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February 1, 2022

TO: The Honorable C.T. Wilson
Chair, Economic Matters Committee

FROM: Brian E. Frosh
Attorney General

RE: HB0299 – Labor and Employment – Employment Standards and Conditions –
Definition of Employer – **Support with Sponsor Amendments**

The Office of Attorney General urges this Committee to adopt the sponsor amendments and favorably report HB 299. If passed, our priority bill will take effect on October 1, 2022.

Wage theft is a widespread problem in Maryland, due in part to the increased use of outsourcing in the workplace. Companies that at one time would have hired employees directly instead insert an intermediary between themselves and their workers. Often these intermediaries—staffing agencies, contractors, and subcontractors—are undercapitalized. As a result, workers in highly outsourced sectors characterized by extensive contracting are particularly vulnerable to wage theft, with large numbers not getting paid overtime, minimum wage, or back wages owed at termination.

As noted in the preamble to the introduced bill, several “federal district court decisions have narrowed the definition of ‘employer’ under [the Maryland Wage Payment and Collection Law] to exclude joint employers, frustrating the intended purpose of the law to ‘provide a meaningful remedy to the harm flowing from the refusal of employers to pay wages lawfully due[.]’” This bill, as introduced, would add a standard definition of “employer” to Labor & Employment § 3-101 to ensure that the employment statutes of Title 3 are applied equally and predictably.

Currently, Title 3 contains several slightly different definitions of “employer.” The Maryland Wage and Hour Law (“MWHL”), along with other Title 3 statutes, defines “employer” to “include[] a person who acts directly or indirectly in the interest of another employer with an employee.” Md. Code Ann., Lab. & Empl. § 3-401(b). The Maryland Wage Payment and Collection Law (“MWPCCL”) currently defines “employer” to “include[] any person who

employs an individual in the State or a successor of the person.” Md. Code Ann., Lab. & Empl. § 3-501(b).

The Maryland Court of Special Appeals has held that, despite the differences in the definition of “employer” between the two statutes, the same test should be applied to determine whether an employee has more than one employer under the MWPCL and MWHL. *See Campusano v. Lusitano Const. LLC*, 208 Md. App. 29, *36 (2012). Certain federal district courts have followed *Campusano* and applied the economic realities test to the MWPCL as well.¹ The economic realities test for joint employment has been applied to Fair Labor Standards Act claims for decades; it is well-known to judges and employers alike. Other federal district courts have declined to follow *Campusano*,² instead limiting liability under the MWPCL to only those employers directly “involved in the payment of wages.”³ The amended definition of employer in the bill would ensure the consistent application of the MWPCL by all courts, state and federal.

If the sponsor amendments appended to this testimony are adopted, the amended version of the bill would change the definition of employer in the MWPCL to harmonize it with that in the MWHL, instead of adding a general definition to Subtitle 1 of Title 3. The amendments simplify the bill while addressing the problem of inconsistent application of the MWPCL.

For the foregoing reasons, the Office of the Attorney General urges adoption of the sponsor amendments and a favorable report of the House Bill 299, as amended.

Encl. Appendix of Sponsor Amendments

cc: Committee Members

¹ *See Rivera v. Mo’s Fisherman Exchange, Inc.*, No. ELH-15-1427, 2018 WL 2020423 (D. Md. May 1, 2018).

² *See, e.g., Deras v. Verizon Maryland, Inc.*, No. DKC-09-0791, 2010 WL 3038812 (D. Md. July 30, 2010); *Jennings v. Rapid Response Delivery, Inc.*, No. WDQ-11-0092, 2011 WL 2470483, at *5 (D. Md. June 16, 2011); *Odjaghian v. EngagePoint, Inc.*, No. JKB-18-0151, 2018 U.S. Dist. LEXIS 112367 (D. Md. July 6, 2018).

³ *Pridgen v. Appen Butler Hill, Inc.*, No. JKB-18-61, 2019 U.S. Dist. LEXIS 35283, at *13 (D. Md. Mar. 4, 2019).

HOUSE BILL 299

K3

2lr1526
CF SB 224

By: **The Speaker (By Request – Office of the Attorney General)**

Introduced and read first time:

January 19, 2022 Assigned to:

Economic Matters

A
BILL
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TLED

1 AN ACT concerning

2 **Labor and Employment – Employment Standards and Conditions –**
3 **Definition of**

4 **Employer**

5 FOR the purpose of ~~adding a general~~ changing the definition of “employer” ~~for purposes~~
6 ~~of certain~~ in the Maryland Wage Payment Collection Law.
7 ~~provisions of law relating to employment standards and conditions; and~~
8 ~~generally~~
9 ~~relating to employment standards and conditions.~~

10 BY repealing and reenacting, with amendments,

11 Article – Labor and Employment

12 Section ~~3-101, 3-301, 3-401, 3-501, 3-702(a), 3-801(a), 3-802(a), and~~
13 ~~3-901~~

14 Annotated Code of Maryland

15 (2016 Replacement Volume and 2021 Supplement)

16 Preamble

17 WHEREAS, The Maryland Wage Payment and Collection Law (MWPCCL) is a
18 “statutory cause of action, the purpose of which is to provide a vehicle for
employees to

19 collect, and an incentive for employers to pay, back wages,” *Cunningham v. Feinberg*,
20 Md. 310, 322–23 (Md. 2015); and

21 WHEREAS, A series of federal district court decisions have narrowed the
22 definition

23 of “employer” under MWPCCL to exclude joint employers, frustrating the intended

purpose
19 of the law to “provide a meaningful remedy to the harm flowing from the refusal of
20 employers to pay wages lawfully due,” Marshal v. Safeway, Inc. 437 Md. 542, 559 (Md.
21 2014); and now, therefore,

~~22 WHEREAS, Enacting a general definition of “employer” reflects the~~
~~legislature’s~~
~~23 intent for MWPCL to function as a complement to the Maryland Wage and Hour Law;~~
~~now,~~
~~24 therefore,~~

22 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 That the Laws of Maryland read as follows:

2 **Article – Labor and Employment**

3 ~~3-101.~~

4 ~~(a) In this title the following words have the meanings indicated.~~

5 ~~(b) “Commissioner” means the Commissioner of Labor and Industry.~~

6 ~~(c) (1) “Employ” means to engage an individual to work.~~

7 ~~(2) “Employ” includes:~~

8 ~~(i) allowing an individual to work; and~~

9 ~~(ii) instructing an individual to be present at a work site.~~

10 ~~(d) (1) “EMPLOYER” MEANS A PERSON ENGAGED IN A BUSINESS, AN~~
11 ~~INDUSTRY, A PROFESSION, A TRADE, OR ANY OTHER ENTERPRISE IN THE STATE~~
12 ~~THAT EMPLOYS AN INDIVIDUAL IN THE STATE.~~

13 ~~(2) “EMPLOYER” INCLUDES A PERSON THAT ACTS DIRECTLY OR~~
14 ~~INDIRECTLY IN THE INTEREST OF ANOTHER EMPLOYER WITH AN EMPLOYEE.~~

15 ~~3-301 3-501.~~

4 (a) In this subtitle the following words have the meanings indicated.

16 (b) ~~[(1)]~~ “Employer” ~~[means:]~~ **INCLUDES:**

17 ~~[(i)]~~ a person engaged in a business, industry, profession, trade, or
18 other enterprise in the State;

19 ~~[(ii)]~~ **(1)** the State and its units;

20 ~~[(iii)]~~ **(2)** a county and its units; and

21 ~~[(iv)]~~ **(3)** a municipal government in the State.

5 ~~[(2)]~~ “Employer” includes a person who acts directly or indirectly in the;
22 interest of another employer with an employee.]

23 (c) “Gender identity” has the meaning stated in § 20-101 of the State Government
24 Article.

~~1 (d) (1) "Wage" means all compensation for employment.~~

~~2 (2) "Wage" includes board, lodging, or other advantage provided to an
3 employee for the convenience of the employer.~~

~~4 3 401.~~

~~5 (a) In this subtitle the following words have the meanings indicated.~~

~~6 (b) ["Employer" includes a person who acts directly or indirectly in the interest of
7 another employer with an employee.~~

~~8 (c)] "Federal Act" means the federal Fair Labor Standards Act of 1938.~~

~~9 [(d)](c) "Wage" means all compensation that is due to an employee for
10 employment.~~

~~11 3 501.~~

~~12 (a) In this subtitle the following words have the meanings indicated.~~

~~(b) "Employer" includes [~~

~~13 6 (1) any person who employs an individual in the State or }
a successor of 7 the person THAT EMPLOYS AN INDIVIDUAL IN THE STATE.; or~~

~~_____ (2) A PERSON WHO ACTS DIRECTLY OR INDIRECTLY IN THE 8 INTEREST OF
ANOTHER EMPLOYER WITH AN EMPLOYEE.~~

9 (c) (1) "Wage" means all compensation that is due to an employee for
~~16~~10 employment.

~~17~~11 (2) "Wage" includes:

~~18~~12 (i) a bonus;

~~19~~13 (ii) a commission;

~~20~~14 (iii) a fringe benefit;

~~21~~15 (iv) overtime wages; or

~~22~~16 (v) any other remuneration promised for service.

~~23 3 702.~~

~~24 (a) In this section, "employer" [means:] **INCLUDES:**~~

~~25 (1) [a person engaged in a business, industry, profession, trade, or other~~
~~26 enterprise in the State;~~

1 ~~(2)~~ the State;
2 ~~{(3)} (2)~~ a county; and
3 ~~{(4)} (3)~~ a municipal corporation in the State.
4 ~~3 801.~~

5 ~~(a) [(1)]~~ In this section, “employer” ~~[means a person engaged in a business,~~
6 ~~industry, profession, trade, or other enterprise in the State.~~

7 ~~(2) “Employer” includes[:]~~

8 ~~[(i)]~~ a unit of State or local government that employs individuals who
9 are not subject to the provisions of Title 9, Subtitle 5 of the State Personnel and Pensions
10 Article~~;~~ and

11 ~~(ii)~~ a person who acts directly or indirectly in the interest of another
12 employer with an employee~~].~~

13 ~~3 802.~~

14 ~~(a) (1)~~ In this section the following words have the meanings indicated.

15 ~~(2) “Bereavement leave” means leave an employee is allowed to use on the~~
16 ~~death of a member of the employee’s immediate family.~~

17 ~~(3) “Child” means:~~

18 ~~(i)~~ for the purposes of leave provided under subsection ~~(d)(1)(i)~~ of
19 this section, an adopted, biological, or foster child, a stepchild, or a legal ward who is:

20 ~~1.~~ under the age of 18 years; or

21 ~~2.~~ at least 18 years old and incapable of self-care due to a
22 mental or physical disability; or

23 ~~(ii)~~ for the purposes of bereavement leave under subsection ~~(d)(1)(ii)~~
24 of this section, an adopted, biological, or foster child, a stepchild, or a legal ward.

25 ~~(4) [(i)]~~ “Employer” means a person that is engaged in a business,
26 industry, profession, trade, or other enterprise in the State.

27 ~~(ii)~~ “Employer” includes a person who acts directly or indirectly in
28 the interest of another employer with an employee.

1 ~~(5)~~ “Immediate family” means a child, spouse, or parent.

2 ~~[(6)](5)~~ (i) “Leave with pay” means paid time away from work that is
3 earned and available to an employee:

4 1. based on hours worked; or

5 2. as an annual grant of a fixed number of hours or days of
6 leave for performance of service.

7 (ii) “Leave with pay” includes sick leave, vacation time, paid time off,
8 and compensatory time.

9 (iii) “Leave with pay” does not include:

10 1. a benefit provided under an employee welfare benefit plan
11 subject to the federal Employee Retirement Income Security Act of 1974;

12 2. an insurance benefit, including benefits from an
13 employer’s self-insured plan;

14 3. workers’ compensation;

15 4. unemployment compensation;

16 5. a disability benefit; or

17 6. a similar benefit.

18 ~~[(7)](6)~~ “Parent” means an adoptive, biological, or foster parent, a
19 stepparent, a legal guardian, or a person standing in loco parentis.

20 3-901.

21 (a) In this subtitle the following words have the meanings indicated.

22 (b) “Construction services” includes the following services provided in connection
23 with real property:

24 (1) building;

25 (2) reconstructing;

26 (3) improving;

27 (4) enlarging;

~~1 (5) painting;~~

~~2 (6) altering;~~

~~3 (7) maintaining; and~~

~~4 (8) repairing.~~

~~5 [(c) "Employer" means any person that employs an individual in the State.]~~

~~6 [(d)](c) "Exempt person" means an individual who:~~

~~7 (1) performs services in a personal capacity and employs no individuals
8 other than:~~

~~9 (i) a spouse of the exempt person;~~

~~10 (ii) children of the exempt person; or~~

~~11 (iii) parents of the exempt person;~~

~~12 (2) performs services free from direction and control over the means and
13 manner of providing the services, subject only to the right of the person or entity for whom
14 services are provided to specify the desired result;~~

~~15 (3) furnishes the tools and equipment necessary to provide the service;~~

~~16 (4) operates a business that is considered inseparable from the individual
17 for purposes of taxes, profits, and liabilities:~~

~~18 (i) in which the individual:~~

~~19 1. owns all of the assets and profits of the business; and~~

~~20 2. has sole, unlimited, personal liability for all of the debts
21 and liabilities of the business, unless the business is organized as a
22 single owned corporate entity, to which sole, unlimited personal liability does not apply;
23 and~~

~~24 (ii) for which:~~

~~25 1. the individual does not pay taxes for the business
26 separately but reports business income and losses on the individual's personal tax return;
27 and~~

~~28 2. if the business is organized as a corporate entity and the
29 individual otherwise qualifies as an exempt person under this subsection, the individual~~

~~1 files a separate federal informational tax return for the entity as required by law;~~

~~2 _____ (5) exercises complete control over the management and operations of the
3 business; and~~

~~4 _____ (6) exercises the right and opportunity on a continuing basis to perform the
5 services of the business for multiple entities at the individual's sole choice and discretion.~~

~~6 **[(e)] (D)** "Knowingly" means having actual knowledge, deliberate ignorance, or
7 reckless disregard for the truth.~~

~~8 **[(f)] (E)** "Landscaping services" includes the following services:~~

~~9 _____ (1) garden maintenance and planting;~~

~~10 _____ (2) lawn care including fertilizing, mowing, mulching, seeding, and
11 spraying;~~

~~12 _____ (3) seeding and mowing of highway strips;~~

~~13 _____ (4) sod laying;~~

~~14 _____ (5) turf installation, except artificial;~~

~~15 _____ (6) ornamental bush planting, pruning, bracing, spraying, and removal;
16 and~~

~~17 _____ (7) ornamental tree planting, pruning, bracing, spraying, and removal.~~

~~18 **[(g)] (F)** (1) "Place of business" means the office or headquarters of the
19 employer.~~

~~20 _____ (2) "Place of business" does not include a work site at which the employer~~

~~21 has been contracted to perform services.~~

~~22 [(h)](c) "Public body" means:~~

~~23 (1) the State;~~

~~24 (2) a unit of State government or an instrumentality of the State; or~~

~~25 (3) any political subdivision, agency, person, or entity that is a party
to a~~

~~26 contract for which 50% or more of the money used is State money.~~

17 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
~~28~~18 October 1, 2022.