
Senate Bill 635

Date: March 15, 2022
Committee: Senate Finance Committee
Bill Title: Unemployment Insurance - Appeals and Recovery of Overpayment of Benefits
Procedures - Revisions
Re: Letter of Information

Senate Bill 635 (“S.B. 635” or “the Bill”) would amend the Labor and Employment Article of the Annotated Code of Maryland in four ways; it: (1) disallows some notices via a claimant’s BEACON portal; (2) allows appeals of overpayment determinations to OAH; (3) allows appeals of Lower Appeals Division decisions to OAH; and (4) changes predetermination procedures, notices and collections for overpayments. The major fiscal and operational impacts of each of these changes are described below.

1. Disallows some notices via a claimant’s BEACON portal

The Division of Unemployment Insurance (“Division”) is subject to federal regulations and internal policies about the transmittal of a claimant’s personal identifiable information (“PII”). The Division may mail documentation containing PII but may not send PII in email form unless the attachment containing the PII is encrypted.

Due to extensive identity theft fraud during the pandemic, the Division has prepared, printed and mailed thousands of letters, notices, and updates to undeliverable addresses and to addresses where the claim application does not match any person living there. The Division currently puts a “mail block” on those claims and defaults claimants to receive notifications via their online portal, but S.B. 635 would require email or mail delivery even for those addresses.

The Bill may drive the Division to send all notices by mail, which would double the budget for mailing supplies (currently about 51% of claimants who have selected a preferred method of communication, have chosen to be alerted to correspondence in their BEACON portal via text or email). This would add an annual cost of approximately \$1,680,000.

2. Allows appeals of overpayment determinations to OAH

OAH hearings are heard by administrative law judges (“ALJs”) and comply with the Administrative Procedure Act (APA) and the Rules of the Office of Administrative Hearings. Depending on the case, an OAH hearing may include discovery, motions, motion hearings, subpoenas, prehearing conferences, and postponements. The APA requires ALJs to issue decisions within 90 days of the conclusion of a hearing.

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Because overpayment appeals at OAH are likely to take several months and because the Division would be required to continue payments to the claimant pending resolution on appeal, this lengthy process could lead to incredibly large overpayments when the Division's overpayment determinations are affirmed. This would be worse for the claimant and in some cases may lead to the Division being unable to recover overpayments at all. The creation of more and greater overpayments is not in the interest of claimants or the Division. In addition, reimbursing employers, which includes state and county governments, would have to foot the bill for benefits paid to their employees while the claims are pending appeal. And, if the Division's determinations are affirmed, these employers would not receive any refunds unless and until the Division were able to recover the overpayments.

In short, this provision of the Bill would lead to a significantly longer appeals process and larger overpayments.

Assuming that an average of 15,000 non-fraud overpayment determinations are appealed to OAH at a cost of even \$1,000 per hearing (because those cases are not likely to be as complex as appeals from Lower Appeals decisions), the cost would be \$15,000,000. It is estimated that the Division would need fifty (50) additional UI Legal Officers to handle the estimated 15,000 annual appeals of overpayments established. The cost of 50 new UI Legal Officers would be approximately \$4,100,000.

The Maryland Department of Labor ("Department") is required to operate merit personnel systems as a condition of eligibility for federal assistance and participation in the intergovernmental UI program. As ALJs are not Department merit staff, it is likely that the Bill would take the Department out of compliance with this merit staffing requirement and jeopardize federal funding.

USDOL guidelines require Lower Appeals to decide 60% of cases within 30 days and 85% of cases within 45 days. The Department is required to report compliance with case-aging guidelines monthly. It is unclear how these reporting requirements could be met if cases were appealed to OAH. Failure to meet these reporting requirements could jeopardize federal funding for the Lower Appeals Division.

Another operational cost relates to the Division's BEACON 2.0 system. BEACON 2.0 was designed with current appeals processes in mind. Should the bill go into effect, it likely would require a costly revision to the coding of BEACON 2.0 to allow greater flexibility while entering appeals data and still allowing effects of decisions to be automated and appeals data to be captured for reporting purposes. It may also require the hiring of data entry professionals to hard code/enter details of thousands of appeals cases.

This provision of the Bill would create a much costlier appeals process (which might be both unfunded and risk other funding) and could require costly system upgrades.

3. Allows appeals of Lower Appeals Division decisions to OAH

As with the provision described above, this provision of the Bill would lead to a significantly longer appeals process and larger overpayments.

Assuming that an average of 4,000 cases were referred to OAH under the Bill at a cost of \$2,000 per hearing, the cost would be \$8 million. It is estimated that the Division would need fifty (50) additional UI Legal Officers to handle the estimated 4,000 annual appeals of Lower Appeals decisions. The cost of 50 new UI Legal Officers would be approximately \$4,100,000.

As with the provision described above, this provision might take the Department out of compliance with federal timeliness standards and the merit staffing requirement, which may jeopardize federal funding.

This provision of the Bill would create a much costlier appeals process (which might be both unfunded and risk other funding) and could require costly system upgrades.

4. Changes predetermination procedures, notices and collections for overpayments

Because the Bill's proposed changes would require the Secretary to provide to a claimant a 30-day period to respond in writing or by telephone before making a finding of overpayment, the Division would be required to continue payments to the claimant for the extra 30-day period specified in the bill. This is longer than the Division took to review overpayment assessments prior to the pandemic and will lead to greater overpayments assessments. And, if a case involves fraud, the Division may pay out additional benefits which may not be recoverable.

Furthermore, the bill lengthens the process unnecessarily. This lengthened process will require additional staff hours for each claimant that chooses to respond to the Secretary's notice by mail or phone. Because the BEACON 2.0 system does not account for this 30-day predetermination process, this provision of the Bill may require the Division to work with its vendor Sagitec to make coding changes to allow for this lengthened and different process for determining overpayments.

The Division sent a request for a conformity opinion to the United States Department of Labor ("USDOL") to determine whether the Bill, if passed, would conflict with federal law and requirements for Maryland's UI program. USDOL reviewed SB 635 and affirmed that "This bill raises certain conformity issues".

USDOL cited the following concerns within their analysis of SB 635:

1. **The thirty-day notice requirement is not a method of administration that ensures UC will only be paid when due.**
 - a. The provision in the bill that requires a thirty-day time frame to respond to the notice of potential overpayment would allow payment of UC to continue when, potentially, the UC agency has sufficient information to reasonably conclude that no further benefits are due given the factual circumstances of the individual claim.
 - b. Allowing the claimant an opportunity to delay the adjudication process for up to thirty days may result in continued payments that may not be due under the provisions of the state UC law and prevents the duty of the UC agency to make timely determinations on continued claims.
2. **The methods of administration requirement requires that staff conducting UC appeals must be merit-staffed.**
 - a. SB 635 creates an issue with the merit-staffing requirement in Section 303(a)(1), SSA as it provides that the claimant or employer may choose to file an appeal with the Maryland Office of Administrative Hearings (MOAH) rather than the lower appeals authority and the appeal hearings will be conducted by Administrative Law Judges (ALJs) in the MOAH.
3. **There are two aspects of Federal law which the state must take into consideration when transferring the appeals functions outside of the state agency.**
 - a. The transfer of some UC appeals to an OAH must not result in appeals being more complex, or in a failure to promptly dispose of appeals hearings.
 - b. If some UC appeals are to be heard by the OAH, only the costs of hearing those appeals, and not appeals on non-UC matters, may be funded from the grant.

The Department respectfully requests that the Committee consider this information.