

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 806
Finance

(Senator Peters)

**Labor and Employment – Workplace Fraud Act – Rebuttable Presumption of
the Employer–Employee Relationship**

This bill allows an employer to overcome the presumption of an employer-employee relationship under the State’s Workplace Fraud Act and establish that an individual performing services is an independent contractor on a showing that the individual meets 15 specified criteria.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State operations or finances.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: An employer may overcome the presumption of an employer-employee relationship and establish that an individual performing services is an independent contractor on a showing that the individual:

- may comply with a work order in a method of the individual’s choosing;
- is not required to attend training sessions offered by the employer;
- provides services to the employer that are not integrated into the regular operations of the employer’s business;
- is not required to perform services personally;

- hires and supervises others under a contract under which the individual agrees to provide material and labor and is responsible only for a result;
- does not necessarily have a continuing relationship with a person for whom work is performed;
- is free to work when and for whom the individual chooses;
- may accomplish the work assigned in a place other than the employer's workplace;
- is not required to file regular status reports;
- is paid according to when a particular job is completed rather than by an hourly, weekly, or monthly schedule;
- determines the price of the service to be performed;
- provides equipment necessary to complete work;
- may realize a profit or suffer a loss as a result of services rendered;
- is free to work for more than one firm at a time; and
- makes services available to the general public.

Current Law: Chapter 188 of 2009 (the Workplace Fraud Act) established, for the purpose of enforcement only, a presumption that work performed by an individual paid by an employer creates an employer-employee relationship, subject to specified exemptions. It prohibits construction companies and landscaping businesses from failing to properly classify an individual as an employee and establishes investigation procedures and penalties for noncompliance.

The "ABC test" incorporated in the Workplace Fraud Act is used by the Maryland Department of Labor (MDL) to establish whether an employer-employee relationship exists for the purpose of determining whether an employee has been misclassified under the Act. While only used to detect workplace fraud in the specified industries, MDL is required to use the ABC test in determining whether an individual is an employee in any industry for the purpose of determining whether the employer should pay unemployment insurance for the individual. The ABC test has three components, all of which must be met to establish that an individual is an independent contractor and not an employee:

- A. the individual is free from control and direction over his or her performance both in fact and under the contract (Alone);
- B. the individual customarily is engaged in an independent business or occupation (Business); and
- C. the work performed is outside the usual course of business, or outside the place of business, of the person for whom work is performed (Control).

The Act distinguishes between an employer who *improperly* misclassifies an employee and an employer who *knowingly* misclassifies an employee, and penalties are more severe for an employer who is guilty of knowingly misclassifying an employee.

Small Business Effect: Although the criteria established by the bill are substantively similar to the questions generally asked by State and federal investigators when determining whether an employer-employee relationship exists, MDL advises that *all* 15 criteria are not necessarily required to be met. Thus, MDL advises that small businesses may find having to meet *all* 15 criteria to be difficult, impractical, or impossible.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 986 (Delegate Harrison) - Economic Matters.

Information Source(s): Maryland Department of Labor; Department of Legislative Services

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rh/mcr

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