

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 417
Finance

(Senator Brochin, *et al.*)

Unemployment Insurance - Exemption From Covered Employment for Nail Technicians - Repeal

This bill repeals a covered employment exemption for work performed by a holder of a limited license to provide nail technician services who leases or otherwise agrees to the use of a chair, booth, or space from a holder of an applicable permit who operates a barbershop or beauty salon under specified conditions.

Fiscal Summary

State Effect: The bill does not materially affect State finances or operations.

Unemployment Insurance Trust Fund Effect: Generally, Unemployment Insurance Trust Fund (UITF) revenues increase beginning in FY 2018 due to increased employer taxes, and UITF expenditures increase beginning in FY 2018 due to increased benefits paid, as discussed below. A reliable estimate cannot be made at this time.

Local Effect: None.

Small Business Effect: Potential meaningful, as discussed below.

Analysis

Current Law/Background: Chapter 574 of 2016 specified that work is not covered employment when performed by a holder of a limited license to provide nail technician services who leases or otherwise agrees to the use of a chair, booth, or space from a holder of a barbershop permit, a beauty salon permit, or an owner-manager permit who operates a barbershop or beauty salon if the Secretary of Labor, Licensing, and Regulation is satisfied that:

- the holder of a limited license to provide nail technician services and the permit holder have entered into a written lease or other written agreement that is in effect;
- the holder of a limited license to provide nail technician services (1) pays a stipulated amount or commission for use of the chair, booth, or space; (2) is not required to make any further accounting of income to the permit holder; and (3) has access to the premises at all hours and may set personal work hours and prices; and
- the lease or other written agreement expressly states that the holder of a limited license to provide nail technician services knows of the responsibility to pay State and federal income taxes and make contributions to Social Security for self-employment and that the work is not covered employment.

Unemployment Insurance – Generally

Unemployment insurance (UI) provides temporary, partial wage replacement benefits to individuals who are unemployed through no fault of their own and who are willing to work, able to work, and actively seeking employment. Both the federal and state governments have responsibilities for UI programs. Funding for the program is provided by employers through UI taxes paid to both the federal government for administrative and other expenses and to the states for deposit in their UI trust funds. Using federal tax revenues, the UI program is administered pursuant to state law by state employees. Each state law prescribes the tax structure, qualifying requirements, benefit levels, and disqualification provisions. These laws must, however, conform to broad federal guidelines.

States must be in conformity with certain provisions of the Federal Unemployment Tax Act (FUTA) in order to receive administrative funding for their state UI programs and for the states' employers to receive federal UI tax credits. The Maryland UI program is 100% federally funded. Employers' FUTA taxes are 6.0% of each employee's first \$7,000 in wages (\$420 annually per employee); however, employers typically receive a credit for most of that amount (5.4%), making the effective tax rate 0.6% (\$42 annually per employee).

Covered Employment

Employment is presumed to be covered employment if:

- regardless of whether the employment is based on the common law relation of master and servant, the employment is performed for wages or under a contract of hire that is written or oral or express or implied; and

- the employment is performed either in the State or partly in the State, or in connection with the State, subject to specified conditions.

To overcome the presumption of employment, an employer must establish that the person performing services is either an independent contractor or is specifically exempted under the law.

Independent Contractors

Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

- the individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
- the work is (1) outside of the usual course of business of the person for whom the work is performed or (2) performed outside of any place of business of the person for whom the work is performed.

Specific Exemptions from Covered Employment

There are several exemptions in State law for certain types of employment. For example, work is not covered employment when performed by a licensed barber or licensed cosmetologist who leases a chair or booth from a holder of a barbershop permit, a beauty salon permit, or an owner-manager permit who operates a barbershop or beauty salon, if the Secretary is satisfied that:

- the barber or cosmetologist as lessee and the permit holder have entered into a written lease that is in effect;
- the lessee pays a stipulated amount for use of the chair or booth and is not required to make any further accounting of income to the permit holder;
- the lessee has access to the premises at all hours and may set personal work hours and prices; and
- the lease expressly states that the lessee knows of the responsibility to pay State and federal income taxes and make contributions to Social Security for self-employment and that the work is not covered employment.

There are other exemptions for specific individuals and circumstances, including newspaper delivery, messenger services, taxicab drivers, and referees.

There are also federal exemptions for certain types of employment under FUTA. The federal exemptions are included in the State UI law. If a certain type of employment is exempt under State UI law but not federal UI law, an employer is subject to the loss of federal UI tax credits.

Nail Technicians

Generally, a person may not practice, attempt to practice, or offer to practice cosmetology in the State unless licensed by the State Board of Cosmetologists in the Department of Labor, Licensing, and Regulation (DLLR). Licensed cosmetologists can provide hair, esthetic, and nail technician services. However, an individual can provide nail technician services under a limited license that restricts the scope of practice to solely nail services.

Unemployment Insurance Trust Fund Effect:

Unemployment Insurance Trust Fund Revenues

In general, UITF revenues increase beginning in fiscal 2018 for each worker no longer considered exempt from UI coverage, which requires employers to pay UI taxes for that worker. Based on recent employer filings, DLLR estimates the taxable wage base of employers of nail technicians to be \$53.0 million. Nail technician businesses have a 1.0% average tax rate. However, as the number of individuals to whom the exemption actually applies or would have applied in the future is unknown, a reliable estimate of the effect on UITF revenues cannot be made at this time. DLLR advises that employer filings for the first quarter during which the exemption could apply (October through December 2016) are being processed now.

Unemployment Insurance Trust Fund Expenditures

In general, UITF expenditures increase beginning in fiscal 2018 for each worker that receives UI benefits due to the removal of the exemption. Based on recent UI claims data, DLLR estimates UI benefits paid to nail technicians had averaged \$2.6 million annually. However, as the number of individuals to whom the exemption actually applies or would have applied in the future is unknown, a reliable estimate of the effect on UITF expenditures cannot be made at this time. DLLR advises that employer filings for the first quarter during which the exemption could apply (October through December 2016) are being processed now.

Small Business Effect: Generally, if a certain type of employment is exempt under State UI law but not federal UI law, an employer is subject to the loss of federal UI tax credits. Employers' FUTA taxes are 6.0% of each employee's first \$7,000 in wages (\$420 annually

per employee). Employers typically receive a credit for most of that amount (5.4%), making the effective tax rate 0.6% (\$42 annually per employee).

Chapter 574 of 2016 may have caused some Maryland employers to be in conflict with federal UI law, which would increase their FUTA taxes due to the loss of the federal credit. That increase may have partially or wholly offset any savings from the exemption provided by the Act. As the bill removes the possibility of an exemption for certain work performed by nail technicians from covered employment, this potential conflict is removed going forward.

DLLR advises that, if a business classifies a worker as an independent contractor for State purposes, then the business likely also classifies the worker as an independent contractor for federal purposes. In this case, the business does not pay State or federal UI taxes. If the worker is later determined to be misclassified (*i.e.*, the worker is found to be an employee) by the Internal Revenue Service, the employer would owe the full FUTA tax at that time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Labor, Licensing, and Regulation; Department of Legislative Services

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Analysis by: Stephen M. Ross

Direct Inquiries to:
(410) 946-5510
(301) 970-5510