on sex or gender identity. Moreover, an employer may not prohibit an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee or requesting that the employer provide a reason for why the employee's wages are a condition of employment.

The bill applies only prospectively and may not be interpreted to apply or have any effect on or application to any cause of action arising before the bill's October 1, 2016 effective date.

Fiscal Summary

State Effect: General fund expenditures within the Department of Labor, Licensing, and Regulation (DLLR) increase by \$5,000 in FY 2017 to update and develop educational materials for employers. The Maryland Commission on Civil Rights (MCCR) can handle the bill's requirements with existing resources. Any increase in caseloads for the Office of the Attorney General and the District Court is not expected to affect State expenditures. Potential minimal increase in general fund revenues due to imposition of existing penalty provisions.

Local Effect: The bill does not materially affect local governmental operations or finances because relatively few cases should be heard in the circuit courts, local governments currently cannot discriminate against an individual based on gender identity, and salaries of local governmental employees are public information.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Gender identity” means the gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth, which may be demonstrated by (1) consistent and uniform assertion of the person’s gender identity or (2) any other evidence that the gender identity is sincerely held as part of the person’s core identity.

The bill expands the Equal Pay for Equal Work law to prohibit an employer from discriminating between employees in any occupation by (1) paying a wage to employees of one gender identity at a rate less than the rate paid to other employees under specified conditions and (2) providing less favorable employment opportunities, as defined by the bill, based on sex or gender identity. “Providing less favorable employment opportunities” means (1) assigning or directing the employee into a less favorable career track, if career tracks are offered, or position; (2) failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or (3) limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but for the employee’s sex or gender identity.

The bill establishes that, for the Equal Pay for Equal Work law, an employee is considered working at the same establishment as another employee if the employees work for the same employer at workplaces located in the same county. The bill generally does not prohibit a variation in a wage based on specified systems or factors. However, an employee may demonstrate that an employer’s reliance on those systems or factors is a pretext for discrimination on the basis of sex or gender identity.

An employer may not prohibit an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee or requesting that the employer provide a reason for why the employee’s wages are a condition of employment. An employer may not require an employee to sign a waiver or any other document to deny the employee the right to disclose or discuss the employee’s wages. An employer may not take any adverse employment actions against an employee for specified actions regarding wages or exercising specified rights.

An employer may, in a written policy provided to each employee, establish reasonable workday limitations on the time, place, and manner for inquiries relating to employee wages so long as it is consistent with standards adopted by the Commissioner of Labor and Industry and all other State and federal laws. If an employee does not adhere to these limitations, and the employer acted because of the employee’s failure to adhere to the

limitations, an employer may have an affirmative defense for taking adverse employment action. A limitation may include prohibiting an employee from discussing or disclosing another employee's wages without that employee's prior permission, except in specified instances for an employee who has access to other employees' wage information as a part of the employee's essential job functions.

The bill does not (1) require an employee to disclose the employee's wages; (2) diminish employee rights to negotiate the terms and conditions of employment or otherwise limit employee rights; (3) limit the rights of an employee provided under any other provision of law or collective bargaining agreement; (4) create an obligation on an employer or employee to disclose wages; (5) permit an employee, without an employer's written consent, to disclose proprietary information, trade secret information, or information that is a legal privilege or protected by law; or (6) permit an employee to disclose wage information to an employer's competitor.

The Commissioner of Labor and Industry, in consultation with MCCR, must develop educational materials and make training available to assist employers in adopting training, policies, and procedures that comply with the bill's requirements.

If an employer knew or reasonably should have known that the employer's action violates Equal Pay for Equal Work provisions, an affected employee may bring an action against the employer for injunctive relief and to recover the difference between the wages paid to employees of one sex or gender identity who do the same type work and an additional equal amount as liquidated damages. If an employer knew or reasonably should have known that the employer's action violates specified wage disclosure provisions, an affected employee may bring an action against the employer for injunctive relief and to recover actual damages and an additional equal amount as liquidated damages.

An employee may bring an action on behalf of the employee and other employees similarly affected; that action must be filed within three years after the employee receives from the employer the wages paid on the termination of employment.

If a court determines that an employee is entitled to judgment in an action, the court must allow against the employer reasonable counsel fees and other costs of the action, as well as prejudgment interest in accordance with the Maryland Rules.

Current Law: State law generally prohibits an employer with at least 15 employees from discharging, failing or refusing to hire, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability. The State and local governments are considered employers.

Regardless of employer size, under the State's Equal Pay for Equal Work law, an employer may not discriminate between employees in any occupation by paying a wage to employees of one sex at a rate less than the rate paid to employees of the opposite sex if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type. Discrimination on the basis of gender identity is not addressed explicitly in the Equal Pay for Equal Work law. An employee may bring an action against an employer that violates this law.

When the Commissioner of Labor and Industry has determined that the State's Equal Pay for Equal Work law has been violated, the commissioner must (1) try to resolve any issue informally by mediation or (2) ask the Attorney General to bring an action on behalf of the employee. The Attorney General may bring an action in the county where the violation allegedly occurred for injunctive relief, damages, or other relief.

If an employer violates the State's Equal Pay for Equal Work law, an affected employee may bring an action against the employer to recover the difference between the wages paid to male and female employees who do the same type work and liquidated damages. An employee may bring an action on behalf of the employee and other employees similarly affected. An action must be filed within three years after the occurrence of the act on which the action is based.

Upon written request of an employee, the Commissioner of Labor and Industry may take an assignment of the claim in trust for the employee, ask the Attorney General to bring an action on behalf of the employee, and consolidate two or more claims against an employer.

If a court determines that an employee is entitled to judgment in an action, the court must allow against the employer reasonable counsel fees and other costs of the action.

An employer who violates certain provisions of the Equal Pay for Equal Work law is guilty of a misdemeanor and subject to a fine of up to \$300.

Federal Equal Employment Opportunity Commission

The federal Equal Pay Act of 1963 requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal.

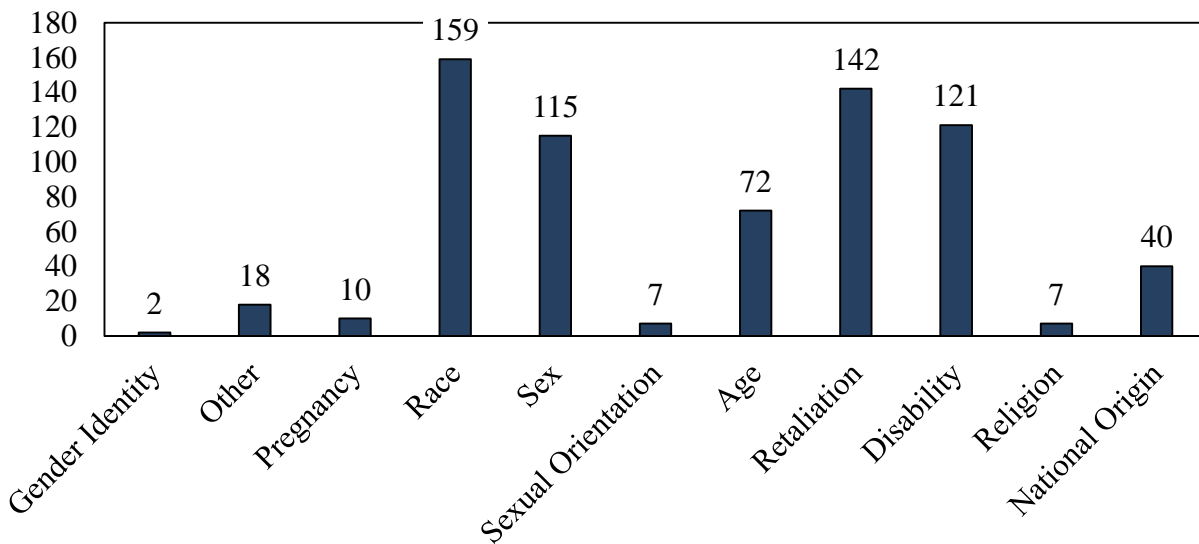
The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If EEOC finds that discrimination has occurred, it tries to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination.

Background: MCCR received 693 employment complaints in fiscal 2015. Of the employment complaints, 17% or 115 were sex discrimination complaints, as shown in **Exhibit 1**. MCCR received 2 complaints of employment discrimination based on gender identity since the enactment of Chapter 474 of 2014, which generally prohibits discrimination based on gender identity in public accommodations, labor and employment, and housing.

Exhibit 1
Employment Complaints by Discrimination Type
Fiscal 2015



Source: Maryland Commission on Civil Rights

State Expenditures: Expanding the Equal Pay for Equal Work law to prohibit wage discrimination based on gender identity has no effect on the State as an employer because State agencies already are prohibited from discriminating against individuals based on gender identity.

The Maryland Public Information Act gives the public the right to access government records, including salaries of governmental employees, without unnecessary cost and delay. Thus, the wage disclosure provisions of the bill do not have a material effect on the State because State employees' salaries are already public information.

The Division of Labor and Industry (DLI) within DLLR reports that it has received one complaint regarding the Equal Pay for Equal Work law in the past year and has one complaint pending. Based on that, DLI anticipates receiving only a nominal number of complaints and inquiries, which can be addressed using existing resources. DLI, in consultation with MCCR, must develop training materials, which increases general fund expenditures by \$5,000 in fiscal 2017. To the extent that employees discover wage discrimination as a result of the bill, MCCR can handle an increase in discrimination cases with existing resources.

The Judiciary anticipates additional operating costs associated with an increase in workload from case filings; however, since DLI anticipates fewer than 10 cases annually, the Judiciary can handle an increase in discrimination cases with existing resources.

Small Business Effect: Employers with fewer than 15 employees may no longer discriminate against an individual based on gender identity. Additionally, employers with fewer than 15 employees may not provide less favorable employment opportunities based on sex or gender identity.

While the bill prohibits an employer from taking any adverse employment action against an employee for specified actions relating to inquiring, disclosing, or discussing wages, the bill does not create an obligation on an employer or employee to disclose wages. However, to the extent that employees gather more information on wages, the bill may create pressure on an employer to decrease or eliminate wage disparities.

Additional Information

Prior Introductions: A similar bill, HB 1051 of 2015, received a hearing in the House Economic Matters Committee and was subsequently withdrawn. Its cross file, SB 424, received a hearing in the Senate Finance Committee but no further action was taken.

Cross File: HB 1003 (Delegate Valderrama, *et al.*) - Economic Matters.

Information Source(s): Maryland Commission on Civil Rights; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; U.S. Equal Employment Opportunity Commission; Department of Legislative Services

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Analysis by: Heather N. Ruby

Direct Inquiries to:
(410) 946-5510
(301) 970-5510