

Department of Legislative Services
 Maryland General Assembly
 2022 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 431 (Delegate Foley)
 Economic Matters

Maryland Fair Scheduling Act

This bill requires an employer of specified chain or franchise restaurants and retail stores to pay an employee for the lesser of four hours of work or the number of hours in the employee’s scheduled shift (or on-call shift *for which the employee reports to work*) at the employee’s regular rate of pay for specified shift reductions when the employee reports to work. An employer must pay an employee as specified in the bill if the employer requires the employee to be available for an on-call shift but *does not require the employee to report to work*. An employee has the right to decline to work hours that occur during the 11 hours following the end of a shift. An employer must pay an employee 1.5 times the employee’s regular rate of pay for any hours worked during the 11 hours following the end of a previous shift if the employee agreed in writing to work the hours.

Fiscal Summary

State Effect: General fund expenditures increase by \$564,700 in FY 2023 for the Maryland Department of Labor (MDL) to enforce the bill, and reimbursable revenues and expenditures increase by \$113,200 for the Office of Administrative Hearings (OAH) to hear cases. Out-year expenditures reflect annualization, inflation, and elimination of one-time start-up costs. The bill does not apply to the State as an employer. General fund revenues increase minimally from fines.

(in dollars)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
GF Revenue	-	-	-	-	-
ReimB. Rev.	\$113,200	\$121,000	\$124,200	\$127,400	\$130,600
GF Expenditure	\$564,700	\$541,300	\$556,200	\$570,400	\$585,400
ReimB. Exp.	\$113,200	\$121,000	\$124,200	\$127,400	\$130,600
Net Effect	(\$564,700)	(\$541,300)	(\$556,200)	(\$570,400)	(\$585,400)

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

Local Effect: The bill does not apply to local governments as employers. The bill does not have a material effect on local income tax revenues. The circuit courts can likely handle any increase in litigation with existing resources.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: An employee does not include an independent contractor, as defined by the bill, or an individual who is exempt from the minimum wage and overtime provisions of the federal Fair Labor Standards Act. An employer is a person that employs individuals in a food service facility or retail establishment. A food service facility is a full-service or limited-service restaurant that is part of a chain of at least 10 restaurants nationwide or a franchise of at least 10 establishments nationwide. A retail establishment is a business where goods are sold on the premises at retail and that is part of a chain of at least 10 retail establishments nationwide. The bill details recordation and notification requirements for employers.

The bill does not (1) discourage or prohibit an employer from adopting or retaining policies that are more beneficial to employees; (2) diminish an employer's obligation to comply with a contract, a collective bargaining agreement, an employment benefit plan, or any other agreement that establishes beneficial policies to an employee; or (3) preempt, limit, or otherwise affect the applicability of any other law, policy, or standard establishing scheduling policies that provide additional employee rights or protections.

If an employer requires an employee to be available for an on-call shift but does not require the employee to report to work, the employer must pay the employee (1) two hours of regular pay for each on-call shift of four hours or less and (2) four hours of regular pay for each on-call shift exceeding four hours.

An employer is not required to pay the wages required under the bill if the change to an employee's work shift is due to specified conditions, including a voluntary, mutually agreed on shift trade among employees. There is a rebuttable presumption that the required pay under the bill is owed if the employer fails to document consent to a shift trade or if the employer takes specified adverse action against an employee within 90 days of an employee taking specified actions.

The Commissioner of Labor and Industry may adopt regulations to implement the bill. The bill specifies how the commissioner may investigate complaints and must enforce the bill, which includes issuing letters and orders and filing actions in the circuit courts. Information relating to complaints, investigations, and orders must be posted on MDL's website by

February 1 each year. The bill describes the rights and procedures for employers to respond to letters and orders, which include requesting an administrative hearing to appeal an order and requesting judicial review of a final order.

A person may not interfere with, restrain, or deny the exercise of, or attempt to exercise any right protected under the bill. An employer may not retaliate against an employee for exercising or attempting to exercise the employee's rights under the bill or declining to work hours not included in an initial work schedule.

Any person may bring an action for a violation of the bill in a court of competent jurisdiction within three years after the person knew or should have known of the alleged violation. If the court finds that an employer violated the bill's provisions, the bill specifies what the court may award, and if the court finds that an employer committed specified violations or otherwise discriminated against an employee, the court must award actual damages and reinstatement of employment, unless the employee waives the right to reinstatement.

Current Law: In general, an employee in a retail establishment may choose a day of rest unless the employee is a managerial, professional, or part-time employee; Wicomico County allows part-time employees to choose a day of rest. An employee who desires a day of rest must provide the employer with written notice. While employed, the individual may change the day of rest by giving written notice to the employer at least 30 days prior to its effective date. If an employer compels an employee to work on his or her day of rest, the employee is entitled to bring a civil action against the employer to recover three times the regular rate of pay for the hours worked on that day. An employer may not discharge, discipline, discriminate against, or otherwise penalize an employee who chooses a day of rest. An employer also may not require an applicant who seeks a work week of at least 25 hours to answer any question that identifies the applicant's desired day of rest. An employer who violates the day of rest provisions is guilty of a misdemeanor and is subject to a fine of between \$250 and \$500. In Wicomico County, an offender is fined \$500 for the first offense and \$1,000 for each subsequent offense.

State Fiscal Effect: State income tax revenues are not materially affected, but general fund revenues increase minimally from fines imposed on employers.

MDL estimates it could receive 800 inquiries and 300 complaints alleging violations of the bill. 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. Additionally, changes must be made to the complaint tracking database.

An employer against whom the commissioner issues an order for a violation of the bill may request an administrative hearing. OAH needs an administrative law judge to handle

approximately 70 hearings stemming from the bill. OAH estimates each hearing will last half a day to one full day, and an additional day or longer will be spent issuing the written decision. Therefore, reimbursable expenditures increase for OAH by \$113,220 in fiscal 2023, which accounts for the bill's October 1, 2023 effective date. OAH bills MDL for these expenses so reimbursable revenues for OAH increase correspondingly, and general fund expenditures increase further for MDL.

Thus, general fund expenditures increase for MDL by \$564,679 in fiscal 2023, which accounts for the bill's October 1, 2022 effective date. This estimate reflects the cost of hiring four wage and hour investigators, one wage and hour supervisor, one assistant Attorney General, and one administrative law judge to investigate complaints, hear cases, and enforce the new requirements. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Regular Positions	7.0
MDL Regular Salaries and Fringe Benefits	\$300,526
MDL One-time Start-up Costs	129,088
MDL Ongoing Operating Expenses	21,845
OAH Expenses	<u>113,220</u>
Total FY 2023 State Expenditures	\$564,679

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Small Business Effect: The bill applies to an employer of (1) a food service facility with a full-service or limited-service restaurant that is part of a chain of at least 10 restaurants nationwide or a franchise of at least 10 establishments nationwide; or (2) a retail establishment in a business where goods are sold on the premises at retail and that is part of a chain of at least 10 retail establishments nationwide. The bill likely does not apply to small businesses since a small business is defined as a business entity that is independently owned and operated.

However, to the extent that the bill applies to small businesses that are food service facilities or retail establishments, the bill has a significant effect on employers. The bill may generate misunderstandings between employers and employees regarding how shift changes, and conversations regarding shift changes, are handled. Employers may need to modify payroll systems, pay stubs, and wage statements. Employers are subject to an array of penalties for violating provisions of the bill, which include private rights of action, double wages, and court fees. Employers may have to pay employees additional wages for shift reductions and for employees being on-call.

Even if the bill does not apply to small businesses, it is likely that employers and employees may be confused about whether the bill is applicable to them, and questions may arise.

Additional Information

Prior Introductions: SB 1145 of 2017, a similar bill, was referred to the Senate Rules Committee, but no further action was taken. It's cross file, HB 1615 of 2017, was referred to the House Rules and Executive Nominations Committee, but no further action was taken.

Designated Cross File: SB 530 (Senator Benson, *et al.*) - Finance.

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

Fiscal Note History: First Reader - February 16, 2022
js/mcr

Analysis by: Heather N. MacDonagh

Direct Inquiries to:
(410) 946-5510
(301) 970-5510