

**Department of Legislative Services**  
 Maryland General Assembly  
 2016 Session

**FISCAL AND POLICY NOTE**  
**Third Reader - Revised**

Senate Bill 777  
 Finance

(Senators Astle and Hershey)

Economic Matters

**Unemployment Insurance - Exemption From Covered Employment - Messenger Service Business**

This bill alters the definition of “messenger service business” applicable to unemployment insurance (UI) by repealing the requirement that the business not have an exclusive contractual delivery arrangement with an individual or a commercial establishment. The bill also alters the conditions under which work is not considered covered employment when performed by a messenger service driver for a person who is engaged in the messenger service business. The bill must be construed to apply retroactively, as discussed below.

The bill takes effect July 1, 2016.

**Fiscal Summary**

**State Effect:** The bill does not materially affect State finances or operations.

**Unemployment Insurance Trust Fund (UITF) Effect:** UITF revenues decrease by \$294,000 annually beginning in FY 2017 from reduced employer taxes, as discussed below. UITF expenditures decrease by \$903,700 annually beginning in FY 2017 from reduced benefits paid, as discussed below. The bill’s retroactive provision is not anticipated to materially affect UITF revenues or expenditures.

(in dollars)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
UITF Rev.	(\$294,000)	(\$294,000)	(\$294,000)	(\$294,000)	(\$294,000)
UITF Exp.	(\$903,700)	(\$903,700)	(\$903,700)	(\$903,700)	(\$903,700)
Net Effect	\$609,700	\$609,700	\$609,700	\$609,700	\$609,700

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

**Local Effect:** None.

**Small Business Effect:** Potential meaningful, as discussed below.

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## **Analysis**

**Bill Summary:** For purposes of determining covered employment for a messenger service driver, compensation by commission (a requirement under current law) *may* include any of the following:

- a schedule of compensation that is calculated from a percentage of revenue or some other measure of revenue that the driver generates for the messenger service business;
- a fixed amount of compensation for the completion of a specific delivery job; and
- a guaranteed minimum amount of compensation for the driver remaining available to provide delivery service.

The bill must be construed to apply retroactively and must be applied to and interpreted to affect all determinations by the Secretary of Labor, Licensing, and Regulation of:

- rates of contributions for employing units for all calendar years beginning on or after January 1, 2013; and
- benefit charges for UI claims for benefits based on work performed on or after January 1, 2013.

**Current Law:** “Messenger service business” means a business that (1) principally and primarily offers and provides to the public or commercial establishments expedited, time critical, and same day as requested delivery service; (2) does not make, produce, sell, or distribute what is delivered; and (3) does not have an exclusive contractual delivery arrangement with an individual or a commercial establishment.

Work that a messenger service driver performs for a person who is engaged in the messenger service business is not covered employment if the Secretary of Labor, Licensing, and Regulation is satisfied that:

- the driver and the person who is engaged in the messenger service business have entered into a written agreement that is in effect;
- the written agreement does not prohibit the driver from performing for more than one person who is engaged in the messenger service business;
- the driver is free to accept or reject delivery jobs from the person who is engaged in the messenger service business;
- compensation is by commission only;

- the driver personally provides the vehicle;
- the driver may set personal work hours; and
- the written agreement expressly states that the driver knows of the responsibility to pay State and federal income taxes and make contributions to Social Security for self-employment and that the work is not covered employment.

There are other exemptions in State law for specific individuals and circumstances, including newspaper delivery, taxicab drivers, and referees.

### *Covered Employment*

Employment is presumed to be covered employment if:

- regardless of whether the employment is based on the common law relation of master and servant, the employment is performed for wages or under a contract of hire that is written or oral or express or implied; and
- the employment is performed either in the State or partly in the State, or in connection with the State, subject to specified conditions.

To overcome the presumption of employment, an employer must establish that the person performing services is either an independent contractor or is specifically exempted under the law.

### *Independent Contractors*

Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

- the individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
- the work is (1) outside of the usual course of business of the person for whom the work is performed or (2) performed outside of any place of business of the person for whom the work is performed.

**Background:** UI provides temporary, partial wage replacement benefits to individuals who are unemployed through no fault of their own and who are willing to work, able to work, and actively seeking employment. Both the federal and state governments have responsibilities for UI programs. Funding for the program is provided by employers through UI taxes paid to both the federal government for administrative and other expenses

and to the states for deposit in their UI trust funds. Using federal tax revenues, the UI program is administered pursuant to state law by state employees. Each state law prescribes the tax structure, qualifying requirements, benefit levels, and disqualification provisions. These laws must, however, conform to broad federal guidelines.

States must be in conformity with certain provisions of the Federal Unemployment Tax Act (FUTA) in order to receive administrative funding for their state UI programs and for the states' employers to receive federal UI tax credits. The Maryland UI program is 100% federally funded. Employers' FUTA taxes are 6.0% of each employee's first \$7,000 in wages (\$420 annually per employee); however, employers typically receive a credit for most of that amount (5.4%), making the effective tax rate 0.6% (which translates into \$42 annually per employee).

There are federal exemptions for certain types of employment under FUTA. The federal exemptions are included in the State UI law. If a certain type of employment is exempt under State UI law but not federal UI law, an employer is subject to the loss of federal UI tax credits.

**UITF Effect:** In general, UITF revenues decrease for each employee exempted from UI coverage as employers no longer make UI contributions for exempt employees. Based on employer filings, the Department of Labor, Licensing, and Regulation (DLLR) estimates the taxable wage base for messenger service businesses to be \$16.7 million. Based on an average State UI tax rate of 2.2% for the industry, exempting these messenger service drivers reduces employer contributions and, thus, decreases UITF revenues by \$294,000 annually beginning in fiscal 2017. This estimate assumes 80% or 1,100 messenger service drivers are affected by the bill – a lower percentage assumption reduces the effect on UITF revenues.

Based on recent UI claims data, DLLR estimates UI benefits paid to the affected messenger service drivers average \$903,700 annually. Since workers who are exempt from UI coverage are no longer eligible to receive UI benefits, UITF expenditures decrease by \$903,700 annually beginning in fiscal 2017. This estimate is based on the following assumptions:

- 15% of messenger service drivers (165) file for UI benefits annually;
- the average weekly benefit amount is \$326 and remains constant; and
- each benefit recipient receives, on average, almost 17 weeks of unemployment benefits.

Actual UITF expenditures may vary from this estimate, depending on the number of drivers that would have filed for UI benefits annually absent the bill, the weekly benefit amount of those drivers, and the length of time the drivers would have received benefits.

The Department of Legislative Services (DLS) notes that, in the context of typical UITF expenditures, the above estimated impact does not have a material effect on the trust fund. UITF expenditures in 2014 were \$623 million – the estimated expenditure impact is about 0.15% of this amount. From 2008 through 2013, UITF expenditures were over \$700 million each year, peaking at \$1.1 billion in 2009.

#### *Retroactive Provision*

Chapters 202 and 203 of 1997 contained a similar retroactive provision for individuals engaged in the trade or business of delivering or distributing newspapers. DLLR is unaware of a single person or business that requested funds retroactively due to that provision. Therefore, the bill's retroactive provision is not anticipated to materially affect UITF revenues or expenditures.

However, to the extent that employers of messenger service drivers request refunds for UI taxes paid applicable to January 1, 2013, through June 30, 2016, UITF expenditures increase. If employers successfully request removal of benefit charges, UITF revenues decrease to the extent that these employers then pay lower UI taxes, which is offset to the extent that DLLR successfully recovers previously paid UI benefits from the individuals responsible for the refunded benefit charges. DLLR notes that each employer's request must be reviewed individually to ensure that only messenger service drivers are included in the request for UI tax refunds and removal of benefit charges.

DLLR advises that, in the unlikely event that *all* affected employers successfully file a retroactive claim for *all* of 2013 through 2015, the maximum amount of UI taxes that could be refunded is \$881,919 and the maximum amount of benefit charges that could be removed is \$2.7 million. DLS advises that this estimate does not include the first half of 2016, which also is eligible under the bill.

**Small Business Effect:** If a certain type of employment is exempt under State UI law but not federal UI law, an employer is subject to the loss of federal UI tax credits. Employers' FUTA taxes are 6.0% of each employee's first \$7,000 in wages (\$420 annually per employee); however, employers typically receive a credit for most of that amount (5.4%), making the effective tax rate 0.6% (which translates into \$42 annually per employee). If the bill causes a Maryland employer to be in conflict with federal UI law, the employer's FUTA tax increases due to the loss of the federal credit, which may partially or wholly offset any savings due to the bill. DLLR advises that the messenger service industry is currently *not* exempt under FUTA.

## Additional Information

**Prior Introductions:** None.

**Cross File:** HB 1334 (Delegate Davis, *et al.*) - Economic Matters.

**Information Source(s):** Department of Labor, Licensing, and Regulation; Department of Legislative Services

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md/ljm Revised - Senate Third Reader/Clarification - March 29, 2016

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