SB 912
Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law – Antiretaliation Provisions
Finance Committee
Position: Unfavorable

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors, both open shop and union. AGC of America is the nation's largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms, all through a nationwide network of chapters. Maryland AGC opposes SB 912 and respectfully urges the bill be given an unfavorable report.

SB 912 increases the burden on employers under the Wage and Hour and Wage Payment Laws. Some of the changes are not objectionable: allowing the Commissioner of Labor and Industry to initiate investigations on its own motion or requiring the workplace notice include antiretaliation provisions. However, other provisions of the bill introduce ambiguity regarding the employer's permissible conduct and so alter the burden of proof in proceedings under the antiretaliation provisions as to remove any pretext of fair and equal treatment of employers and employees.

Because the bill affects both the Wage and Hour and Wage Payment statutes, for ease of analysis, I'll deal with the Wage and Hour provisions first, but the same objections apply to the portions of the bill dealing with Wage Payment, since lines 11-14 on page 8 incorporate all of the Wage and Hour provisions into the Wage Payment statute. Objectionable provisions include the following:

1. On page 2 in line 15, the bill adds "or on behalf of", which would result in extending protections to people outside of the employment relation. It is an invitation to free-lance advocates to seek out or foment situations that they can use to their advantage. Employees who feel their employer has taken prohibited adverse action are fully protected and can complain without the need of outside third parties. The language "or on behalf of" should be rejected.

2. On page 2 in lines 17-19, SB 912 creates an opportunity for miscommunication and misunderstanding with potentially serious consequences for employers. The Bill proposes to amend §3-428(a)(1) to protect a complaint by an employee to "an individual with apparent authority to alter the terms or conditions of employment to the employee." There is no definition of "apparent authority" in the Bill, which creates ambiguity. Apparent to whom? To the employee, to a reasonable person, or to the employer? This change is unnecessary and irrelevant. If the individual complained to simply ignores the complaint because he or she has no actual authority to deal with wages, the employer could miss the opportunity to deal with the employee's complaint, resulting in action by the Commissioner or a lawsuit and consequent damages. Logically, in order to prove retaliation, the employer or its agent(s) ["a supervisor, manager, or foreman"] must have knowledge of the employee's protected conduct, in this case a complaint. Otherwise, adverse action against the employee cannot possibly be motivated by the unknown or confidential complaint of the employee. Absent such knowledge of the complaint, there can be no retaliatory intent, and thus no causal connection to the adverse action. See, e.g., *Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009). The nebulous concept of a complaint to "an individual with apparent authority" who is not a legal agent of the employer should be rejected.

3. On page 2 in lines 23-24, the bill stretches the 3-year statute of limitations by beginning the period to run from the date of the complaint. The relevant and correct point from which limitations should run is the date of the action or giving rise to the complaint. The language proposed in SB 912 would permit an employee to wait for three years minus a day from the prohibited action to file a complaint and then wait an additional three years minus a day before filing suit. Moreover, the language would give SB 912 retroactive effect, allowing employees to file complaints about actions taken three years previously. This section of the bill should be rejected.

4. On page 2 in line 30, the bill expands the meaning of "adverse action" to include the broad and nebulous undefined term "or otherwise discriminate." When coupled with the amendment to §3-428(b) on page 4 in lines 6-10, the result is adverse action is simply in the eye of the beholder, i.e., whatever anyone could conceivably think is adverse. That ambiguity puts employers in the impossible position of being exposed to complaints such as from an employee who feels that he or she isn't being treated nicely by a supervisor or thinks another employee is somehow more favored by a supervisor. The existing language in §3-428(b)(6) wisely refers to changes in the terms or conditions of employment. The ambiguous "or otherwise discriminate" and the changes to §3-428 (b)(6) should be rejected.

5. On page 3, lines 16-18, the bill creates an impossible burden of proof for the employer. An employee only has to claim that some neutral action by the employer, changing a shift assignment, for example, was secretly motivated by the employer's "suspecting or believing" the employee was going to do something protected by the statute to bring the action under the statute and force the employer to court with the burden of proving the employer's mental state; this provision should be rejected.

6. On page 4, in line 7, the bill expands the protected class under the bill to include not only employees but also "another individual", i.e., everyone else in the wide world. Third parties have no rights under the Wage and Hour or Wage Payment Laws, but this language would expand the scope of the bill beyond any limits. Protection of employees is one matter; adding everyone else anywhere in the world is quite another. This language should be rejected.

7. On page 4, beginning in line 23-31, SB 912 introduces a manifestly unfair shifting of the burden of proof in lawsuits by an employee seeking redress under §3-428. Whereas an employee complainant could meet his or her burden of proof by "a preponderance of the evidence", an employer would have to meet the higher standard of meeting the burden of proof by producing "clear and convincing evidence." There is no justification for such an unequal and unfair rule. Applying the clear and convincing standard is both unfair to the employer and not in accordance with the burdens applicable to retaliation cases brought under federal discrimination statutes. In essence, the bill says employers are inherently dishonest and not to be believed, absent overwhelming evidence in their favor. The burdens of proof should be equal.

8. On page 4, line 32, through page 5, line 4, the bill adopts the standard that employers are presumed guilty until proven innocent. On its face, this is a subversion of justice and American legal standards and should be rejected. It's worth noting that the bill reinforces the assault on employers by requiring them to prove their innocence not simply by the normal burden of a preponderance of the evidence, but by the higher burden of "clear and convincing." These lines should be stricken from the bill.

9. On pages 5 and 6, new §3-428 (f) continues the pattern of unequal treatment of employers and employees. Thus, an employee who prevails is entitled to "counsel fees and other costs (not specified), but the bill is silent if it's the employer who prevails. Moreover, the bill tolls the running of the three-year statute of limitations during an investigation by the Commissioner, which can proceed for an unlimited period. This exposes an employer to a lengthy period with the threat of damages hanging over the employer's head. Note that proposed §3-428 (f)(1)(i) (page 5, lines 10-12) allows an employee to proceed both before the Commissioner and simultaneously in court. Thus, the employee has the choice of proceeding simultaneously or waiting until the conclusion of the Commissioner's investigation. In other words, for employer, it's "heads I win, tails you lose." Employees should be required to exhaust their remedies before the Commissioner before filing suit. Moreover, an employer faces a civil penalty of not less than $10,000 for another violation within 6 years, but employees face no such penalty for repeated false accusations.

10. Finally, on page 6, lines 6 -8, SB 912 would give courts and the Commissioner unlimited discretion to penalize employers in any other manner that comes to mind: perhaps mandating the firing of particular management employees, closing their businesses; imposing a financial penalty of a magnitude that would have the same effect, or ordering the employer to turn over control of the company to employees, etc.

With respect to the provisions dealing with the Wage Payment statute, the amendments to §3-507.2 are inappropriate and should be rejected.

2. On page 11, lines 17-23, the bill allows an employee to sue and win the employee's attorney's fees and court costs in a case where the court determines wages were withheld as a result of a bona fide dispute. This "heads I win, tails you lose" approach is unjust and encourages and rewards unnecessary litigation. The changes to the current law should be rejected.

3. On page 14, lines 11-15, the bill repeats the inappropriate expansion to include "another individual" addressed above and should be rejected.

Accordingly, Maryland AGC respectfully urges the Committee to give SB 912 an unfavorable report.

Champe C. McCulloch
McCulloch Government Relations, Inc.
Lobbyist for Maryland AGC