

Department of Legislative Services
 Maryland General Assembly
 2024 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 233 (Chair, Finance Committee)(By Request - Departmental - Labor)

Finance

Employment Standards, Prevailing Wage, and Living Wage - Employer Adverse Actions - Prohibition

This departmental bill prohibits employers from taking or threatening to take adverse action against employees who take specified actions relating to Equal Pay for Equal Work, Maryland Wage and Hour, Workplace Fraud, Prevailing Wage, and Living Wage laws and creates a uniform enforcement process. Thus, the bill creates new anti-retaliation provisions for the Living Wage law and standardizes and/or strengthens existing anti-retaliation provisions and enforcement within the other laws. **The bill takes effect July 1, 2024.**

Fiscal Summary

State Effect: General fund expenditures increase by \$225,200 in FY 2025 for the Maryland Department of Labor (MDL) to enforce the bill. Out-year expenditures reflect annualization and elimination of one-time start-up costs. General fund revenues increase minimally due to additional fines imposed on employers.

(in dollars)	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	225,200	209,500	218,400	227,600	237,200
Net Effect	(\$225,200)	(\$209,500)	(\$218,400)	(\$227,600)	(\$237,200)

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

Local Effect: Local governments as employers are subject to several anti-retaliation provisions of the bill (Equal Pay for Equal Work and the State minimum wage provision), but the bill is not anticipated to materially affect local governments or the circuit courts.

Small Business Effect: MDL has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment.

Analysis

Bill Summary: The Commissioner of Labor and Industry may conduct an investigation under the bill on the commissioner's own initiative or on receipt of a written complaint.

Within 90 days of receiving a written complaint related to the five affected statutes, the commissioner must investigate and attempt to resolve the issue informally through mediation. If the issue is not resolved through mediation and the commissioner determines that an employer has violated the bill, the commissioner must issue an order. These actions are subject to the State's hearing and notice requirements.

An order issued under the bill must describe the violation and direct, if appropriate, the recovery of lost wages and actual economic damages. In the commissioner's discretion, an order may seek reinstatement or the hiring of employees with or without back pay and may assess a civil penalty of up to \$1,000 for each employee for whom the employer is not in compliance with the bill.

The bill establishes court procedures if an employer does not comply with an order within 30 days of issuance in which the Commissioner of Labor and Industry, the Attorney General, and an employee may bring an action under specified circumstances.

Current Law:

Equal Pay for Equal Work

Under the State's Equal Pay for Equal Work law, an employer may not discriminate between employees in any occupation by providing less favorable employment opportunities based on sex or gender identity or 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. The State and local governments are considered employers.

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.

The Equal Pay for Equal Work law also requires an employer to provide, on request by an applicant for employment, the wage range for the position for which the applicant applied. An employer is prohibited 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.

When the Commissioner of Labor and Industry 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 applicant or employee. The Attorney General may bring an action in the county where the violation allegedly occurred for injunctive relief, damages, or other relief. An employee may bring an action against the employer under specified circumstances.

An employer may not discharge or otherwise discriminate against an employee or applicant because the employee or applicant makes a complaint, brings or causes an action or proceeding, or has testified or will testify in an action or a proceeding relating to Equal Pay for Equal Work. The commissioner may bring an action for injunctive relief and damages against a person who violates this.

Maryland Wage and Hour Law

For a general overview on Maryland's Wage and Hour Law, please see the **Appendix – Maryland Wage and Hour Law**.

An employer may not take adverse action against an employee because the employee (1) makes a complaint that the employee has not been paid in accordance with law; (2) brings an action or proceeding; or (3) testifies in an action relating to the Maryland Wage and Hour law. A person who does so is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

Workplace Fraud Act

Chapter 188 of 2009 (the Workplace Fraud Act) established, for the purpose of enforcement only, a presumption that work performed by an individual paid by an employer creates an employer-employee relationship, subject to specified exemptions. It

prohibits construction companies and landscaping businesses from failing to properly classify an individual as an employee and establishes investigation procedures and penalties for noncompliance.

The Act distinguishes between an employer who improperly misclassifies an employee and an employer who knowingly misclassifies an employee, and civil penalties are more severe for an employer who is guilty of knowingly misclassifying an employee. The maximum penalty for a knowing violation is a \$5,000 fine for each employee who was not properly classified.

An employer may not discriminate or take adverse action against an individual because the individual files a complaint with the employer or Commissioner of Labor and Industry, brings an action or proceeding or testifies in an action or proceeding relating to the Workplace Fraud Act. If the commissioner determines that a person has discriminated or taken adverse action against an individual, the commissioner must file a complaint to enjoin the violation, to reinstate the employee to the former position with back pay, and to award any other appropriate damages or other relief in the circuit court.

Prevailing Wage Law

Contractors and subcontractors working on eligible public works projects in Maryland must pay their employees the prevailing wage rate, subject to various specified conditions and exclusions.

Under Maryland's Prevailing Wage law, an employer may not discharge, threaten, or otherwise retaliate or discriminate against an employee regarding compensation or other terms and conditions of employment because that employee or an organization or other person acting on behalf of that employee reports or makes a complaint or otherwise asserts the worker's rights under the law or participates in any investigation, hearing, or inquiry held by the Commissioner of Labor and Industry. Likewise, a contractor or subcontractor may not retaliate or discriminate against an employee. If a contractor or subcontractor retaliates or discriminates against an employee in violation of the prevailing wage law, the affected employee may file an action in any court of competent jurisdiction within three years from the employee's knowledge of the action.

Living Wage

Chapter 284 of 2007 made Maryland the first state to require State service contractors to pay their employees a "living wage." For fiscal 2008, the living wage was set at \$11.30 in Anne Arundel, Baltimore, Howard, Montgomery, and Prince George's counties and Baltimore City (Tier 1). It was set at \$8.50 for all other areas of the State (Tier 2). The living wage rates are adjusted annually for inflation by the Commissioner of Labor and

Industry. Effective September 2023, the Tier 1 living wage is \$16.13, and the Tier 2 wage is \$12.11, though covered employees must be paid the higher of the State minimum wage (\$15.00 per hour) or the minimum living wage rate. Montgomery and Prince George’s counties and Baltimore City have local living wage ordinances that apply to their procurement of services. The living wage law does not apply to State contracts with nonprofit organizations. The living wage law does not have any anti-retaliation protections for employees.

Background: MDL advises that employees are often reluctant to exercise their rights under employment laws for fear of retaliation by their employer. Further, MDL advises that strong anti-retaliation laws encourage employees to exercise their rights, which in turn ensures that violations are more promptly reported and remedied, and employers abide by the law.

State Revenues: General fund revenues may increase minimally from penalties paid by employers who are found by MDL to be in violation of anti-retaliation labor laws.

State Expenditures: As the bill strengthens the anti-retaliation provisions in current law and also creates new ones, the Division of Labor and Industry anticipates receiving as many as 50 new complaints per year alleging adverse action violations. Additionally, MDL anticipates that strengthening protection against retaliatory acts will cause more workers to exercise their rights under existing laws, thereby creating 100 additional complaints of labor violations from employees.

MDL cannot absorb the additional workload within existing resources and requires additional staffing to respond to the increase in inquiries and complaints prompted by the bill. Additionally, changes must be made to the complaint tracking database used by several of MDL’s units. Thus, general fund expenditures increase for MDL by \$225,198 in fiscal 2025, which accounts for the bill’s October 1, 2024 effective date. This estimate reflects the cost of hiring one civil rights officer, one wage and hour investigator, and one part-time assistant Attorney General to investigate complaints and enforce the new requirements. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2.5
Salaries and Fringe Benefits	\$149,907
Database Costs	44,900
Other Operating Expenses	<u>30,391</u>
Total FY 2025 State Expenditures	\$225,198

Future year expenditures reflect full salaries with annual increases and employee turnover, termination of one-time costs, and ongoing operating expenses.

An employer against whom the commissioner issues an order for a violation of the bill may request an administrative hearing. Depending on the number of contested cases, which the Office of Administrative Hearings (OAH) cannot estimate at this time, OAH may need to hire additional administrative law judges to handle administrative hearings stemming from the bill. Administratively, OAH needs to train administrative law judges on the substantive aspects of the bill and create a new code in its database to track hearings. Thus, reimbursable expenditures for OAH may increase beginning in fiscal 2025. OAH bills MDL for these expenses, so reimbursable revenues for OAH increase correspondingly, and general fund expenditures increase further for MDL.

Causes of action created by the bill may be heard in a circuit court or the District Court, depending on the nature of the damages sought and filing choices of a plaintiff. However, the Judiciary does not anticipate a significant fiscal or operational impact due to the new causes of action.

Additional Comment: The bill seeks to standardize anti-retaliation provisions and enforcement across the five different statutes. However, it does not repeal the existing anti-retaliation provisions in four of the statutes, which may create confusion.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 136 (Chair, Economic Matters Committee)(By Request - Departmental - Labor) - Economic Matters.

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

Fiscal Note History: First Reader - January 22, 2024
js/mcr

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Appendix – Maryland Wage and Hour Law

The Maryland Wage and Hour Law is the State complement to the federal Fair Labor Standards Act, which specifies minimum wage and overtime requirements for employers and employees in the State. State law specifies that an employee must be paid the greater of the federal minimum wage (which is currently \$7.25 per hour) or \$15.00 per hour. However, an employer may pay 85% of the State minimum wage rate to employees younger than age 18.

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; certain farm workers; and covered employees under the Secure Maryland Wage Act.

Generally, the employer of a tipped employee is allowed a tip credit that can be applied against the direct wages paid by the employer. The employee can be paid tipping wages so long as the wages plus the tips received equal at least the minimum wage, the employee retains all tips, and the employee customarily receives more than \$30.00 a month in tips. The tip credit is equal to the State minimum wage, less \$3.63. Thus, the wage paid by employers to tipped employees is \$3.63, as long as their wages plus tips equal the minimum wage.

Under Maryland's Wage and Hour Law, an employer is required to pay an overtime wage of at least 1.5 times the usual hourly wage for each hour over 40 hours that an employee works during one work week. 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. Also, 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 Maryland Wage and Hour Law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Employment Standards, Prevailing Wage, and Living Wage - Employer Adverse Actions - Prohibition

BILL NUMBER: SB0233

PREPARED BY: Devki Virk, Commissioner Labor & Industry

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

 X WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

OR

 WILL HAVE A MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

Small employers who retaliate against employees for exercising their rights to ensure compliance with existing workplace standards laws will be subject to liability under the enhanced anti-retaliation provisions contained in this bill. As reporting of potential violations rises as a result of strengthened anti-retaliation measures, small businesses that fail to comply with existing Maryland employment standards laws may be at greater risk of detection. The risk of potential liability may result in the need for professional human resource and/or attorney guidance. However, consolidating anti-retaliation provisions for workplace standards laws also eliminates the multiple different current anti-retaliation schemes that currently exist, which should help to mitigate these risks. Small businesses will be subject to a single set of rules for anti-retaliation claims, not many different sets of rules.