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NATIONAL WOMEN'S LAW CENTER
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**Testimony of**
**Andrea Johnson, Director of State Policy, Workplace Justice & Cross-Cutting Initiatives**
**National Women's Law Center**

**FAVORABLE – SB 450 – Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training**
**Before the Maryland Senate Judiciary Proceedings Committee**

**February 15, 2022**

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights and has long worked to remove barriers to equal treatment of women in the workplace, including workplace harassment and discrimination.

We commend the legislature for working to end workplace harassment. Workplace harassment is a widespread problem, and the need for strong workplace protections has become more urgent than ever. Harassment affects workers in every state, in every kind of workplace and industry, and at every level of employment. However, low-paid workers—nearly two-thirds of whom are women in Maryland—are especially at risk of harassment given the stark power imbalances they experience at work.[1] The COVID-19 pandemic has exposed and exacerbated these conditions.

## I. Maryland's employment discrimination law currently prohibits harassment, but does not explicitly define the term, which puts workers at greater risk of workplace abuses.

Maryland's employment discrimination code does not spell out what conduct constitutes workplace harassment. In interpreting Maryland's state employment discrimination law, Maryland courts traditionally seek guidance from federal cases interpreting Title VII.[2] Federal courts have interpreted Title VII to prohibit workplace harassment when submitting to the conduct becomes a condition of employment or continued employment or when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment (typically called "hostile work environment" harassment). Unfortunately, in evaluating whether conduct is so "severe or pervasive" as to create a hostile work environment, a number of lower federal courts have interpreted the "severe or pervasive" standard so narrowly that conduct most people would find egregious is not considered "severe or pervasive."

For example, courts in the 4th Circuit—the federal court cases to which Maryland courts will look—have found that each of the following incidents did not constitute "severe" or "pervasive" harassment and thus the law did not protect against this harassing behavior:

- An employee working in prison facility alleged that, over a year, a co-worker stared at her breasts, constantly told her that he found her attractive, and made inappropriate comments such as, "the [employee] should be spanked every day." The co-worker also referred to his physical fitness for his age; on one occasion, measured the length of the employee's skirt to judge its compliance with the prison's dress code and told her that it looked 'real good;' asked her if he made her nervous (she answered 'yes'); and repeatedly remarked to her that if he had a wife as attractive as her, he would not permit her to work in a prison facility around so many inmates.[3]
- An employee alleged same-sex harassment extending over a seven-year period. The employee alleged that a supervisor frequently entered the men's restroom when plaintiff was in the restroom alone, and on one of those occasions, pretended to lock the door and said, "Ah, alone at last," while approaching the employee. The supervisor also inquired about the employee's sex life, and regularly commented on the employee's physical appearance. During one incident, the supervisor positioned an illuminated magnifying glass over the employee's crotch, looking through it while pushing the lens down and asking, "Where is it?" In another instance, the supervisor bumped into the employee and said, "You only do that so you can touch me." Additionally, while in a confined darkroom space together, the supervisor asked the employee, "Was it as good for you as it was for me?" and upon leaving the darkroom, attempted to force himself in a one-person revolving door with the employee.[4]
- An employee, a transgender woman, alleged that she was subjected to persistent misgendering by coworkers despite a meeting informing the entire staff of correct pronouns and her transition and that she should be treated with dignity and respect. A manager witnessed the misgendering but told the employee to "lay low" and if she were to complain, she would be in worse trouble. A co-worker filed a complaint against the employee stating that the co-worker was "walking on eggshells" because of the employee's request to be called by her name and the proper pronouns and the employee was subsequently put on probation due to this complaint.[5] On one occasion, the employee's supervisor told her that her skirt was too short when another woman was wearing a shorter skirt but was not reprimanded. In addition, a co-worker told her that she "hated" transgender people because her ex-husband was transgender.
- An employee alleged that her supervisor requested sexual favors from her in return for a promotion; repeatedly accused her of having a sexual relationship with her former supervisor and repeatedly inquired of other employees if such a sexual relationship occurred; commented on one occasion on the shape of her legs and waist; and groped her by squeezing her around the waist.[6]

When a survivor brings a harassment lawsuit, courts should consider all the ways the employer harassed the survivor. But under the "severe or pervasive" standard, instead of viewing events in their totality, judges too often parse apart each instance of harassment and consider each in isolation. This framework minimizes survivors' experiences and the impact of harassment at work.

Women of color are particularly hurt by the "severe or pervasive" standard because judges' application of the standard does not consider the complexities of intersectional identities. Instead of, for

example, recognizing that race and gender-based discrimination often co-exist for women of color, judges applying this standard parse out and diminish specific conduct as "based on race" or "based on gender" instead of considering the totality of the circumstances. This framework effectively excludes women of color, and other groups with multiple marginalized identities, and their unique experiences in the workplaces, denying them justice for the discrimination and harassment they have suffered.

In short, the "severe or pervasive" standard does not reflect the realities of our workplaces, power dynamics, or modern understandings of unacceptable harassment at work. As a result, many cases challenging workplace behavior most people would consider harassment are being thrown out by courts, which normalizes harassing behavior in workplaces.

## II. SB 450 provides a clear definition of harassment that reflects the realities of workplace harassment.

By disavowing the harmful "severe or pervasive" standard, SB 450 will restore Maryland's civil rights law as a tool to prohibit a broad spectrum of egregious harassment. It will ensure that Maryland law is responsive to the lived experiences of Maryland workers and modern understandings of unacceptable harassment at work. The language in SB 450 closely follows federal law without codifying the harmful "severe or pervasive" standard and makes clear that judges must consider the "totality of the circumstances" in evaluating alleged harassing conduct, as required by federal law. The bill helps refocus courts on what was intended to be the heart of the analysis—whether the harassing conduct unreasonably alters the conditions of employment.

## III. By passing SB 450, Maryland would join the movement of states and cities across the country moving away from the "severe or pervasive" standard.

In the fall of 2020, Montgomery County, Maryland enacted a workplace harassment definition and standard that closely follows this legislation.[7] In 2019, New York state adopted similar, but more expansive legislation, to move away from the "severe or pervasive" standard,[8] as New York City had done years' prior in 2016.[9] In 2018, California also passed legislation to ensure their courts do not follow unduly narrow interpretations of "severe or pervasive."[10] And this year, more and more states from Vermont to DC to Colorado are working on legislation to provide a clear definition of workplace harassment in their codes and ensure that unduly narrow interpretations of "severe or pervasive" do not present a barrier to preventing harassment or accessing justice.

## IV. SB 450 will benefit Maryland businesses.

This bill provides clarity to employers about what constitutes unlawful harassment, which will help employers prevent and stop harassment. In turn, it will help employers avoid liability and the lasting human impacts of harassment that translate into business costs, such as decreased productivity, increased absenteeism, and diminished recruitment and retention. [11]

We urge members of this Committee to show up for working people in Maryland support SB 450.

[1] National Women's Law Center (NWLC) calculations using American Community Survey (ACS) 2018 1-year estimates using IPUMS-USA.
[2] *Young v. Housing Authority of Balt. City*, 2017 WL 5257127, at *6 n.9 (D. Md. Nov. 13, 2017); *Haas v. Lockheed Martin Corp.*, 915 A.2d 735 (Md. 2007).
[3] *Singleton v. Dep't of Corr. Educ., 115 F. App'x 119* (4th Cir. 2004).
[4] *Hopkins v. Balt. Gas and Elec. Co.*, 77 F.3d 745 (4th Cir. 1996).
[5] *Milo v. CyberCore Techs.*, et al., 2019 WL 4447400 (D. Md).
[6] *Francis v. Bd. of Sch. Comm'rs of Balt. City*, 32 F.Supp. 2d 316 (D. Md. 1999).
[7] Montgomery County Council Legis. Info. Mgmt. Sys. Bill 14-20, Ch. 29.
[8] N.Y. EXEC §296.
[9] N.Y.C. LOCAL L. NO. 35, §2(c) (2005). In 2016, New York City passed the second Local Civil Rights Restoration Act and codified the standard set forth in *Williams v. N.Y.C. Housing Authority*, 872 N.Y.S.2d 27, 36 (App. Div. 2009), which disavowed "severe or pervasive" and held that "the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender."
[10] 2018 Cal. Legis. Serv. Ch. 955 (S.B. 1300).
[11] *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686304.

**MCCR.Harass.Sex,Definitions.SB450.pdf**
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# State of Maryland
# Commission on Civil Rights

*"Our vision is to have a State that is free from any trace of unlawful discrimination."*



February 15, 2022

**Senate Bill 450 – Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training**
**POSITION: Support**

Dear Chairperson Smith, Vice Chairperson Waldstreicher, and Members of the Senate Judicial Proceedings Committee:

The Maryland Commission on Civil Rights ("MCCR"; "The Commission") is the State agency responsible for the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, health services and state contracts based upon race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, gender identity, genetic information, physical and mental disability, and source of income.

Senate Bill 450 eliminates the need for an incident of harassment or sexual harassment to be severe or pervasive when terms and conditions or an employment decision is based on the submission or rejection of the harassing conduct. SB 450 provides it also can be found that an employer has engaged in unlawful harassment or sexual harassment based on the totality of circumstances. This bill removes the definition of sexual harassment from the State Personnel & Pensions Article and places the definition in State Government Article, Title 20 which is enforced by MCCR.

The definitions in SB 450 for harassment and sexual harassment captures those incidents where employees suffer a tangible employment action or a hostile employment environment when they fail to submit to or reject inappropriate conduct or advances from co-workers or decision makers. SB 450 seeks to eliminate all types of harassment based on the protected classes covered by Title 20 and to place a definition of sexual harassment in the article. Thus, clear guidance to employers, judges and employees is provided on what unlawful behaviors are prohibited in the workplace.

For these reasons and more, the Maryland Commission on Civil Rights urges a favorable vote on SB 450. Thank you for your time and consideration of the information contained in this letter. The Maryland Commission on Civil Rights looks forward to the continued opportunity to work with you to improve and promote civil rights in Maryland.



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**Sexual harassment - testimony - senate - 2022.pdf**
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MCASA
Maryland Coalition Against Sexual Assault

**Working to end sexual violence in Maryland**

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For more information contact:
Lisae C. Jordan, Esquire

**Testimony Supporting Senate Bill 450**
**Lisae C. Jordan, Executive Director & Counsel**
February 15, 2022

The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on Senate Bill 450.

**Senate Bill 450 – Bringing the Definition of Sexual Harassment into the 21st Century**
In 2018, the late President Miller and Speaker Busch established the General Assembly's Workplace Harassment Commission. In response to the recommendations of the Commission, Maryland enacted reforms to Maryland's employment discrimination laws, expanding protection to workers in more types of employment situations, and expanding the time that victims of harassment have to file for remedies. While the Commission had ended, the work it started must continue. **SB450 does exactly that: this legislation would effectively repeal dated and offensive case law that limits access to justice for employees who have been sexually harassed and replaces it with a modern and reasonable definition.**

Courts have interpreted anti-discrimination law to prohibit workplace harassment based on two theories: quid pro quo harassment (when submitting to the conduct becomes a condition of employment or continued employment), or hostile workplace environment (when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment). **Far too often, lower courts have interpreted the hostile work environment standard very narrowly, so that egregious conduct is not considered "severe or pervasive."** Senate Bill 450 seeks to correct this by providing statutory definitions of "SEXUAL HARASSMENT" and "HARASSMENT" that repeals the requirement that this conduct be "severe or pervasive" and directs the court to examine the "totality of the circumstances".

Examples of Maryland cases that illustrate the impact of current case law are listed below. While these are federal cases, Maryland courts routinely look to federal Title VII cases to determine a defendant's scope of liability under Title 20 of the Maryland Code.[1]

[1] *Moore v. Sprint Commc'n Co.*, LP, 2012 WL 4480696, at *6 (D. Md. Sept. 27, 2012); see also *Haas v. Lockheed Martin Corp.*, 914 A.2d 735 (Md. 2007) ( "Title VII is the federal analog to Article 49B of the Maryland Code" and "our courts traditionally seek guidance from federal cases in interpreting Maryland's Article 49B").

*In one case, a supervisor frequently entered the men's restroom when plaintiff was in the restroom alone, and on one of those occasions, pretended to lock the door and said, "Ah, alone at last," while approaching the plaintiff. The supervisor also inquired about the plaintiff's dating life and whether the plaintiff had sex with anyone over the weekend, and regularly commented on the plaintiff's physical appearance. During one incident, the supervisor positioned an illuminated magnifying glass over the plaintiff's crotch, looking through it while pushing the lens down and asking, "Where is it?". In another instance, the supervisor bumped into the plaintiff and said, "You only do that so you can touch me." Additionally, while in a confined darkroom space together, the supervisor asked the plaintiff, "Was it as good for you as it was for me?, and upon leaving the darkroom, attempted to force himself in a one-person revolving door with the plaintiff. This behavior continued over a seven year period, and the court found the sexual harassment was not "severe or pervasive" enough to constitute unlawful harassment. Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745 (1996).*

*In another reported case, a supervisor engaged in sexually harassing conduct towards his employee, including requesting sexual favors from her in return for a promotion; repeatedly accusing her of having a sexual relationship with her former supervisor and asking other employees if such a sexual relationship occurred; commenting on her body, specifically, on the shape of her legs and waist; and, on one occasion, squeezing her waist. The court held the conduct was not sufficiently severe or pervasive. Francis v. Board of School Com'rs of Baltimore City, 32 F.Supp 2d 316 (D. Md. 1999).*

The era of #MeToo has changed the culture of our workplaces. **Employees now rightfully expect to be treated without discrimination and to go to work without being subjected to the sexually harassing behavior that was once categorized as "boys will be boys".** Senate Bill 450 will mean that Maryland's courts and anti-discrimination laws take a fresh look at this behavior without the weight of questionable and dated case law or the expectation that a "little bit" of harassment is acceptable as long as it is not "severe and pervasive".

**HB450 is also timely in light of the pandemic.** The need for strong workplace anti-harassment laws in Maryland is more urgent than ever. The COVID-19 pandemic has unleashed an economic recession that is hitting women hardest, with especially high levels of job loss for Black women and Latinas. Women— disproportionately Black women—are also 65% of front-line workers in Maryland risking their lives in low-paid jobs.[2] Without a safety net or optimism about their chances of finding another job, workers are more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work.

**Senate Bill 450 will help enforce the reasonable expectation that a workplace should be free of sexual harassment. This bill passed this Committee, the Senate, and the Economic Matters Committee during the 2021 session, but did not receive a vote on the floor of the House.**

**The Maryland Coalition Against Sexual Assault urges**
**the Judicial Proceedings Committee to**
**report favorably on Senate Bill 450**

[2] National Women's Law Center calculations using 2014-2018 American Community Survey (ACS), 5-year sample, using IPUMS-USA, available at https://usa.ipums.org/usa/. Front-line workforce defined using methodology outlined in Hye Jin Rho, Hayley Brown, & Shawn Fremstad, Center for Economic Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (Apr. 2020), available at https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/.

## SB 450 - Harasment and Sexual Harassment - Definit

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|---|---|
| BILL NO: | Senate Bill 450 |
| TITLE: | Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training |
| COMMITTEE: | Judicial Proceedings Committee |
| HEARING DATE: | February 15, 2022 |
| POSITION: | **Favorable** |

In the wake of the #MeToo movement, the Maryland General Assembly has made positive advances to address the serious issues of workplace harassment and to bolster the reforms undertaken by the General Assembly in prior sessions. While the Maryland Commission on Workplace Harassment has ended, it's work is not yet finished, and Senate Bill 450 seeks to build on its progress. As a statewide legal services provider whose mission is to ensure the physical safety, economic security, and autonomy of women in Maryland, and as the operator of the only free, statewide Employment Law Hotline, the Women's Law Center of Maryland fully supports SB 450.

According to the Equal Employment Opportunity Commission (EEOC), at least one in four women have been sexually harassed in the workplace. Workplace harassment is alleged in nearly 30% of all complaints filed with the federal agency, yet many workers, particularly those in low-wage jobs are loathe to report it, fearing retaliation and humiliation. Even fewer are willing to take those reports further by filing charges with the agency or attempting to litigate the harassment, as the lawsuits are often too expensive, too likely to increase retaliation, and too likely to fail due to the unreasonably high legal standards required to prove unlawful levels of harassment.

The need for stronger workplace harassment laws is even more urgent given the current pandemic, where women are overrepresented in many of the sectors that have been hardest hit – hospitality, leisure, restaurants, and education – accounting for as much as 83% of the jobs lost in those sectors. It has been even more devastating for Black and Latina women, who make up a disproportionate percentage of workers in those sectors and who, not surprisingly, have experienced unemployment levels at an even higher rate than their white counterparts. Without a safety net or optimism about their chances of finding another job, workers are more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work. SB 450 would help provide these vulnerable workers with extra security, by updating our laws to meet our current societal mores and eliminating the untenable "severe and pervasive" standard that is so often an insurmountable barrier to advancing a claim of harassment.

SB 450 seeks to clarify that harassment can occur under state law, even if it does not meet what courts have previously called the "severe or pervasive standard". The WLC is fully in favor of removing the "severe or pervasive" standard, which developed through federal claims filed under Title VII of the Civil Rights Act of 1964. By doing so, the legislature would make clear that a single instance of sexual harassment may be sufficient to give rise to a claim. The current inquiry of whether the harassment was sufficiently severe or pervasive enough to create an abusive working environment imposes too high of a burden on plaintiffs, and has been repeatedly interpreted so narrowly by courts, that conduct most people would find egregious is often found by the court not to be unlawful. This standard, which is outdated and unnecessary, results in cases

where employees have been ogled, groped, and sexually solicited, being thrown out for not being "severe or pervasive" enough, even if the harassment occurred on multiple occasions[1]. Indeed, under this standard, courts have even found an employer leaping out from behind bushes to grab and attempt to kiss an employee was neither severe nor pervasive as that incident only occurred once. While an argument may be made that at one time this behavior was tolerated, that can no longer be the case. Such behavior can no longer be acceptable under any circumstances, and we must align our laws to reflect those changes.

In applying the "severe or pervasive" standard courts have too often looked at incidents of harassing conduct in isolation, instead of in totality, and have ignored critical context that increased the threatening nature of the harassment, such as the power dynamic between the harasser and the victim or other forms of harassment occurring simultaneously. SB 450 would ensure harassment includes conduct that creates a working environment that a reasonable person would perceive to be abusive or hostile, based on the *totality of the circumstances*. This is important language that would require the court to consider a multitude of factors, rather than looking at the conduct in isolation. Otherwise, a court could look at a sexual harassment claim without consideration of other forms of harassment suffered by the plaintiff based on race, religion, or ethnicity. By including the language regarding "totality of the circumstances", a court would be required to view the intersectional nature of those identities and the harassment perpetuated against the plaintiff.

Our Employment Law Hotline has frequently heard from employees who fear that the harassment they are subjected to and must endure in order to continue earning a living, would not be considered severe enough should they bring a claim to address it. They are almost universally fearful of retaliation, or skeptical that the system will ever support them. SB 450 would be a positive step in addressing those issues while updating our laws and giving clear guidance to the courts as to the standards to be utilized. It presents an important step towards fixing a large problem, which will enhance the working conditions of many Maryland employees. Therefore, the Women's Law Center urges a favorable report.

***The Women's Law Center of Maryland operates statewide Family Law and Employment Law Hotlines, the Protection Order Advocacy and Representation Projects in Baltimore City, Baltimore County and Carroll County, and the statewide Collateral Legal Assistants for Survivors and Multi-Ethnic Domestic Violence Projects.***

[1] See generally: *Milo v. CyberCore Techs., et al*., 2019 WL 4447400 (D.Md. 2019); *Hopkins v. Balt. Gas and Elec. Co*., 77 F.3d 745 (4th Cir. 1996); *Francis v. Bd. Of Sch. Comm'rs of Balt. City*, 32 F. Supp. 2d 316 (D. Md. 1999); *Swyear v. Fare Foods Corp*., 911 F.3d 874 *7th Cir. 2018); *Saxton v. American Telephone Telegraph Co*., 10 F.3d 526 (7th Cir. 1993).

**SB 450_MDCC_Harassment and Sexual Harassment - Def**
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MARYLAND
Chamber of Commerce

**LEGISLATIVE POSITION:**
**Unfavorable**
**Senate Bill 450**
**Harassment and Sexual Harassment - Definitions - Employment Discrimination and Sexual Harassment Prevention Training**
**Senate Judicial Proceedings Committee**
**Tuesday, February 15, 2022**

Dear Chairman Smith and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 5,500 members and federated partners working to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families. Through our work, we seek to maintain a balance in the relationship between employers and employees within the state through the establishment of policies that promote fairness and ease restrictive burdens.

Senate bill 450 alters the definition of "harassment" and "sexual harassment" and redacts the current use of the judicially determined meaning. SB 450 introduces as part of their definitions language that states the conduct "need not be severe or pervasive". This type of broad language drastically broadens the interpersonal conduct which could be defined as harassment. Conceivably, SB 450 appears to focus on conduct more akin to bullying than harassment.

The Maryland Chamber of Commerce and its members fully support the intent and desired outcome of SB 450. However, business owners will be subject to an increased risk of liability based on the bill's expanded definition of harassment – the Department of Legislative Services recognizes this as such in their fiscal note. It also stands to reason that a significantly broader definition of harassment would lead to an increase in allegations made and a corresponding increase in cases handled by the Maryland Commission on Civil Rights. It is our understanding that that the MCCR already deals with a significant caseload and may have difficulty handling the additional complaints because of SB 450.

Finally, the bill introduces the term "reasonable person" as the arbiter of determining if the defined conduct is inappropriate. This term is undefined and far too broad. With these comments in mind, the Maryland Chamber of Commerce respectfully requests an **unfavorable report** on **SB 450** as many concerns and challenges remain from the standpoint of Maryland employers.