

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 Third Reader

Senate Bill 217
 Finance

(Senator Lee, *et al.*)

Economic Matters

Labor and Employment - Wage History and Wage Range

This bill requires an employer to provide, on request by an applicant for employment, the wage range for the position for which the applicant applied. The bill prohibits an employer from seeking wage history information for an applicant, or from screening or considering an applicant for employment or determining an applicant’s wages based on the applicant’s wage history. However, an applicant is not prohibited from voluntarily sharing wage history information with an employer. An employer may not retaliate against or refuse to interview, hire, or employ an applicant because the applicant did not provide wage history or requested the wage range. The bill includes civil penalties for employers who violate specified provisions.

Fiscal Summary

State Effect: General fund expenditures increase by \$269,700 in FY 2021. Out-year expenditures reflect annualization and the phased elimination of contractual staff and one-time start-up costs. Additionally, the bill may have a fiscal impact on recruiting and hiring State employees. General fund revenues increase, likely minimally, from penalties.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
GF Revenue	-	-	-	-	-
GF Expenditure	\$269,700	\$232,500	\$196,800	\$160,700	\$164,500
Net Effect	(\$269,700)	(\$232,500)	(\$196,800)	(\$160,700)	(\$164,500)

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

Local Effect: Local government operations are affected, and expenditures likely increase minimally. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: After an employer makes an initial offer of employment that specifies compensation to an applicant, an employer may rely on wage history voluntarily provided by the applicant to support a higher wage offer only if it does not create an unlawful pay differential based on protected characteristics. An employer may also seek to confirm the wage history voluntarily provided to support a wage offer that is higher than the initial wage offered by the employer.

If an employer violates provisions of the bill, an affected applicant may bring an action against the employer for injunctive relief and to recover actual damages. If an employer relied on the applicant's wage history to screen the applicant or determine wages, or sought the wage history for an applicant, an affected applicant may bring an action against the employer for injunctive relief and to recover the greater of actual damages or statutory damages up to \$10,000. An applicant may bring an action on behalf of other applicants for employment similarly affected.

An employer who violates the bill is not subject to the criminal penalty provisions of the Equal Pay for Equal Work law, but if the Commissioner of Labor and Industry determines that an employer has violated the bill, the commissioner must issue an order compelling compliance. The commissioner may, in the commissioner's discretion, assess a civil penalty of up to \$500 for each applicant for whom the employer is not in compliance. That penalty increases for a second violation (up to \$1,000 for each applicant) and again for each subsequent violation within three years (up to \$5,000 for each applicant). The commissioner must consider specified items when determining the amount of the penalty, and assessment of the penalty is subject to specified notice and hearing requirements.

Current Law: Maryland's Equal Pay for Equal Work law applies to employees but not to job applicants. Under the law, an employer may not prohibit an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee or requesting that the employer provide a reason for why the employee's wages are a condition of employment. An employer may not require an employee to sign a waiver or any other document to deny the employee the right to disclose or discuss the employee's wages. An employer may not take any adverse employment actions against an employee for specified actions regarding wages or exercising specified rights.

An employer may, in a written policy provided to each employee, establish reasonable workday limitations on the time, place, and manner for inquiries relating to employee wages so long as it is consistent with standards adopted by the Commissioner of Labor and Industry and all other State and federal laws. If an employee does not adhere to these limitations, and the employer acted because of the employee's failure to adhere to the limitations, an employer may have an affirmative defense for taking adverse employment

action. A limitation may include prohibiting an employee from discussing or disclosing another employee's wages without that employee's prior permission, except in specified instances for an employee who has access to other employees' wage information as a part of the employee's essential job functions.

These provisions do not (1) require an employee to disclose the employee's wages; (2) diminish employee rights to negotiate the terms and conditions of employment or otherwise limit employee rights; (3) limit the rights of an employee under any other provision of law or collective bargaining agreement; (4) create an obligation on an employer or employee to disclose wages; (5) permit an employee, without an employer's written consent, to disclose proprietary information, trade secret information, or information that is a legal privilege or protected by law; or (6) permit an employee to disclose wage information to an employer's competitor.

State law generally prohibits an employer with at least 15 employees from discharging, failing or refusing to hire, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability. The State and local governments are considered employers. Regardless of employer size, under the State's Equal Pay for Equal Work law, an employer may not discriminate between employees in any occupation by (1) paying a wage to employees of one sex or gender identity at a rate less than the rate paid to employees of another sex or gender identity if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type or (2) providing less favorable employment opportunities based on sex or gender identity. However, a variation in a wage based on specified systems or factors is generally not prohibited.

When the Commissioner of Labor and Industry within the Maryland Department of Labor (MDL) has determined that the State's Equal Pay for Equal Work law has been violated, the commissioner must (1) try to resolve any issue informally by mediation or (2) ask the Attorney General to bring an action on behalf of the employee. The Attorney General may bring an action in the county where the violation allegedly occurred for injunctive relief, damages, or other relief.

If an employer knew or reasonably should have known that the employer's action violates Equal Pay for Equal Work provisions, an affected employee may bring an action against the employer for injunctive relief and to recover the difference between the wages paid to employees of one sex or gender identity who do the same type work and an additional equal amount as liquidated damages. If an employer knew or reasonably should have known that the employer's action violates specified wage disclosure provisions, an affected employee

may bring an action against the employer for injunctive relief and to recover actual damages and an additional equal amount as liquidated damages.

An employee may bring an action on behalf of the employee and other employees similarly affected; that action must be filed within three years after the employee receives from the employer the wages paid on the termination of employment.

If a court determines that an employee is entitled to judgment in an action, the court must allow against the employer reasonable counsel fees and other costs of the action, as well as prejudgment interest in accordance with the Maryland Rules.

An employer who violates certain provisions of the Equal Pay for Equal Work law is guilty of a misdemeanor and subject to a fine of up to \$300. An employer who violates the Equal Pay for Equal Work law at least twice within a three-year period may be required to pay a civil penalty equal to 10% of the amount of damages owed by the employer.

State Revenues: General fund revenues increase from penalties. The Commissioner of Labor and Industry has discretion to assess a civil penalty of up to \$500 for each applicant for whom the employer is not in compliance and up to \$1,000 for each applicant for a second offense. For each subsequent violation within three years, the penalty increases to up to \$5,000 for each applicant. As the frequency and amount of future penalties cannot be predicted, a reliable estimate of the increase in revenues is not feasible.

State Expenditures: The bill creates additional responsibilities for the Division of Labor and Industry within MDL by expanding the Equal Pay for Equal Work law to generally prohibit employers from inquiring about the wage history of applicants. MDL cannot absorb the additional workload within existing resources and requires additional staff to respond to the increase in inquiries and complaints prompted by the bill.

MDL anticipates approximately 300 complaints and, therefore, anticipates needing one wage and hour investigator and two contractual wage and hour investigators to respond to and manage the additional workload created by the bill. Additionally, a part-time assistant Attorney General is needed to promulgate regulations and handle legal proceedings. Over time, it is anticipated that employer familiarity and compliance with the bill's provisions increase, thereby reducing the need for the contractual employees by fiscal 2024 and allowing MDL to respond to inquiries and enforce the bill with the one full-time permanent position and one part-time permanent position.

Accordingly, general fund expenditures increase for MDL by \$269,694 in fiscal 2021, which reflects the bill's October 1, 2020 effective date. This estimate reflects the cost of hiring one regular and two contractual wage and hour investigators to investigate and process complaints and one part-time assistant Attorney General to handle legal

proceedings. It includes salaries, fringe benefits, one-time start-up costs (which include changes to the management information system), and ongoing operating expenses.

Regular Positions	1.5
Contractual Positions	2.0
Regular Salaries and Fringe Benefits	\$79,577
Contractual Salaries and Fringe Benefits	56,615
One-time Start-up Costs	116,521
Ongoing Operating Expenses	<u>16,981</u>
Total FY 2021 MDL Expenditures	\$269,694

Future year expenditures reflect the phased elimination of the contractual positions, full salaries with annual increases and employee turnover, and ongoing operating expenses. If the volume of inquiries or complaints exceeds expectations, one or both of the contractual positions could be extended or converted to regular status.

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State’s implementation of the federal Patient Protection and Affordable Care Act.

The Office of Administrative Hearings can process cases with existing resources.

The bill has an operational impact, and potentially a fiscal impact, on recruiting and hiring State employees. Currently, if an applicant or current State employee applying for a new position requests a salary above the base salary due to the applicant’s salary history, proof of the salary is requested. Under the bill, the State is prohibited from confirming the wage history information voluntarily provided from an employee until after the employer has made an initial wage offer. Without being able to verify the salary information prior to an initial wage offer, the State may have to offer the lowest salary in the salary grade or offer a higher than justifiable wage. The bill may hinder the ability of State agencies to hire the most qualified candidates or it may prolong the wage negotiation process when hiring new employees. Additionally, recruitment systems may need to be modified to not request salary information and appointing authorities may need to retrain their staff to ensure compliance with the bill.

Local Expenditures: Local governments are generally restricted from seeking or relying on wage history. Thus, the bill has an operational impact, and potentially a fiscal impact, on recruiting and hiring local government employees similar to that described above for the State.

Small Business Effect: Small businesses may need to alter their job applications, including any online programs that ask for the wage history of an applicant. Employees

who conduct interviews or who are involved in the hiring, recruitment, or salary negotiation process may need to be trained and made aware of the bill. The bill may prolong the wage negotiation process when hiring new employees because an employer may not confirm the wage history voluntarily provided by an applicant until after an initial offer of employment with an offer of compensation is made.

Additional Information

Prior Introductions: A similar bill, HB 634 of 2019, received a hearing in the House Economic Matters Committee, but no further action was taken. Its cross file, SB 738, received a hearing in the Senate Finance Committee, but no further action was taken.

Designated Cross File: HB 123 (Delegate K. Young, *et al.*) - Economic Matters.

Information Source(s): Maryland Association of Counties; Maryland Municipal League; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Budget and Management; Maryland Department of Labor; Maryland Department of Transportation; Office of Administrative Hearings; Department of Legislative Services

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