SB 635

Department of Legislative Services

Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 635 (Senator Lam)
Finance

Unemployment Insurance - Appeals and Recovery of Overpayment of Benefits Procedures - Revisions

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This bill modifies the process by which the Secretary of Labor (1) communicates with an unemployment insurance (UI) claimant and (2) recovers benefits paid to a claimant under specified circumstances. The bill establishes a predetermination investigation that the Secretary must conduct before making a finding that entitles the Secretary to recover benefits. The Secretary must delegate to the Office of Administrative Hearings (OAH) the authority to hold a contested case hearing related to a UI claim under specified circumstances. The bill also makes a series of conforming changes.

Fiscal Summary

State Effect: Under one set of assumptions, federal/general fund expenditures for the Maryland Department of Labor (MDL) increase by *at least* $16.7 million in FY 2023; federal fund revenues increase, potentially significantly, to offset *a portion* of MDL's costs. Future years reflect annualization, ongoing operating expenses, and the elimination of one-time costs. Reimbursable revenues and expenditures for OAH increase by *at least* $13.1 million in FY 2023 and *at least* $17.5 million annually thereafter, as discussed below. State revenues (all funds) decrease beginning in FY 2023 (not quantified below).

($ in millions)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
FF Revenue	-	-	-	-	-
GF/SF/FF Rev.	(-)	(-)	(-)	(-)	(-)
ReimB. Rev.	$13.1	$17.5	$17.5	$17.5	$17.5
GF/FF Exp.	$16.7	$21.7	$21.7	$21.8	$21.9
ReimB. Exp.	$13.1	$17.5	$17.5	$17.5	$17.5
Net Effect	($-)	($-)	($-)	($-)	($-)

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

Unemployment Insurance Trust Fund (UITF) Effect: UITF nonbudgeted expenditures increase to the extent the bill results in additional claims payments being made due to the longer process for determinations and new requirements related to recoupment and contested hearings, as discussed below. UITF revenues decrease, potentially significantly, to the extent the bill results in fewer overpayments being recouped, as discussed below.

Local Effect: Local revenues decrease beginning in fiscal 2023, as discussed below. Local expenditures are not affected.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Notice by Online Portal Prohibited

The definition of "mailed or otherwise delivered," in reference to UI notices and documents, means to cause to be delivered by emailing or physical mailing, which encompasses the inclusion of a document in or attachment of a document to an email but specifically *does not include* posting on an online portal. Likewise, the definition of "send" means to cause to be delivered by emailing or physical mailing, which encompasses the inclusion of a document in or the attachment of a document to an email but specifically *does not include* posting on an online portal. As a result, notifications sent to UI claimants are not considered sent or delivered when MDL posts the notifications on an online portal.

Office of Administrative Hearings

The Secretary must delegate to OAH the authority to hold a contested case hearing in accordance with the Administrative Procedures Act if a claimant or an employee appeals a decision of the Lower Appeals Division of MDL or requests that OAH conduct the appeal hearing. Additionally, the Secretary must delegate to OAH the authority to hold a contested hearing when a claimant appeals a recovery of benefits by the Secretary.

Required Investigations for Benefit Recovery

Before the Secretary of Labor makes a finding that a UI claimant was not entitled to benefits or knowingly made a false statement or representation or failed to disclose a material fact to obtain or increase benefits, the Secretary must conduct a predetermination investigation by:

- promptly sending written notice to the claimant stating that the Secretary believes the claimant may have been overpaid and that includes (1) the specific alleged facts or legal basis for the Secretary's belief and (2) instructions explaining how the claimant may contest the basis for the Secretary's belief; and

- allowing the claimant 30 days after the mailing or other delivery of the written notice to respond in writing or by telephone.

The Secretary may not recover any benefits before conducting this investigation.

Notification of Overpayment

If the Secretary decides to recover benefits, after the predetermination investigation has been completed, the written notice sent to the claimant must include (1) the *factual and evidentiary information* used to make the determination to recover the benefits; (2) *whether* the Secretary has assessed any monetary penalty, as specified; (3) instructions explaining how a claimant can appeal the determination, as specified; and (4) instructions on how and when to file an application to request a waiver of the overpayment recoupment.

Current Law:

Unemployment Insurance – Recovery of Benefits

The Secretary is authorized to recover benefits paid to a UI claimant if the Secretary finds that the claimant was not entitled to the benefits because (1) the claimant was not unemployed; (2) the claimant received or retroactively was awarded wages; or (3) due to a redetermination of an original claim, the claimant is disqualified or otherwise ineligible for benefits. Additionally, if a claimant knowingly made a false statement or representation or knowingly failed to disclose a material fact to obtain or increase a benefit or other payment, the Secretary may recover (1) all benefits paid to the claimant for each affected week; (2) a monetary penalty; and (3) interest. If the Secretary decides to recover benefits from a claimant, the Secretary must notify the claimant of:

- the amount to be recovered;
- the basis for the recovery of benefits, including any evidence used to make the determination;
- the weeks for which benefits were paid;
- the amount of any assessed monetary penalty;
- the provision of law under which MDL determined the claimant was ineligible for benefits; and
- the appeal rights available to the claimant.

The Secretary must adhere to various other processes and timelines related to appeals made by a claimant and the Secretary's recovery of the benefits. Generally, (1) the Lower

Appeals Division of MDL must hear and decide appeals from the determinations of UI claims examiners and review determination decisions (2) and the Board of Appeals of MDL must hear and decide appeals from the decisions of the Lower Appeals Division and claims for benefits referred by the Secretary.

For general information on the State's UI program, including information on the weekly benefit amount, the experience rating process, and recently enacted legislation, see the **Appendix – Unemployment Insurance.**

Administrative Procedures Act

The Administrative Procedures Act generally governs authority, responsibilities, and procedures of OAH as it hears and makes determinations on disputes involving specified State agencies, local governments, and other instrumentalities of the State. Among other things, the act generally requires OAH hearings to be open to the public, establishes rules for evidence, and subjects OAH decisions to judicial review under specified circumstances.

The unemployment claim determinations, tax determinations, and appeals in MDL's Board of Appeals are generally not subject to the Administrative Procedures Act; however, the board must generally follow the rules of evidence, rules for *ex parte* communications, record-keeping requirements, and notification requirements established by the act.

State Fiscal Effect:

Maryland Department of Labor

Federal/general fund expenditures for MDL increase by *at least* $16.7 million in fiscal 2023, which accounts for the bill's October 1, 2022 effective date. This estimate reflects the cost of hiring *at least* 25 legal officers to handle the significant increase in cases to be heard by OAH. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It also includes the payment of fees charged by OAH for hearings and one-time programming costs. The estimate assumes that only 5,000 UI appeals are annually referred to OAH; however, costs are significantly higher to the extent that more cases are referred, as discussed below.

Positions	25.0
Salaries and Fringe Benefits	$1,886,190
OAH Hearing Costs	13,125,000
Notification and Mailing Costs	1,300,000
Programming Costs	250,000
Operating Expenses	183,575
Total FY 2023 MDL Expenditures	**$16,744,765**

Future year expenditures reflect full salaries with annual increases and employee turnover, annual increases in ongoing hearing costs and operating expenses, and the elimination of one-time costs. If existing federal administrative funds are insufficient to cover these expenses, additional above-base federal funding will be provided, but only for expenses that are allowable, beginning in fiscal 2023. Otherwise, and for costs for which federal funding may not be used, general funds are needed to cover these costs. Many of the costs associated with the bill are likely not an authorized use for federal funding, and MDL has sent a request for a conformity opinion to the U.S. Department of Labor to determine whether the bill conflicts with federal law and requirements for the State's UI program.

A more fulsome discussion of these costs and the associated assumptions can be found in the following subsections.

Referral of Cases to OAH: The bill requires all UI appeals related to overpayments to be referred to OAH and requires certain other UI appeals to be referred to OAH upon request by an employer or claimant; currently, MDL advises, on average, fewer than 20 cases each year are referred to OAH. MDL experiences two direct and significant costs related to this requirement: direct payments to OAH for hearings and the hiring of additional legal officers needed to represent MDL before OAH. The total cost to MDL depends on how many cases are ultimately referred to OAH, which is difficult to predict due to significant variation in appeals and overpayment cases from year to year.

Specifically, MDL experienced (including both fraud and non-fraud cases) 17,811 overpayment cases in 2019 and 36,891 overpayment cases in 2020. MDL was unable to provide data on the number of overpayment cases that were ultimately appealed but advises that (1) the Lower Appeals Division heard and decided 16,499 cases in 2019, 17,048 cases in 2020, and 39,015 cases in 2021 and (2) the Board of Appeals heard and decided 3,000 cases in 2019, 2,022 cases in 2020, and 4,017 cases in 2021.

For purposes of this analysis, it is assumed that 5,000 cases are referred to OAH by MDL each year (either directly in the case of overpayment appeals or by request for cases that would otherwise be heard and decided by the Board of Appeals) and that, as advised by OAH, the average charge for referral of a case to OAH is $3,500. Under these assumptions, MDL is anticipated to need *at least 25* new legal officers to represent it before OAH (the cost of which is discussed in greater detail above), and MDL federal/general fund expenditures increase by $13.1 million in fiscal 2023 and $17.5 million annually thereafter for MDL to pay OAH.

Costs to MDL are significantly higher to the extent that more than 5,000 cases are referred to OAH each year. For example, if 15,000 cases were referred to OAH, which could occur if the bill were to incentivize new appeals by employers and claimants, total expenditures could approach or even exceed $50.0 million for additional legal staff and for MDL to pay OAH, assuming no shifting of current legal staff for existing appeals.

Although referral of more cases to OAH may mitigate, to some extent, Division of Unemployment Insurance (DUI) expenditures for appeals to the Lower Appeals Division and/or the Board of Appeals, this analysis does not account for any such potential effect. Instead, it assumes greater efficiencies in the cases heard by those entities.

Notification and Mailing Costs: MDL advises that its DUI has recently updated its UI system; DUI's BEACON 2.0 was deployed in September 2020. DUI currently notifies many UI claimants through email and text alerts that inform claimants of new messages or work items in their BEACON portals. DUI advises it cannot directly send these notices to claimants through email (as envisioned by the bill) because (1) the information contains personally identifiable information and (2) the BEACON system cannot encrypt information as required under federal law. Therefore, to meet the bill's requirements, DUI will be required to resume physically mailing all notifications to claimants.

As of February 8, 2022, of the claimants who had selected a preferred method of communication, 532,933 had selected email, 186,527 had selected text, and 672,619 had selected mail. Thus, expenditures for MDL increase by an estimated $140,000 per month, totaling $1.3 million in fiscal 2023 and by $1.7 million annually thereafter for mailing costs.

Office of Administrative Hearings

As discussed above regarding the anticipated number of UI cases referred to OAH on an annual basis, reimbursable revenues for OAH increase by $13.1 million in fiscal 2023 and $17.5 million annually thereafter as MDL pays OAH to hold hearings. Reimbursable expenditures increase correspondingly as OAH significantly expands its operations (through the hiring of new judges, training, and, if necessary, additional space to conduct hearings). The additional revenues are anticipated to fully offset OAH's additional costs.

State Unemployment Insurance Overpayments

In certain UI overpayment cases, such as for reimbursing employers that must reimburse DUI for all UI benefits paid to their employees, DUI does not provide refunds to the employer unless and until the claimant repays DUI. Thus, because the State is a reimbursing employer, State revenues (all funds) decrease beginning in fiscal 2023 to the extent that MDL recovers fewer overpayments or recoupment is delayed, as discussed below.

Unemployment Insurance Trust Fund Effect: MDL advises the appeals processes through OAH may take longer than appeals processes through its Lower Appeals Division and Board of Appeals. An extended appeals process extends UITF payments to a claimant who is ultimately determined to have overpaid (absent the bill, the determination may have been made sooner), thereby increasing UITF expenditures. Any such impact cannot be reliably estimated without actual experience under the bill, but the total impact may be significant.

Additionally, the process established by the bill to recover overpayments, which necessitates a predetermination investigation in order to recover benefits paid, may result in fewer overpayments being recovered by MDL and/or significant delays in the recovery of overpayments. As noted above, in certain cases, such as for reimbursing employers that must reimburse DUI for all UI benefits paid to their employees, DUI does not provide refunds to the employer unless and until the claimant repays DUI. However, in other cases, any unrecoverable benefits directly decrease UITF revenues. Any such impact cannot be reliably estimated without actual experience under the bill.

Local Revenues: Local governments are reimbursing employers and are required to reimburse DUI for all UI benefits paid to their employees. If a claimant is ultimately determined to have been overpaid, those employers are not refunded those benefits unless and until the claimant repays DUI. Therefore, local government revenues decrease beginning in fiscal 2023 to the extent the bill decreases or delays the recovery of overpayments.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

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

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Appendix – Unemployment Insurance

Program Overview

Unemployment Insurance (UI) provides temporary, partial wage replacement benefits of up to $430 per week 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. Generally, 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. The Maryland Department of Labor's (MDL) Division of Unemployment Insurance administers the State's UI program.

Each state law prescribes the tax structure, qualifying requirements, benefit levels, and disqualification provisions. These laws must, however, conform to broad federal guidelines.

Employer Contributions

Most Maryland employers pay State UI taxes, although State and local governments and some nonprofit organizations reimburse the Unemployment Insurance Trust Fund (UITF) for claims paid in lieu of paying taxes. Therefore, for most Maryland employers, the State UI tax rate is a function of:

- the employer's specific unemployment claims history; and
- the applicable tax table, which is based on the State's UITF balance and applies to most taxable employers.

Exhibit 1 shows the range of State UI taxes a typical employer owes based on the tax table in effect; there are other rates for new employers and in other limited circumstances. State UI taxes and reimbursements are typically due quarterly; however, Chapter 39 of 2021 allows employers with fewer than 50 employees to defer 2021 State UI tax payments or reimbursements until January 31, 2022, and authorizes the Secretary of Labor to offer a similar deferment in 2022. The Act, in conjunction with a 2020 executive order, also prevents UI *claims* made during the COVID-19 pandemic from increasing an employer's taxes, although employers still paid broadly higher rates under Table F in 2021 and will continue to do so under Table C in 2022 and 2023.

Exhibit 1
Tax Tables and Applicable Employer Tax Rates

	As of Sept. 30, if the Trust Fund Balance, As a Percentage of Taxable Wages		Trust Fund Balance ($ in Millions)		Then Next Year's Tax Rates Range from…			Annual Tax Per Employee (Rate x $8,500)		
Tax Table	**Exceeds**	**Up to**	**Exceeds**	**Up to**	**No Claims**	**Single Claim**	**Up to**	**No Claims**	**Single Claim**	**Up to**
A	5.00%	N/A	$995.8	N/A	0.30%	0.60%	7.50%	$25.50	$51.00	$637.50
B	4.50%	5.00%	896.2	$995.8	0.60%	0.90%	9.00%	51.00	76.50	765.00
C	4.00%	4.50%	796.6	896.2	1.00%	1.50%	10.50%	85.00	127.50	892.50
D	3.50%	4.00%	697.1	796.6	1.40%	2.10%	11.80%	119.00	178.50	1,003.00
E	3.00%	3.50%	597.5	697.1	1.80%	2.60%	12.90%	153.00	221.00	1,096.50
F	0.00%	3.00%	0.0	597.5	2.20%	3.10%	13.50%	187.00	263.50	1,147.50

Notes: Fund balance threshold dollar amounts are based on the 2020 taxable wage base and are subject to modest changes each year. A "single claim" represents the tax rate applicable to the lowest possible rate associated with nonzero (.0001 to .0027) benefit ratios. Taxes are applied to the first $8,500 earned by each employee, each year; compensation less than that amount reduces taxes owed accordingly.

Table F was in effect in 2021 due to the COVID-19 pandemic; prior to that, Table A had been in effect since 2016. Table C will be in effect in 2022 and 2023 pursuant to Chapter 73 of 2021, which also resulted in an $830 million infusion of federal funds into the trust fund in 2021. A preexisting State law requiring a federal solvency goal to be met prior to moving to a tax table with lower rates will again apply beginning in 2024. The federal solvency goal, which is designed to ensure the State's ability to pay claims during periods of high unemployment, is approximately $1.4 billion.

As of January 1, 2022, the trust fund balance was $1.25 billion.

Source: Department of Legislative Services

Benefit Payments

Generally, the weekly benefit amount a claimant is eligible for is based on the quarterly wages that the claimant was paid for covered employment in the calendar quarter of the claimant's base period in which those wages were highest. The base period is the first four of the last five completed calendar quarters immediately preceding the start of the benefit year, or, if the individual does not qualify under that definition, the four most recently completed calendar quarters immediately preceding the start of the benefit year.

Weekly benefit amounts range from $50 to $430 per week, based on earnings in the base period. There is also a dependent allowance of $8 per dependent, for up to five dependents, although the allowance cannot raise the weekly benefit amount above $430. The first $50 of any wages earned by an individual receiving UI benefits in a given week is disregarded for purposes of calculating the weekly benefit amount, after which the benefit payment is reduced dollar for dollar. These amounts do not adjust for inflation. Generally, during a benefit year, a claimant is entitled to 26 times the claimant's weekly benefit amount. During periods of high unemployment, extended benefits may also be available.

2021 Legislation Enhanced and Required Evaluation of the State Unemployment Insurance System

The unprecedented volume of claims and benefit payments due to COVID-19 strained the State UI system to its limit, which raised numerous concerns about the system's ability to effectively meet the needs of claimants and employers. Consequently, during the 2021 legislative session, the General Assembly required several system reforms, including an MDL-led study due by December 1, 2021, regarding various longer-term reforms.

Broadly, the new laws (1) required Table C to apply in 2022 and 2023; (2) made administrative changes to assist employers in paying their taxes, specifically allowing them to defer payments under certain circumstances; (3) exempted certain UI benefit payments from being subject to the State income tax; (4) temporarily modified benefit calculations to assist claimants working on a part-time basis; (5) made system administrative changes that must be implemented by MDL; and (6) enhanced the State's work sharing program, which allows an employee to continue working at reduced hours and obtain UI benefits under certain circumstances.