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April 8, 2021

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1002/Senate Bill 893, “Unemployment - Insurance Revisions and Special Enrollment Period for Health Benefits”

Dear Governor Hogan:

We have reviewed House Bill 1002 and Senate Bill 893.¹ While we approve these bills for constitutionality and legal sufficiency, we write to recommend implementation in a manner to avoid a conflict with federal law.

The bills require the Maryland Department of Labor (“MDL”) to take a number of actions related to the administration of the State’s unemployment insurance (“UI”) program. Our concern is with the provision that requires MDL, on request and for certain purposes, to provide demographic data and related claimant information to the chief elected official of a county, and further allows redisclosure by the chief elected official. The provision in question provides as follows:

(A) ON REQUEST AND FOR PURPOSES CONSISTENT WITH CHAPTERS ____ AND ____ (S.B. 893 AND S.B. 894) OF THE ACTS OF THE GENERAL ASSEMBLY OF 2021, THE DEPARTMENT SHALL PROVIDE TO THE CHIEF ELECTED OFFICIAL OF A COUNTY DEMOGRAPHIC DATA AND THE ADDRESSES, OCCUPATIONS,

¹ These are crossfiled bills but are not entirely identical. There is a very minor difference in the purpose paragraphs. HB 1002, in line 11 on page 1 refers to “claimants,” whereas on page 1, line 11, SB 893 uses the term “certain individuals.” Also, HB 1002 adds a surplus “and” after § 8-809(c)(1)(i), in line 18 of page 12. For this reason, if both bills are to be signed, we recommend that SB 893 be signed last.

AND LAST KNOWN EMPLOYERS OF UNEMPLOYMENT INSURANCE RECIPIENTS WHO LIVE IN THE COUNTY OF THE CHIEF ELECTED OFFICIAL.

(B) A CHIEF ELECTED OFFICIAL OF A COUNTY MAY:

(1) SHARE THE INFORMATION PROVIDED TO THE CHIEF ELECTED OFFICIAL UNDER SUBSECTION (A) OF THIS SECTION WITH THE GOVERNING BODY OF THE COUNTY; AND

(2) REQUEST INFORMATION UNDER SUBSECTION (A) OF THIS SECTION ON BEHALF OF A POLITICAL SUBDIVISION WITHIN THE COUNTY AND PROVIDE THE INFORMATION TO THE POLITICAL SUBDIVISION.

(C) THE SECRETARY MAY ADOPT REGULATIONS TO CARRY OUT THIS SECTION, INCLUDING REGULATIONS THAT:

(1) ESTABLISH THE CIRCUMSTANCES UNDER WHICH THE NAMES OF UNEMPLOYMENT INSURANCE RECIPIENTS MAY BE INCLUDED IN THE INFORMATION PROVIDED UNDER SUBSECTION (A) OF THIS SECTION; AND

(2) ARE NECESSARY TO PROTECT THE PERSONALLY IDENTIFIABLE INFORMATION OF UNEMPLOYMENT INSURANCE RECIPIENTS.

New Labor and Employment Article (“LE”), § 8-110 (HB 1002, page 8, lines 13-28; page 9, lines 1-5; SB 893, page 8, lines 25-31, page 9, lines 1-14).

On April 5, 2021, an Unemployment Compensation (“UC”) Program Specialist from the U.S. Department of Labor’s (“U.S. DOL”) State Conformity and Compliance Team contacted MDL about the requirements of federal UC law concerning the confidentiality and disclosure of UC information and raised questions about the bill. The email from U.S. DOL notes that disclosure of confidential UC information to a public official for use in the performance of his or her official duties is permissible. 20 CFR 603.5(e). Those provisions further provide:

“Performance of official duties” means administration or enforcement of law or the execution of the official responsibilities of a Federal, State, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does

not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

There are also listed various other activities that fall within “performance of official duties.”

Federal regulations also define “public official.” 20 CFR 603.2(d). The email acknowledges that

[t]he chief elected official of a county demographic area is a public official. Therefore, it is permissible under the public official exception at 20 CFR 603.5(e) for the state UC agency to disclose confidential UC information to the chief elected official of a county demographic area for use in the performance of the chief elected official’s duties.

However, the email noted that it was not entirely clear, based on the language of the bill alone, whether disclosure to the chief elected official would be for the performance of an official duty of that official, as is required by the federal regulations. That is, the bill merely provides that disclosure be “for purposes consistent with . . . S.B. 893 and S.B. 894,” without spelling out what those purposes would be.

Similarly, with regard to the provision of the bill allowing redisclosure by the chief elected official of a county to the county “governing body” or a “political subdivision within the county,” the email said the following:

While the governing body of a county or a political subdivision within a county would appear to have responsibility for administering or enforcing a law, it is unclear whether these can be considered an agency or public entity in and of themselves. We will need additional information about whether a board of county commissioners or a county council (the two types of county governing bodies in Maryland), or a political subdivision is considered an agency or public entity within the executive branch of local government. The elected and local officials serving on them are public officials, but it is unclear whether these entities as a whole fit the 20 CFR 603.2(d) definition of “public official.” In addition, we will need further information about the purpose of the redisclosure to the governing body of the county and what the governing body would do with the redisclosed information.

The Honorable Lawrence J. Hogan, Jr.
April 8, 2021
Page 4

In light of the federal law and provisions in the bill relating to disclosure of protected UI information, we considered the extent of the Secretary's authority regarding disclosure and, more specifically, whether the Secretary has the power to implement the bill in a way that complies with the federal regulations. The ultimate inquiry must be based on "the General Assembly's intent in empowering an agency and the statutory scheme under which the agency acts." See *Thanner Enters. LLC v. Baltimore County*, 414 Md. 265, 279 (2010). We do not believe, however, that an agency necessarily needs to have explicit statutory authority to conform its conduct to other laws so as to ensure that it does not perform its powers or duties in an unlawful manner. We also do not believe that the General Assembly intended this particular bill to be implemented in a way that would violate federal law. Rather in our view, the provisions authorizing the Secretary to adopt regulations to carry out the purposes of the bills, grant implicit authority to MDL to take steps to ensure any disclosure and redisclosure of protected information is consistent with federal law, which in this case would likely include providing sufficient information to U.S. DOL so that it can make the appropriate determinations, interpreting the terms in the statute to avoid a conflict with federal law, and taking steps to require any chief elected official and governing body of a county or a political subdivision within a county who receives the protected UC information also complies with federal law.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is written in a cursive style with a horizontal line underneath it.

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber