

Department of Legislative Services
 Maryland General Assembly
 2023 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 349 (Delegate Foley, *et al.*)
 Economic Matters

Maryland Fair Scheduling Act

This bill generally requires specified restaurants and retail stores to pay an employee for a minimum number of hours when reporting to work for a shift that subsequently has its hours reduced. An employer must also generally pay an employee for on-call shifts when the employer does not require the employee to report to work. Minimum required payments vary by shift length and whether the employee reports to work. An employee has the right to decline to work hours that occur during the 11 hours following the end of a shift; however, if an employee agrees in writing to work the hours, the employer must pay the employee additional wages, as specified. The bill includes enforcement and reporting provisions.

Fiscal Summary

State Effect: General fund expenditures increase by \$651,800 in FY 2024 for the Maryland Department of Labor (MDL) to enforce the bill, and reimbursable revenues and expenditures increase by \$133,600 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 2024	FY 2025	FY 2026	FY 2027	FY 2028
GF Revenue	-	-	-	-	-
ReimB. Rev.	\$133,600	\$164,100	\$171,400	\$178,900	\$188,200
GF Expenditure	\$651,800	\$671,400	\$700,500	\$730,900	\$768,700
ReimB. Exp.	\$133,600	\$164,100	\$171,400	\$178,900	\$188,200
Net Effect	(\$651,800)	(\$671,400)	(\$700,500)	(\$730,900)	(\$768,700)

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 and 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:

General Applicability and Related Requirements

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, as specified. 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 recordkeeping and notification requirements for employers. The Commissioner of Labor and Industry may adopt regulations to implement the bill.

Required Pay for Certain Shifts and When On call

Affected restaurants and retail stores must pay an employee for a minimum number of hours for each shift if the employee reports to work but is then required to work fewer hours. Generally, if the employee reports to work but is then required to work less than four hours, the minimum is four hours of pay. However, if the employee is originally scheduled for a shift of less than four hours, the minimum is the scheduled shift length. These minimums also apply to on-call shifts for which an employee reports to work. 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 employee has the right to decline to work hours that occur during the 11 hours following the end of a shift; however, if an employee agrees in writing to work the hours, the employer must pay the employee the greater of (1) 1.5 times the employee's regular rate of pay or (2) four hours of regular pay.

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.

Investigation, Enforcement, and Penalties

The Commissioner of Labor and Industry must enforce the bill as specified, which includes investigating complaints, 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 for declining to work hours not included in an initial work schedule.

There is a rebuttable presumption that the employer violated the bill if the employer retaliates, as defined, against an employee within 90 days after an employee files a complaint with the commissioner or takes other specified actions.

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.

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.

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.

See the **Appendix – Maryland Wage and Hour Law** for more general information on minimum wage and overtime requirements for employers and employees in the State.

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

Based on its experience with similar changes to the Wage and Hour Law, MDL estimates that 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 enforce the bill and 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 that it expects to result 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 \$133,564 in fiscal 2024, 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 \$651,798 in fiscal 2024, which accounts for the bill’s October 1, 2023 effective date. This estimate reflects the cost of hiring four wage and hour investigators, one wage and hour supervisor, and one assistant Attorney General to investigate complaints and enforce new requirements; it also includes the cost of reimbursing OAH for the increased caseload prompted by the bill. It includes salaries, fringe benefits, one-time start-up costs, programing costs, and ongoing operating expenses.

Positions	7.0
MDL Salaries and Fringe Benefits	\$368,855
MDL Programming Costs	89,800
MDL Other Operating Expenses	59,579
OAH Expenses	<u>133,564</u>
Total FY 2024 MDL Expenditures	\$651,798

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

As noted above, reimbursable revenues and expenditures for OAH both increase by \$133,564 to hire one additional Administrative Law Judge.

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. This limits the applicability since a small business is defined for purpose of fiscal and policy notes as a business entity that is independently owned and operated, not dominant in its field, and employs 50 or fewer full-time employees.

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: Similar legislation has been introduced within the last three years. See SB 530 and HB 431 of 2022.

Designated Cross File: None.

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

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km/mcr

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Appendix – 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 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 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. BPW has not exercised this authority.

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:

- \$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:

- \$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.

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; certain farm workers; and covered employees under the Secure Maryland Wage Act.

Generally, 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.

Under Maryland's Wage and Hour Law, an employer is required to pay an overtime wage of at least 1.5 times the usual hourly wage for each hour over 40 hours that an employee works during one work week. This requirement does not apply to an employer that is subject to federal rail laws; a nonprofit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or specified amusement or recreational establishments. It also does not apply to an employee for whom the U.S. Secretary of Transportation sets qualifications and maximum hours of service under federal law; a mechanic, parts person, or salesperson, under certain conditions; a driver employed by a taxicab operator; or specified air carrier employees under certain conditions. Also, specific exemptions apply for farm work, bowling establishments, and infirmaries.

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.