



David Rodwin, Attorney
Public Justice Center
201 North Charles Street, Suite 1200
Baltimore, Maryland 21201
410-5815-9409, ext. 249
rodwind@publicjustice.org

SB 224 – Labor & Employment – Employment Standards & Conditions – Definition of Employer
Senate Finance Committee, February 10, 2022

Position: SUPPORT

The Public Justice Center (PJC) is a not-for-profit civil rights and anti-poverty legal services organization that seeks to advance social justice, economic and racial equity, and fundamental human rights in Maryland. Our Workplace Justice Project aims to ensure that our state’s low-wage workers receive fair and full payment for their labor, as well as other basic protections on the job. The PJC **supports SB 224** and urges a **favorable** report.

Maryland state courts already apply the joint employment “economic realities” test to the Maryland Wage Payment and Collection Law (MWPCCL), and SB 224 will simply ensure that all federal courts do so as well.

- For decades, courts have used the “economic realities” test to determine if an employee has multiple employers in connection with the same work. Both Maryland and federal courts have long used this test to determine such “joint employment” under the federal Fair Labor Standards Act (FLSA) and the Maryland Wage and Hour Law.
- Since at least the 2012 decision of *Campusano v. Lusitano Construction LLC*, 208 Md. App. 29 (2012), state courts have also applied this test to the MWPCCL. However, while some federal courts have followed *Campusano*, others have declined to do so.

SB 224 is a narrow, technical fix that will clear up this confusion by adding to the MWPCCL the same definition of employer that already exists in much of the rest of Title 3 of Maryland’s Labor and Employment Article.

- In addition to the federal FLSA, many other Maryland wage laws already include in their definition of “employer” the same language that SB 224 would add to the MWPCCL – “a person who acts directly or indirectly in the interest of another employer with an employee.” This makes sense, as it would be confusing to apply different tests to different wage laws that serve the same purposes of preventing wage theft and providing workers with a remedy when it happens.
- Other wage statutes in Title 3 of Maryland’s Labor and Employment Article that include this same definition of “employer” are the (1) Wage and Hour Law, Md. Code Ann., Lab. & Empl. § 3-401(b), (2) Equal Pay for Equal Work Law, *id.* § 3-301(b)(2), (3) Wage Lien Law, *id.* § 3-1101(b), (4) Parental Leave Act, *id.* § 3-1101(c)(2)(i), (5) Healthy Working Families Act, *id.* § 3-1301(f)(2), (6) Criminal History Screening Law, *id.* § 3-1501(c)(2), and (7) Secure Maryland Wage Act, *id.* § 3-1601(d)(1).

SB 224 will not subject employers to additional liability.

- As mentioned above, state courts and some federal courts already apply the economic realities test to the MWPCCL. But even if that were not so, employers acting in good faith have no cause for concern.

- The MWPCCL permits a court to award treble damages only when the court has previously found that the employer's failure to pay wages owed *was not the result of a bona fide dispute*. See Md. Code Ann., Lab. & Empl. § 3-507.2(b). Good-faith employers that are doing their best to follow the law are not subject to treble damages – such damages are only available when there is a judicial finding that the employer did not have a bona fide reason for failing to ensure that the employer was paid all wages owed.
- Even when the court has found that there was no bona fide dispute for failing to pay all wages owed, the Court of Appeals has made crystal clear that an award of treble damages is *still discretionary* and there is no presumption in favor of enhanced damages. See *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 661 (2014). In other words, even after the court has found that there was no bona fide reason for the failure to pay all wages owed, employees must still convince the judge or jury that the facts of the case warrant enhanced damages. Put simply, treble damages are reserved for truly bad actors and there is no reason to be worried about employers acting in good faith – this bill does not help, hurt, or otherwise affect them.

Wage theft hurts Maryland's workers, state and local governments, and law-abiding businesses.

- Wage theft – when an employer denies workers the wages or benefits to which they are entitled – is both common and extremely harmful. Violations are most common in low-wage industries like construction, retail, food services, cleaning services, and home health care.¹ In Maryland alone, one study estimated minimum wage violations deprive 580,000 workers of \$875 million in gross wages each year.²
- Wage theft *hurts workers* – particularly low-wage workers – who lose income they need to pay rent, buy food, and provide for their families. It *hurts state and local governments*, which lose tax revenue and must pay for additional social services. And it *hurts law-abiding businesses*, which are forced to compete on an uneven playing field with businesses that save money by breaking the law.
- It is critically important that Maryland's wage laws both deter the practice of wage theft and provide workers victimized by it with an adequate remedy.

For these reasons, the Public Justice Center **SUPPORTS SB 224** and requests a **FAVORABLE** report.

¹ Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L. & Pol'y Rev. 93, 100, 125 (2018).

² Rachel Deutsch & Kate Hamaji, Ctr. for Popular Democracy, *Combating Wage Theft with the Maryland Paystub Transparency Act of 2016* 2 (Feb. 2016), <https://populardemocracy.org/sites/default/files/MD%20Pay%20Stub-web.pdf>.
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