

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 Enrolled - Revised

House Bill 1663

(The Speaker)

Health and Government Operations

Finance

**State Government – State of Emergency and Catastrophic Health Emergency –
 Authority of Governor and Unemployment Insurance Benefits
 (COVID–19 Public Health Emergency Protection Act of 2020)**

This emergency bill authorizes the Governor, for the duration of the emergency, to take specified actions relating to health insurance, Medicaid, retailer profits, employer actions, and personnel at State health care facilities as a result of the March 5, 2020 proclamation declaring a state of emergency and the existence of a catastrophic health emergency (or any other specified proclamation related to the outbreak of “COVID-19”). The bill also authorizes the Secretary of Labor to determine that an individual is eligible for unemployment insurance (UI) benefits under specified circumstances due to COVID-19. **The bill terminates April 30, 2021.**

Fiscal Summary

State Effect: Maryland Department of Health (MDH) expenditures increase by an indeterminate but potentially significant amount in FY 2020 and 2021. Federal Medicaid expenditures and matching revenues increase accordingly. Specified funds may be available to cover or reimburse for these expenses. State expenditures (all funds) may increase to reimburse the Unemployment Insurance Trust Fund (UITF) for UI benefits paid to eligible individuals in FY 2020 and 2021. The effect on UITF, a nonbudgeted fund, is discussed below. The bill’s imposition of existing penalty provisions does not have a material impact on State finances or operations. **This bill increases the cost of an entitlement program in FY 2020 and 2021.**

Local Effect: Local expenditures may increase to reimburse UITF for UI benefits paid to eligible individuals in FY 2020 and 2021. The bill’s imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “COVID-19” means, interchangeably and collectively, the coronavirus known as COVID-19 or 2019-nCoV and the SARS-CoV-2 virus.

The bill establishes a series of protections for individuals who are either directly affected by COVID-19 or more broadly affected under the state of emergency and the catastrophic health emergency – due to difficulties in obtaining specified goods and services or of employers maintaining operations.

Health Insurance and Medicaid

The bill authorizes the Governor to take a series of actions that would facilitate access to health care and provision of that care and mitigate costs to individuals for COVID-19 diagnosis and treatment. Specifically, the Governor may:

- prohibit cost-sharing by an insurer, nonprofit health service plan, or health maintenance organization (collectively known as carriers) for COVID-19 testing (and associated costs) conducted based on testing protocols recommended by the Secretary of Health;
- order MDH to cover the cost of COVID-19 testing and associated costs if the costs would not otherwise be paid for by a carrier or another third party;
- require carriers and Medicaid to cover a COVID-19 immunization (should one be determined to prevent the disease) and any associated costs, without cost-sharing, if the patient belongs to a category of individuals to whom MDH has determined cost-sharing should not apply;
- establish or waive telehealth protocols for COVID-19, including authorizing health care professionals licensed out-of-state to provide telehealth to patients in the State;
- order MDH to reimburse synchronous and asynchronous telehealth services for COVID-19 provided to a patient, without regard to whether the patient is at a clinical site, if the service is covered by Medicaid, provided by a participating Medicaid provider, and authorized under the health care provider’s scope of practice; and
- consult, as appropriate, with MDH, the Maryland Insurance Commissioner, and the Maryland Health Benefit Exchange to develop and implement orders relating to COVID-19 to minimize disruption in enrollment in health insurance and Medicaid, facilitate reimbursement by carriers of telehealth services provided to patients in the State, and facilitate reimbursement of essential services to minimize the risk to public health.

Retail Profits

The Governor may prohibit a retailer from increasing the sale or rental price of any good or service to a price that increases the retailer's value of profit by more than 10%, including food, fuel, water and ice, medicine, medical supplies and equipment, cleaning products, building supplies and equipment, energy sources, and storage space. The Governor may publish a list of goods and services to which this prohibition applies.

Notwithstanding the provisions of the Commercial Law Article, if the Governor prohibits a retailer from increasing the sale or rental price of any good or service as provided under the bill, a violation of the prohibition is an unfair, abusive, and deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA's civil and criminal penalty provisions.

Employer Actions

The Governor may prohibit an employer from terminating an employee solely on the basis that the employee has been required to be isolated or quarantined.

Staffing of Health Care Facilities Owned or Operated by the State

The Governor may order MDH to authorize an alternative workweek for an employee (1) of a health care facility that is owned or operated by MDH and open 24 hours a day and seven days a week and (2) who is subject to a memorandum of understanding with the American Federation of Teachers (which applies to registered nurses at some State facilities). If so, the alternative workweek may allow the employee to work hours or shifts that are not typical for State employees and work less than 40 hours in a week. An employee who is authorized to work an alternative workweek must be (1) considered a full-time State employee and (2) entitled to compensation or overtime work. The time worked by an employee who is authorized to work an alternative workweek includes only the hours actually worked and does not include paid leave hours taken by the employee during the workweek.

These provisions are intended to allow MDH to offer more flexibility in staffing its behavioral health facilities during the COVID-19 emergency. State facilities can move to a 12-hour shift, three days per week (the standard for the health care industry) for State direct care employees instead of a traditional 8-hour shift for 40 hours per week.

Increased Unemployment Insurance Eligibility Due to COVID-19

The bill authorizes the Secretary of Labor, notwithstanding any other provision of State UI law, to determine that an individual, who need not separate from the individual's employment, is eligible for UI benefits if:

- the individual's employer temporarily ceases operations due to COVID-19, preventing employees from coming to work;
- the individual is quarantined due to COVID-19 with the expectation of returning to work after the quarantine is over; or
- the individual leaves employment due to a risk of exposure or infection of COVID-19 or to care for a family member due to COVID-19.

Current Law:

Governor's Health Emergency Powers

Under Title 14, Subtitle 3A of the Public Safety Article, a "catastrophic health emergency" is a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent, which includes a viral agent capable of causing extensive loss of life or serious disability.

After issuing a proclamation that a catastrophic health emergency exists, the Governor may, among other things, order the Secretary of Health or other designated official to control, restrict, or regulate the use, sale, dispensing, distribution, or transportation of anything needed to respond to the medical consequences of the catastrophic health emergency by rationing or using quotas, creating and distributing stockpiles, prohibiting shipments, setting prices, or taking other appropriate actions.

The Governor may also order the Secretary of Health or other designated official to require individuals to go to and remain in places of isolation or quarantine until the individuals no longer pose a substantial risk of transmitting the disease to the public. A specified directive must be issued to require isolation or quarantine. An individual or group of individuals isolated or quarantined may request a hearing in circuit court to contest the isolation or quarantine.

A person who fails to comply with an order, requirement, or directive related to a catastrophic health emergency is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$5,000.

Maryland Healthy Working Families Act

Under the Maryland Healthy Working Families Act, an employer with 15 or more employees (with specified exceptions) must have a sick and safe leave policy under which an employee earns at least 1 hour of *paid* sick and safe leave, at the same rate as the employee normally earns, for every 30 hours an employee works. An employer with 14 or fewer employees, based on the average monthly number of employees during the preceding year, must at least have a sick and safe leave policy that provides an employee with at least 1 hour of *unpaid* sick and safe leave for every 30 hours an employee works.

An employer must allow an employee to use earned sick and safe leave to care for or treat the employee's mental or physical illness, injury, or condition. An employer is not required to allow an employee to earn or carry over more than 40 hours of earned sick and safe leave in a year, use more than 64 hours of earned leave in a year, accrue more than 64 hours at any time, or use earned sick and safe leave during the first 106 calendar days the employee works for the employer.

Maryland Consumer Protection Act

An unfair, abusive, or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind, which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair, abusive, or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division within the Office of the Attorney General is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$10,000 for each violation and up to \$25,000 for each repetition of the same violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Unemployment Insurance

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. Generally, to be eligible for UI benefits an individual must be able to work, available for work, and actively seeking work.

Employer Taxes and Tax Tables: A Maryland employer's State tax rate is based on the employer's unemployment history and ranges within a certain percentage of the total taxable wages of the employer's employees. The taxes are deposited in UITF and can be used only to pay benefits to eligible unemployed individuals. Generally, an employer's earned rate (benefit ratio) is determined by finding the ratio between the benefits charged to the employer's account and the taxable wages reported in the three fiscal years prior to the computation date. The benefit ratio is then applied to the tax rate table in effect for the year. The table in use for a particular calendar year is determined by measuring the adequacy (on September 30 of the immediately preceding year) of UITF to pay benefits in the future. There are six tables, ranging from the lowest (Table A) to the highest (Table F). Table A, which has been in effect since 2016, has the lowest rates, ranging from 0.3% to 7.5% of total taxable wages (\$25.50 to \$637.50 per employee).

Potential Employer Benefit Charge Waiver Due to Natural Disasters: Chapter 733 of 2017 authorized the Secretary of Labor to waive the benefit charges against the earned rating record of an employer if (1) the benefits are paid to the claimant during a period in which the claimant is temporarily unemployed because the employer shut down due to a natural disaster and (2) the Governor declared a state of emergency due to the natural disaster. If the Secretary waives the benefit charges under this provision, the waiver may only be in effect until four months after the natural disaster or the date the employer reopens, whichever is earlier. The Maryland Department of Labor advises that this provision applies to the current COVID-19 outbreak.

Background:

Coronavirus Disease 2019

In December 2019, Chinese health officials announced they were investigating a pneumonia outbreak of unknown etiology (cause) in the city of Wuhan, China. At that time,

it was reported that many of the cases were linked to a seafood and animal market in Wuhan. Since then, health officials have reported that the outbreak was caused by a novel coronavirus, and the illness has been named “coronavirus disease 2019.”

According to the [World Health Organization \(daily situation report\)](#), as of March 17, 2020, 179,111 cases had been reported globally, and 7,426 cases were fatal; in the United States, 3,503 cases had been reported, and 58 cases were fatal. According to MDH, as of March 18, 2020, Maryland had 85 confirmed cases of coronavirus infections. Updated information on COVID-19 testing and confirmed cases can be found on the MDH [website](#).

MDH advises that, as COVID-19 is a new disease, there is currently no vaccine. While many experts are at work developing one, it may take more than a year for a vaccine to become readily available. There is also no specific antiviral treatment for COVID-19.

Maryland’s Response to Date

On March 5, 2020, Governor Hogan [declared a state of emergency](#) to mobilize all available State resources in response to COVID-19. The declaration officially authorized and directed MDH and the Maryland Emergency Management Agency (MEMA) to ramp up coordination among all State and local agencies. The declaration also enables MDH and MEMA to fast track coordination with State and local health departments and emergency management teams. The Governor has directed State agencies to take every precaution to prepare and mobilize whatever resources are necessary to address COVID-19.

Insurance Commissioner Actions

On March 6, 2020, the Insurance Commissioner issued [Bulletin 20-05](#), which requires carriers to waive any time restrictions on prescription refills and authorize payments to pharmacies for at least a 30-day supply of any prescription medication regardless of when the prescription has been most recently filled to allow individuals to obtain medication in advance of any quarantine. Carriers are asked to (1) consider removing cost barriers to testing, such as waiving cost-sharing for in-network provider office visits, urgent care center visits, and emergency department visits that result in testing for COVID-19 and (2) encourage the use of telehealth services to reduce the likelihood of exposure to and transmission of COVID-19.

Also on March 6, 2020, the Insurance Commissioner submitted emergency regulations to the Joint Committee on Administrative, Executive, and Legislative Review Committee that require carriers to:

- waive any cost-sharing for any visit to diagnose or test for COVID-19, regardless of the setting of the testing;

- waive any cost-sharing for laboratory fees to diagnose or test for COVID-19;
- waive any cost-sharing for vaccination for COVID-19;
- make a claims payment for treatment for COVID-19 that a carrier has denied as experimental;
- evaluate a request to use an out-of-network provider to perform diagnostic testing of COVID-19 solely on the basis of medical necessity;
- limit prior authorization requirements for testing for COVID-19; and
- treat an adverse decision on a request for coverage of diagnostic services for COVID-19 as an emergency case for an expedited grievance procedure.

Federal Guidance on Unemployment Insurance Program Flexibility

On March 12, 2020, the U.S. Department of Labor issued [new guidance](#) on the flexibility of federal law in permitting states to amend their UI laws to provide benefits in multiple scenarios related to COVID-19. The bill implements the three examples provided in the notice of that guidance.

Funding Actions

Chapter 12 of 2020 (Senate Bill 1079), signed by Governor Hogan on March 9, 2020, authorizes the Governor to transfer up to \$50.0 million from the State Rainy Day Fund to cover State agency costs associated with COVID-19. The transfer is subject to review and comment by the Legislative Policy Committee and subsequent reporting.

Governor Hogan also requested \$10.0 million in general funds as an emergency funding request for MDH as part of Supplemental Budget No. 1 to support emergency COVID-19 preparedness expenses. Funds may be transferred within MDH and to other State agencies to support the State's emergency COVID-19 preparedness.

State/Local Fiscal Effect:

COVID-19 Testing and Telehealth Services for COVID-19

Under the bill, the Governor may order MDH to cover the cost of COVID-19 testing and associated costs if those costs would not otherwise be paid for by a carrier or another third party. MDH must also reimburse for synchronous and asynchronous telehealth services for COVID-19 provided to Medicaid enrollees, regardless of whether the patient is at a clinical site. Thus, MDH expenditures increase by an indeterminate but potentially significant amount in fiscal 2020 and 2021 to provide coverage for these services. Federal Medicaid expenditures and matching revenues increase accordingly for telehealth services.

Funding transferred from the State Rainy Day Fund to cover State agency costs associated with COVID-19 and emergency funding requested through Supplemental Budget No. 1 may be available to cover these expenditures.

Unemployment Insurance

Unlike most employers, State and local governments reimburse UITF dollar-for-dollar on a quarterly basis for UI benefits paid. The bill expands UI eligibility for a limited period of time. Therefore, State and local government expenditures may increase to reimburse UITF for UI benefits paid to eligible government employees, likely in fiscal 2020 and 2021 only, and predominantly in fiscal 2021. The amounts cannot be reliably estimated at this time, and depend on the extent of the effect of COVID-19 and whether any State or local government employees are made eligible for UI benefits due to the bill. Many such employees currently have available paid sick leave and/or may be granted other types of leave, which would limit the impact.

UITF Effect: UITF expenditures increase in fiscal 2020 and 2021 from UI benefits paid to eligible individuals affected by COVID-19. The amount is unknown at this time and depends on the extent of the effect of COVID-19 in the coming months.

UITF revenues increase in fiscal 2020 and 2021 from reimbursements for UI benefits paid to certain entities that do not pay UI taxes but instead reimburse dollar-for-dollar: the State and local governments and certain nonprofits. The expected increase is predominantly in fiscal 2021.

The effect on UITF revenues from employer UI taxes is less straightforward, but generally UITF revenues may increase beginning in fiscal 2021. As discussed above, the Secretary of Labor *may* waive employer benefit charges during a natural disaster. Waived benefit charges essentially hold a particular employer harmless for UI benefits paid to its employees, which would otherwise increase employer taxes beginning in fiscal 2021 when new benefit ratios are calculated. However, UITF is a self-funded program. Eventually, benefits paid must be recouped from employers.

If UI benefit payments made under the bill reduce the UITF balance to a level that requires a new (higher) tax table to apply, then UITF revenues increase as all employers subject to UI taxes pay more than they would have under Table A. The change in tax rates may occur no earlier than January 1, 2021, based on the existing process for determining tax tables. As a further complication, since the general economy may also be entering a contractionary period, the bill may not be solely responsible for changing the applicable employer tax table.

For context, the UITF balance as of the end of February 2020 was \$1.2 billion, and the most recent determination that employers were to pay from Table B – the next highest tax table – was based on a UITF balance of about \$900 million.

Small Business Effect: Small businesses benefit from potential extra flexibility in responding to the effects of COVID-19, as their employees are more likely to be eligible for UI benefits.

Additional Comments: Carrier costs increase due to the prohibition on cost-sharing by carriers for COVID-19 testing and associated costs and may increase due to the provision of additional telehealth services for COVID-19. These costs are indeterminate and cannot be quantified at this time.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 1080 (The President and Senator Lam) - Finance.

Information Source(s): World Health Organization; U.S. Centers for Disease Control and Prevention; U.S. Department of Labor; Department of Budget and Management; Maryland Department of Health; Maryland Health Benefit Exchange; Maryland Insurance Administration; Maryland Department of Labor; Department of Legislative Services

Fiscal Note History: rh/ljm
First Reader - March 11, 2020
Third Reader - March 17, 2020
Revised - Amendment(s) - March 17, 2020
Revised - Updated Information - March 17, 2020
Enrolled - March 18, 2020
Revised - Amendment(s) - March 18, 2020
Revised - Updated Information - March 18, 2020

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