

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1097 (Delegate Charkoudian, *et al.*)
 Economic Matters

Maryland Wage and Hour Law and Maryland Wage Payment and Collection
 Law – Revisions
 (Maryland Wage Protection Act)

This bill expands anti-retaliation provisions of the Maryland Wage and Hour Law and prohibits an employer from taking adverse action, as specified in the bill, against an employee who takes specified actions related to the State’s Wage Payment and Collection Law. The bill also exempts specified independent contractors from the Maryland Wage and Hour Law, and alters the contents and timing of wage and pay period notices that an employer must provide to employees.

Fiscal Summary

State Effect: General fund expenditures increase by \$337,900 in FY 2021 for the Maryland Department of Labor (MDL) to enforce the bill and conduct outreach. Out-year expenditures reflect annualization and elimination of one-time start-up costs. General fund revenues increase minimally for the court awarding the Attorney General legal fees and from additional fines imposed on employers. The State is not subject to the Wage Payment and Collection Law as an employer.

| (in dollars) | FY 2021 | FY 2022 | FY 2023 | FY 2024 | FY 2025 |
|----------------|-------------|-------------|-------------|-------------|-------------|
| GF Revenue | - | - | - | - | - |
| GF Expenditure | \$337,900 | \$339,200 | \$346,400 | \$357,600 | \$369,200 |
| Net Effect | (\$337,900) | (\$339,200) | (\$346,400) | (\$357,600) | (\$369,200) |

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

Local Effect: Local governments as employers are subject to anti-retaliation provisions of the bill relating to the State minimum wage, but the bill is not anticipated to materially affect local governments or the circuit courts.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Maryland Wage and Hour Law

The Commissioner of Labor and Industry may conduct an investigation under the Maryland Wage and Hour Law on the commissioner's own initiative or on receipt of a written complaint.

An employer may not take adverse action as specified in the bill or otherwise discriminate against an employee because the employee took specified actions or because an employer believes that the employee may take specified actions. An individual, instead of an employee as provided under current law, is prohibited from (1) making a groundless or malicious complaint to the Commissioner of Labor and Industry or (2) in bad faith bringing an action or testifying in an action or a proceeding related to the bill.

If there is a preponderance of evidence that a specified prohibited activity was a contributing factor in an employer's alleged retaliation or adverse action, the defendant bears the burden of proof to prove by clear and convincing evidence that the alleged adverse employment action would have occurred for legitimate, nondiscriminatory reasons even if the employee had not engaged in the protected activity. If the adverse action or discrimination occurs within 180 days after an employee engages in protected activities, it is presumed that the adverse action was retaliation unless it can be rebutted by clear and convincing evidence that it was not retaliation. The commissioner must keep confidential the name of the employee or another person identified in a complaint or an investigation unless the commissioner determines that the employee's name should be disclosed, with the employee's consent, to further investigate the complaint.

An employee may bring an action against an employer on behalf of the employee and other employees similarly affected. An action generally must be filed within three years after the employee knew or should have known of the employer's action.

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. If a person is found to have violated certain provisions of the bill, the commissioner or court must require the person to pay the greater of actual damages plus liquidated damages or \$500 for each day that the violation continued. If an employer subsequently violated provisions of the bill within six years after a previous violation, the commissioner or court must assess against the employer a civil penalty of at least \$10,000. The commissioner and a court may order additional civil penalties and any other appropriate relief for violations under the bill. Each civil penalty assessed under the bill must be paid to the general fund.

The poster of the Maryland Wage and Hour Law that employers must keep posted in each place of employment must include the anti-retaliation provisions specified under the bill.

Maryland Wage Payment and Collection Law

The bill establishes that the Commissioner of Labor and Industry may conduct an investigation under the Maryland Wage Payment and Collection Law on the commissioner's own initiative, in addition to on receipt of a written complaint from an employee.

The Maryland Wage Payment and Collection Law may not be construed to create any legal right for specified independent contractors.

An employer must provide an employee within 30 days after the first date of employment, instead of at the time of hiring, written notice of the information required under current law, plus the basis of how an employee is paid, allowances claimed, and contact information for the employer. For each pay period, an employer must provide an employee the following information: the dates covered by the wage payments, the name of the employee and employer, the employer's address and telephone number, the rate of pay, a statement of the employee's net earnings, allowances claimed, and the number of hours worked per workweek in the pay period. For an employee paid at a piece rate, the employer must also provide information on the number of pieces completed and the piece rates.

If an employer does not meet specified wage and pay period notice requirements, an employee may bring an action against the employer under specified conditions to recover liquidated damages of \$100 for each pay period in which the violations occurred, up to \$2,500. The court may award the employee in specified circumstances reasonable attorney's fees and other costs and an amount of up to three times the wage.

An employer may not take adverse action against an employee as specified in the bill, pay or agree to pay an employee in a manner that violates the Wage Payment and Collection Law, or hinder or delay the commissioner in enforcing the law.

The bill applies enforcement provisions, civil penalties, and remedies provided under current law to specified violations of the bill, and assessed civil penalties must be paid to the general fund.

Current Law:

Maryland Wage and Hour Law

The Maryland Wage and Hour Law is the State complement to the federal Fair Labor Standards Act, which specifies minimum wage and overtime requirements for employers and employees in the State. Chapters 10 and 11 of 2019 increase the State minimum wage rate for employers with 15 or more employees in six increments until the full phase-in of \$15.00 per hour on January 1, 2025. For employers with 14 or fewer employees, the wage rate reaches full phase-in after eight increments on July 1, 2026.

The Board of Public Works (BPW), however, may temporarily suspend one scheduled increase in the State minimum wage for one year between October 1, 2020, and October 1, 2024, if it determines that the seasonally adjusted total employment is negative as compared with the previous six-month period. If total adjusted employment is negative, BPW may also consider the recent performance of State revenues in making its determination.

The Acts specify that, unless the federal minimum wage is set at a higher rate, the State minimum wage for employers with 15 or more employees is as follows:

- \$11.00 per hour as of January 1, 2020;
- \$11.75 per hour as of January 1, 2021;
- \$12.50 per hour as of January 1, 2022;
- \$13.25 per hour as of January 1, 2023;
- \$14.00 per hour as of January 1, 2024; and
- \$15.00 per hour as of January 1, 2025.

The State minimum wage for an employer that employs 14 or fewer employees is as follows:

- \$11.00 per hour as of January 1, 2020;
- \$11.60 per hour as of January 1, 2021;
- \$12.20 per hour as of January 1, 2022;
- \$12.80 per hour as of January 1, 2023;
- \$13.40 per hour as of January 1, 2024;
- \$14.00 per hour as of January 1, 2025;
- \$14.60 per hour as of January 1, 2026; and
- \$15.00 per hour as of July 1, 2026.

An employer may pay 85% of the State minimum wage rate to employees younger than age 18. Exceptions to the minimum wage requirement also exist for a training wage and a disabled employee of a sheltered workshop under specified conditions.

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.

The employer of a tipped employee is allowed a tip credit that can be applied against the direct wages paid by the employer. The employee can be paid tipping wages so long as the wages plus the tips received equal at least the minimum wage, the employee retains all tips, and the employee customarily receives more than \$30.00 a month in tips. The tip credit is equal to the State minimum wage, less \$3.63. Thus, the tip credit increases as the minimum wage increases, and the wage paid by employers to tipped employees remains \$3.63, as long as their wages plus tips equal the minimum wage. The State and local governments are not considered employers under the tip credit provisions of the Maryland Wage and Hour Law.

The commissioner may conduct an investigation to determine if the Wage and Hour Law has been violated on the commissioner's own initiative, or the commissioner may require a written complaint.

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 Maryland Wage and Hour Law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

Maryland Wage Payment and Collection Law

Maryland's Wage Payment and Collection Law regulates the payment of wages by employers in the State. The law requires employers to pay workers the wage promised; establish regular paydays; pay wages when due; pay employees in a specified manner; pay employees at least once every two weeks or twice in each month, with exceptions; furnish employees with a statement of gross earnings; advise employees of their rate of pay and designated payday; and pay employees all wages due on termination of employment. MDL's Division of Labor and Industry enforces the State's Wage Payment and Collection Law. Unless otherwise specified, the definition of "employer" in the State's Wage Payment and Collection Law does not include units of government.

The commissioner may investigate a violation of the Wage Payment and Collection Law only upon receipt of a written complaint by an employee. Whenever it is determined that the State's Wage Payment and Collection Law has been violated, the commissioner may (1) try to resolve the violation informally through mediation; (2) ask the Office of the Attorney General to bring an action on behalf of the employee; or (3) bring an action on behalf of the employee in the county where the violation allegedly occurred.

However, for wage complaints amounting to \$3,000 or less, the Commissioner of Labor and Industry uses an expedited process. For these cases, the commissioner must review the complaint and may investigate the claim and may either issue an order requiring the employer to pay or dismiss the claim. Within 30 days after receipt of the order to pay wages, the employer may request an administrative hearing. Under specified circumstances, the commissioner may proceed in District Court to enforce payment of the order.

For wage complaints over \$3,000, an employee entitled to wages from an employer may – after two weeks have elapsed – bring an action against the employer in a court of competent jurisdiction to recover the unpaid wages.

If a court determines that an employer withheld an employee's wage unlawfully, and not as a result of a bona fide dispute, the court may award the employee up to three times the amount of wages owed, counsel fees, and other costs.

Employers who violate the State's Wage Payment and Collection Law are guilty of a misdemeanor and may be fined up to \$1,000.

State Revenues: General fund revenues may increase minimally from penalties paid by employers who are found by MDL to be in violation of the Maryland Wage and Hour Law or the Maryland Wage Payment and Collection Law. Additionally, general fund revenues

increase, likely minimally, to the extent the Office of the Attorney General is awarded reasonable counsel fees and other costs.

State Expenditures: As the bill expands the anti-retaliation provisions in current law, the Division of Labor and Industry anticipates receiving as many as 100 claims per year alleging adverse action violations. Additionally, MDL estimates the Employment Standards Service workload increasing by approximately 70 cases a year and the Worker Classification Protection Unit caseload increasing by 100 cases a year due to the expanded paystub requirements. MDL cannot absorb the additional workload within existing resources and requires additional staffing to respond to the increase in inquiries and complaints prompted by the bill. The regular staff needed to respond to and manage the additional workload created by the bill includes an assistant Attorney General, two civil rights officers (each of whom could handle 50 cases a year), and two wage and hour investigators. Additionally, changes must be made to the complaint tracking database used by the Employment Standards Service and Wage and Hour units.

Thus, general fund expenditures increase for MDL by \$337,914 in fiscal 2021, which accounts for the bill's October 1, 2020 effective date. This estimate reflects the cost of hiring two civil rights officers, two wage and hour investigators, and one assistant Attorney General to investigate complaints and enforce the new requirements. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

| | |
|---|------------------|
| Regular Positions | 5.0 |
| Regular Salaries and Fringe Benefits | \$243,286 |
| One-time Start-up Costs | 69,350 |
| Operating Expenses | <u>25,278</u> |
| Total FY 2021 State Expenditures | \$337,914 |

Future year expenditures reflect full salaries with annual increases and employee turnover, termination of one-time costs, and ongoing operating expenses.

The bill is not expected to materially affect the workload of the District Court.

Small Business Effect: Small businesses must provide written notice of specified information to employees each pay period and within 30 days after the employee's first date of employment. Small businesses are subject to expanded anti-retaliation provisions of the Wage and Hour Law and the Wage Payment and Collection Law.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 641 (Senator Benson, *et al.*) - Finance.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland Department of Labor; Department of Legislative Services

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