

Department of Legislative Services
 Maryland General Assembly
 2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 664
 Finance

(Senator Benson, *et al.*)

Fair Scheduling, Wages, and Benefits Act

This bill requires an employer to provide each employee with an initial work schedule at least 21 days before the first day the employee is scheduled to work, notify an employee of any subsequent changes to the initial work schedule, and within 24 hours after making a change to an employee’s work schedule, provide the employee with a revised work schedule. An employer that changes an employee’s work schedule under specified circumstances must pay the employee one hour of predictability pay. An employer must also offer additional hours of work to current employees before hiring new employees or subcontractors. Generally, employees who hold jobs that require substantially equal skill, effort, responsibility, and duties and are performed under similar working conditions, must be paid the same hourly wage, have the same eligibility to accrue employer-provided paid and unpaid leave, and be provided the same promotion opportunities and other conditions of employment. The Commissioner of Labor and Industry may adopt regulations to implement the bill and must enforce its provisions.

Fiscal Summary

State Effect: General fund expenditures increase by \$1.1 million in FY 2017 due to additional staffing needs for the Department of Labor, Licensing, and Regulation (DLLR) to enforce the bill and for the Office of Administrative Hearings (OAH) to hear cases. Out-year expenditures reflect annualization, elimination of one-time costs, and inflation. The bill does not apply to the State as an employer. State income tax revenues are not materially affected, but general fund revenues increase minimally from civil penalties.

(\$ in millions)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
GF Revenue	-	-	-	-	-
GF Expenditure	\$1.1	\$1.2	\$1.2	\$1.3	\$1.3
Net Effect	(\$1.1)	(\$1.2)	(\$1.2)	(\$1.3)	(\$1.3)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: The bill does not apply to local governments as employers. The bill does not have a material effect on local income tax revenues. The circuit courts can likely handle any increase in litigation with existing resources.

Small Business Effect: Meaningful.

Analysis

Bill Summary: An employee does not include an independent contractor, as defined by the bill.

The bill does not (1) discourage or prohibit an employer from adopting or retaining policies that are more beneficial to employees; (2) diminish an employer's obligation to comply with a contract, an employment benefit plan, or any other agreement that establishes beneficial policies to an employee; or (3) preempt, limit, or otherwise affect the applicability of any other law, policy, or standard establishing scheduling policies that provide additional employee rights or protections.

On hiring a new employee and by the first day of work for a new employee, an employer must provide the employee with specified written information relating to the employee's work schedule. At least 21 days prior to the start of each work week, an employer must post a written work schedule of the shifts of all employees at the work site, including those not scheduled to work. An employer must post an updated schedule within 24 hours of any change made to a previously posted work schedule.

An employer may not require an employee to work hours not included in an initial work schedule, unless the employee provides written consent. However, written consent is not required under specified circumstances.

Prior to 24 hours before a shift is scheduled to begin, but within 21 days of the first scheduled hour of a shift, an employer may reduce, extend, cancel, or change a scheduled shift. However, if an employer does so, he or she must pay the employee one hour of predictability pay, which is the employee's regular rate of pay, for each shift that is changed, with specified exceptions. Predictability pay is in addition to any other wages required to be paid to the employee.

Regardless of actual hours worked, in lieu of predictability pay, an employer must pay an employee for the lesser of four hours of work or the number of hours in the employee's scheduled shift at the employee's usual hourly rate for specified shift cancellations or reductions.

An employer must offer additional hours of work to current employees before hiring new employees or subcontractors, with specified exceptions. Among other provisions, the bill details the employer's posting and notice requirements, the requirements to hire current employees versus new employees or subcontractors, and documentation requirements. An employer must make reasonable efforts to offer employees training opportunities to gain the skills and experience to perform work for which the employer typically has additional needs. There is a rebuttable presumption that an employer has violated these provisions if the employer fails to maintain required documentation.

Employees who hold jobs that require substantially equal skill, effort, responsibility, and duties and are performed under similar working conditions, must be paid the same hourly wage, have the same eligibility to accrue employer-provided paid and unpaid leave, and be provided the same promotion opportunities and other conditions of employment. However, differences in hourly wages based on reasons other than the number of hours the employee is scheduled to work or the expected duration of employment are allowable.

An employer must keep specified records, give employees notice of their rights, make specified records available for inspection by the Commissioner of Labor and Industry, and allow an employee to inspect the employee's record at any reasonable time and place. Each day an employer fails to keep a record, falsifies a record, or otherwise violates provisions of the bill constitutes a separate violation.

A person may not interfere with, restrain, or deny the exercise or attempt to exercise any rights protected under the bill. An employer may not retaliate against an employee because the employee has exercised rights protected under the bill. There is a rebuttable presumption that an employer has violated these provisions if the employer takes specified action against an employee within 90 days of the employee filing a complaint with the commissioner or taking other steps related to exercising rights granted by the bill.

A person may file a complaint alleging a violation of the Fair Scheduling, Wages, and Benefits Act with the Commissioner of Labor and Industry. The commissioner must keep the identity of a person who files a complaint confidential, unless disclosure is necessary – in which case the commissioner must notify the person before the disclosure is made.

On receipt of a complaint, the commissioner must send a letter to the employer relating to the complaint, and within 10 days of receipt of the letter, the employer must submit proof of compliance and an action plan to the commissioner.

When the commissioner has determined that a provision of the bill has been violated, the commissioner may issue an order (1) requiring the employer to comply and pay predictability pay or other wages; (2) imposing a civil penalty of up to \$500 for each

violation; and (3) granting any other appropriate relief. Within 30 days of receiving an order, an employer may request a *de novo* administrative hearing. If an employer does not request a hearing or appeal the decision, the commissioner may file an action to enforce the order in a specified circuit court.

An employee may bring an action against the employer for a violation of the bill, and the bill specifies what the court may award. Among other provisions, the court must award actual damages and reinstatement of employment in specified cases.

The commissioner must post specified information on DLLR's website relating to employer compliance with the bill.

Current Law:

Maryland Wage and Hour Law

The Maryland Wage and Hour Law is the State complement to the federal Fair Labor Standards Act (FLSA) of 1938. State law sets minimum wage standards to provide a maintenance level consistent with the needs of the population. State law specifies that an employee must be paid the greater of the federal minimum wage (which is currently \$7.25 per hour) or \$8.25 per hour. Under Chapter 262 of 2014, the State minimum wage is scheduled to increase on an incremental basis over the next three years to:

- \$8.75 per hour as of July 1, 2016;
- \$9.25 per hour as of July 1, 2017; and
- \$10.10 per hour as of July 1, 2018.

However, an employer may pay an employee a wage that equals 85% of the State minimum wage for the first six months that the employee is employed if the employee is younger than age 20. Additionally, an employer of an amusement or a recreational establishment, including a swimming pool, that meets specified conditions may pay an employee a wage that equals the greater of \$7.25 or 85% of the State minimum wage. Exceptions to the minimum wage requirement also exist for a training wage and a disabled employee of a sheltered workshop.

The Maryland Wage and Hour Law, and minimum wage requirements, do not apply to certain categories of employees, including those defined as administrative, executive, or professional; certain seasonal employees; part-time employees younger than age 16; salesmen and those who work on commission; an employer's immediate family; drive-in theater employees; employees training in a special education program in a public school; employees of an establishment that sells food and drink for on-premises consumption and has an annual gross income of \$400,000 or less; employees employed by an employer who

is engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, poultry, or seafood; and certain farm workers.

An employer is required to pay an overtime wage of at least 1.5 times the usual hourly wage. This requirement does not apply to an employer that is subject to federal rail laws; a nonprofit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or specified amusement or recreational establishments. It also does not apply to an employee for whom the U.S. Secretary of Transportation sets qualifications and maximum hours of service under federal law; a mechanic, parts person, or salesperson, under certain conditions; a driver employed by a taxicab operator; or specified air carrier employees under certain conditions. An employer has to compute the wage for overtime on the basis of each hour over 40 hours that an employee works during one work week. Specific exemptions apply for farm work, bowling establishments, and infirmaries.

If an employer pays less than the wages required, the employee may bring an action against the employer to recover (1) the difference between the wage paid to the employee and the wage required; (2) an additional amount equal to the difference as liquidated damages; and (3) legal fees. The court must award these differences in wages, damages, and counsel fees if the court determines that an employee is entitled to recovery. However, if an employer shows to the satisfaction of the court that the employer acted in good faith and reasonably believed that the wages paid to the employee were not less than the required wages, then the court must award liquidated damages of an amount less than the difference in wages or no liquidated damages.

A person who violates the State's Wage and Hour Law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

Involuntary Overtime Prohibition for Nurses

Generally, an employer may not require a nurse to work more than the regularly scheduled hours according to a predetermined work schedule. However, a nurse may be required to work overtime if:

- the work is due to an emergency situation that could not have been reasonably anticipated;
- the emergency situation is nonrecurring and not caused by an employer's lack of reasonable contingency planning;
- the employer has exhausted all good-faith reasonable attempts to procure voluntary workers for the subsequent shifts;
- the nurse has critical skills and expertise that are required for the work;

- the standard of care requires continuity through completion of a case, treatment, or procedure; and
- the employer informed the nurse of the basis for the mandate and that basis satisfies other specified requirements.

A nurse may also be required to work overtime if employment requires on-call rotation or the nurse works in community-based care. A nurse may not be considered responsible for a patient's care beyond the nurse's predetermined work schedule if the nurse has notified another appropriate nurse of the patient's status and has transferred responsibility for the patient's care to another appropriate nurse or properly designated individual. The employer must exhaust all good-faith reasonable attempts to ensure that appropriate staff is available to accept responsibility of a patient's care beyond a nurse's predetermined work schedule.

Day of Rest Available to Certain Retail Employees

An employee in a retail establishment may choose a day of rest unless the employee is a managerial, professional, or part-time employee. An employee who desires a day of rest must provide the employer with written notice. While employed, the individual may change the day of rest by giving written notice to the employer at least 30 days prior to its effective date. If an employer compels an employee to work on his or her day of rest, the employee is entitled to bring a civil action against the employer to recover three times the regular rate of pay for the hours worked on that day.

An employer may not discharge, discipline, discriminate against, or otherwise penalize an employee who chooses a day of rest. An employer also may not require an applicant who seeks a work week of at least 25 hours to answer any question that identifies the applicant's desired day of rest. Wicomico County allows part-time employees to choose a day of rest.

An employer who violates the day of rest provisions is guilty of a misdemeanor and is subject to a fine of between \$250 and \$500. In Wicomico County, an offender is fined \$500 for the first offense and \$1,000 for each subsequent offense.

Fair Labor Standards Act

With some exceptions, similar to State law, FLSA requires that a worker be paid a minimum hourly wage and that overtime compensation be paid to employees who work more than 40 hours in a week. FLSA has no provisions regarding the scheduling of employees, except for specified child labor provisions. There are two ways in which an employee can be covered by FLSA: "enterprise coverage" and "individual coverage."

Enterprise Coverage: Employees who work for certain businesses or organizations are covered by FLSA. These enterprises, which must have at least two employees, are

(1) those that have an annual dollar volume of sales or business done of at least \$500,000 or (2) hospitals, businesses that provide medical or nursing care, schools and preschools, and government agencies.

Individual Coverage: Even where there is no enterprise coverage, employees may be covered by FLSA if their work regularly involves them in interstate commerce. FLSA covers individual workers who are engaged in commerce or in the production of goods for commerce. Examples of employees who are involved in interstate commerce include those who (1) produce goods that will be sent out of state; (2) regularly make telephone calls to persons located in other states; (3) handle records of interstate transactions; (4) travel to other states for work; or (5) perform janitorial work where goods are produced for shipment to another state. Also, domestic service workers (*i.e.*, housekeepers, full-time baby sitters, and cooks) are normally covered by FLSA. However, many agricultural workers are not subject to FLSA minimum wage and overtime standards.

State Revenues: General fund revenues increase minimally from employers paying civil penalties assessed by DLLR and from taxes associated with employers paying employees predictability pay and overtime wages under specified circumstances. To the extent that predictability pay boosts the purchasing power of workers and generates new consumer spending, general fund sales tax revenues increase minimally. However, to the extent that employers' payroll spending increases, general fund tax revenues from employers may decrease as they can deduct payroll from taxable income. Regardless, the bill does not have a material effect on State income tax revenues.

State Expenditures: The Commissioner of Labor and Industry Employment Standards Service unit currently handles inquiries regarding scheduling issues and cancellation of shifts. In establishing the Fair Scheduling, Wages, and Benefits Act, which applies to almost all private-sector employers, including those exempt from FLSA and the Maryland Wage and Hour Law, the bill creates additional enforcement responsibilities for DLLR's Division of Labor and Industry. DLLR cannot absorb the additional workload within existing resources and requires additional staffing to respond to the increase in inquiries and complaints prompted by the Fair Scheduling, Wages, and Benefits Act.

The regular staff needed to respond to and manage the additional workload includes two assistant Attorney Generals, an administrator, eight wage and hour investigators, two administrative specialists, one office service clerk, and one wage and hour supervisor. DLLR advises that inquiries into the Fair Scheduling, Wages, and Benefits Act violations are expected to increase significantly because the State has never had such a policy before and because of its broad application. DLLR estimates it could receive a significant number of inquiries and as many as 800 complaints alleging violations.

In addition to conducting investigations at worksites, interviewing employers and employees, and processing complaints, DLLR advises that the additional staff must develop employee notification materials of the Fair Scheduling, Wages, and Benefits Act and conduct an employer and employee outreach program. Additional administrative support is needed to assist in responding to phone and email inquiries and manage complaint files. Legal staff is needed to provide advice, draft regulations, review court actions, and plead cases. General fund expenditures increase for DLLR by \$1.0 million in fiscal 2017, as explained below, which accounts for the bill's October 1, 2016 effective date.

It is assumed that most cases brought by the commissioner or appealed by employers would be heard by OAH. As a result, OAH needs an administrative law judge to handle approximately 160 hearings stemming from the bill. OAH estimates each hearing will last half a day, and an additional half day will be spent issuing the written decision. Therefore, general fund expenditures increase for OAH by \$113,902 in fiscal 2017, which accounts for the bill's October 1, 2016 effective date.

Thus, total general fund expenditures increase by \$1.1 million in fiscal 2017, which accounts for the bill's October 1, 2016 effective date. This estimate reflects the cost of OAH hiring an administrative law judge, and DLLR hiring the 15 staff noted above to investigate complaints and enforce the State's Fair Scheduling, Wages, and Benefits Act. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses, along with \$150,000 for a database to track employer compliance and violations.

Positions	16
Salaries and Fringe Benefits	\$823,504
One-time Start-up Costs	231,297
Operating Expenses	<u>63,425</u>
Total FY 2017 DLLR and OAH Expenditures	\$1,118,226

Future year expenditures reflect annual increases and employee turnover as well as annual increases in ongoing operating expenses.

It is assumed that most cases would be heard by OAH and that only a minimal number of cases would be filed by an employee in the District Court; thus, the Office of the Attorney General can handle the increase in cases with existing resources. However, to the extent that there is a significant increase in litigation, the Office of the Attorney General may need an additional assistant Attorney General to handle the increased workload.

Local Fiscal Effect: The circuit courts can likely handle any increase in litigation with existing resources. Local income tax revenues may increase minimally from employers paying employees predictability pay and overtime wages under specified circumstances.

However, to the extent that employers' payroll spending increases, local income tax revenues from employers may decrease minimally as they can deduct payroll from taxable income. The Department of Legislative Services assumes the net effect does not have a material effect on local income tax revenues.

Small Business Effect: The bill has a significant impact on small businesses, which are required to:

- provide a new employee with an estimate of the employee's expected work schedule and provide each employee with an initial work schedule at least 21 days prior to an employee working;
- post the work schedule of all employees' shifts at the work site;
- not require an employee to work hours not included in an initial work schedule unless the employee consents in writing;
- pay an employee predictability pay or specified wages when specified schedule changes occur;
- offer additional hours of work to current employees before hiring new employees or subcontractors;
- pay employees who hold jobs that require substantially equal skill, effort, responsibility, and duties, and are performed under similar working conditions, the same hourly wage;
- provide employees with the same eligibility to accrue employer-provided paid and unpaid leave and provide them with the same promotion opportunities and other conditions of employment;
- make reasonable efforts to offer employees training opportunities to gain the skills and experience to perform work for which there are additional needs; and
- maintain schedules and shift records for three years.

These requirements place a tremendous administrative burden on small businesses, especially those with salaried employees accustomed to working flexible hours. Thus, the bill could have a significant negative impact on an employer's ability to meet operational needs.

Restricting an employer from hiring additional employees could result in operational inefficiencies for small businesses. To the extent that current employees work additional shifts and must be paid overtime wages, an employer's personnel costs could greatly increase.

Moreover, employers are subject to civil penalties and various types of relief (such as reinstatement of employment, injunctive relief, actual damages, two times the amount of predictability pay or other wages owed to employees, and liquidated damages) – either

ordered by the Commissioner of Labor and Industry or awarded by a court. A court may also award reasonable counsel fees and other costs.

However, to the extent that employees have more certainty regarding their work schedules and view wages and benefits as more equitable, worker morale could increase and employee turnover and absenteeism could decrease.

Additional Information

Prior Introductions: A similar bill, HB 969 of 2015, received a hearing in the House Economic Matters Committee and was subsequently withdrawn. Its cross file, SB 688, received a hearing in the Senate Finance Committee and was subsequently withdrawn.

Cross File: HB 1175 (Delegate Waldstreicher, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; Department of Legislative Services

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