

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Appropriations Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 73
State and Local Government and Private Employers - Teleworking
DATE: January 21, 2021
(1/27)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 73. This bill, if passed, would require the appropriate official of each local government, municipality, and branch of state government to establish a telework program and adopt a telework policy and guidelines for his or her respective entity. The bill also would require each entity to coordinate with the Department of Information Technology to ensure the adequacy of information and security protections for information and information systems used while teleworking.

First, current law recognizes that the Judiciary has broad authority to set its own personnel policies, which include a telework policy.

Md. Code Ann., State Pers. & Pens. § 2-201 provides:

Except as otherwise provided by law, an employee in the Judicial, Legislative, or Executive Branch of State government is governed by the laws and personnel policies and procedures applicable in that branch.

Telework is inherently a personnel policy. The Judiciary operates as an almost entirely public facing entity and, in order to effectively provide access to justice, it must have control of its staffing needs without the imposition of generic metrics.

The Judiciary ensures that its personnel policies apply consistently across the various Judicial Branch units. Maryland Rule 16-801 (b) states:

Budget, Procurement, and Personnel Standards. All units of the Judiciary above shall prepare their proposed budgets and exercise procurement and personnel decisions in conformance with standards and guidelines promulgated by the State Court Administrator.

The above, coupled with the existing Judiciary telework policy, negate the requirements in the proposed bill. Moreover, Division I of the State Personnel and Pensions article,

where the proposed legislation is located, is largely only applicable to the Executive Branch. Accordingly, this bill, if enacted, would undermine existing statutory law by unnecessarily attempting to encroach on the Judiciary's authority to establish its own personnel policies.

Most importantly, the bill conflicts with the Maryland State Constitution's clear recognition of the separation of powers between the branches of government. Article 8 of the Maryland Constitution's Declaration of Rights recognizes: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

In addition, Article IV, § 18 of the Maryland Constitution grants to the Chief Judge of the Court of Appeals administrative authority over Judicial Branch: "The Chief Judge of the Court of Appeals shall be the administrative head of the Judicial system of the State." Employee telework policies are an administrative matter that falls squarely within the Chief Judge's constitutional duties.

Unlike the other policies to which the Judiciary is subject¹ and which do not impose on judicial functions, the proposed legislation would impose on the Judiciary's day-to-day functioning and therefore it runs afoul of the separation of powers. In acknowledging the limited powers of the legislative branch to impose authority on the judicial branch, the Court of Appeals in *Attorney Gen. of Maryland v. Waldron*, 289 Md. 683, 699 (1981) stated:

There can be no doubt, however, that the deferential respect accorded the legislative branch by the judicial must neither undermine nor dilute the fundamental authority and responsibility vested in the judiciary to carry out its constitutionally required function, an aspect of which, as we have seen, is the supervision of practicing attorneys. Nonetheless, the flexibility that inheres in the separation of powers doctrine allows for some limited exertion of legislative authority. As a consequence of this elasticity, we have recognized, first, that the General Assembly may act pursuant to its police or other legitimate power to aid the courts in the performance of their judicial functions[.]

By instituting specific telework requirements on the Judiciary, the legislature exceeds its permissible "limited exertion of legislative authority . . . to aid the courts in the performance of their judicial function." Instead, the proposed legislation "dilutes the fundamental authority and responsibility vested in the judiciary to carry out its

¹ Specifically, § 2-203, inquiries into criminal record or criminal history of job applicants, is applicable to the Judiciary ("this section applies to all employees in the Judicial, Legislative, and Executive branches of State government."). Also, and probably more analogous to the telework requirement, § 2-311 expressly includes the Judiciary and prohibits requiring an employee to take leave if the employer can provide a reasonable accommodation for the employee's limitation caused or contributed to by pregnancy or childbirth.

constitutionally required function.” The administration of justice does not end at the doors of the courtroom. Rather, the clerk’s offices, where the teleworking requirements would have a large impact, are crucial in ensuring that actions are promptly processed and scheduled, communicating with the bar and the general public, and otherwise allowing each courthouse to function smoothly. The Judiciary must maintain administrative control over employee staffing, including and decisions about teleworking, in order to carry out the judicial function.

The Judiciary already has a telework policy in place that meets the needs of the Judicial Branch as well as its own IT department and, thus, the bill is both unnecessary and administratively burdensome. Moreover, the bill runs afoul of the separation of powers doctrine.

cc. Hon. Carol Krimm
Judicial Council
Legislative Committee
Kelley O’Connor