

Department of Legislative Services
 Maryland General Assembly
 2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 993 (Senator Young)
 Education, Health, and Environmental Affairs

Procurement - Equal Pay Certificates - Requirement

This bill prohibits a State procurement unit from awarding a contract to specified contractors unless the contractor has obtained an equal pay certificate described in the bill and issued by the Commissioner of Labor and Industry, or the contractor is exempted from the requirement by the commissioner. The bill applies to most entities otherwise exempt from State procurement law, including public-private partnerships (P3s), public four-year universities, the Maryland Stadium Authority, and investment-related expenses of the State Retirement Agency.

The bill applies only prospectively and does not affect any procurement contract entered into or any invitation for bids or request for proposals issued before October 1, 2016.

Fiscal Summary

State Effect: General and special fund expenditures by the Department of Labor, Licensing, and Regulation (DLLR) increase by a combined \$626,100 in FY 2017 to administer the equal pay certificate program. Out-year expenditures reflect annualization, inflation, termination of contractual and one-time expenditures, and continued reliance on general fund support until at least FY 2021. Special fund revenues increase by an estimated \$585,000 in FY 2017 from application fees; out-year revenues reflect the four-year term for equal pay certificates and a small number of new applications annually.

(in dollars)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
SF Revenue	\$585,000	\$30,000	\$30,000	\$30,000	\$615,000
GF Expenditure	\$41,100	\$246,200	\$195,700	\$204,200	\$0
SF Expenditure	\$585,000	\$30,000	\$30,000	\$30,000	\$243,000
Net Effect	(\$41,100)	(\$246,200)	(\$195,700)	(\$204,200)	\$372,000

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

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Equal Pay Certificates

Each contractor that (1) employs at least 40 full-time employees in Maryland or in the state where the contractor has its primary place of business and (2) works on a procurement contract valued at \$500,000 or more must provide to the commissioner a \$150 application fee and an equal pay compliance statement. Revenues from the application fee are distributed to a special fund to be used only to administer the bill's provisions. The statement included with the application must attest that the contractor is in compliance with:

- Title VII of the federal Civil Rights Act of 1964 (employment discrimination);
- the federal Equal Pay Act of 1963;
- the State's Equal Pay for Equal Work provisions; and
- employment discrimination provisions in State law.

The compliance statement must also include additional attestations regarding the absence of discrimination on the basis of sex with respect to benefits, compensation, retention, and promotion, as specified in the bill.

The commissioner has 15 days from the receipt of the application to either grant or reject the application. The commissioner may reject the application only if the contractor failed to pay the application fee or the statement did not meet the above requirements. Alternatively, the commissioner may exempt an applicant if it is determined that the requirements for an equal pay certificate cause an undue hardship to a contractor. If awarded, an equal pay certificate is valid for four years. The commissioner must provide technical assistance to a contractor that requests assistance in meeting the bill's requirements.

Information related to equal pay certificates is not subject to inspection or disclosure under the State's Public Information Act.

Enforcement and Reporting

The commissioner may suspend or revoke an equal pay certificate if the contractor fails to make a good-faith effort to comply with the bill, fails to make a good-faith effort to comply with the federal and State laws specified in the compliance statement, or has at least two violations of the bill or the State and federal laws. However, before revoking or suspending a certificate, the commissioner must (1) seek to resolve any issue related to wages owed to the contractor's employees and (2) notify the contractor and any relevant State agencies of the revocation or suspension. A contractor may appeal the revocation or suspension, as specified in the bill. If the commissioner suspends or revokes a certificate, an agency may abridge or terminate a procurement contract, subject to specified rights to appeal.

The commissioner is authorized to audit a contractor to determine compliance with the bill's provisions. The bill specifies the information that an audited contractor must provide to the commissioner. The commissioner must also establish an anonymous tip line so that employees can report violations of the bill's provisions.

If a State agency awards a contract to a contractor that does not have an equal pay certificate, the commissioner may (1) notify the contractor of the violation; (2) require the contractor to apply for an equal pay certificate within 60 days; and (3) void the contract if the contractor willfully and knowingly violated the bill's provisions. The commissioner must notify the contracting agency of the voiding of a contract.

By January 31, 2018, and every two years thereafter, the commissioner must report to the Governor and designated committees of the General Assembly on the number of certificates issued, the number and results of audits conducted since the previous report, and processes used by contractors to comply with the bill's provisions.

Current Law: 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 paying a wage to employees of one sex at a rate less than the rate paid to employees of the opposite sex 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. Discrimination on the basis of

gender identity is not addressed explicitly in the Equal Pay for Equal Work law. An employee may bring an action against an employer that violates this law.

Federal Equal Employment Opportunity Commission

The federal Equal Pay Act of 1963 requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal.

The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If EEOC finds that discrimination has occurred, it tries to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination.

Procurement Exemptions

The University System of Maryland, Morgan State University, St. Mary's College of Maryland, and P3s authorized by State law are exempt from most provisions of State procurement law. State law also exempts other agencies, in whole or in part, from State procurement law, including:

- Blind Industries and Services of Maryland;
- Maryland State Arts Council;
- Maryland Health and Higher Educational Facilities Authority;
- Department of Economic Competitiveness and Commerce;
- Maryland Food Center Authority;
- Maryland Public Broadcasting Commission;
- Maryland State Planning Council on Developmental Disabilities;
- Maryland Historical Trust;

- Rural Maryland Council;
- Maryland Health Insurance Plan;
- Maryland Energy Administration;
- Maryland Developmental Disabilities Administration;
- Maryland Stadium Authority;
- Maryland State Lottery and Gaming Control Agency;
- State Retirement and Pension System;
- Department of General Services (DGS), for renovation of historical structures;
- Department of Natural Resources, for negotiating with nonprofit entities for projects related to conservation service opportunities;
- College Savings Plans of Maryland; and
- Chesapeake Bay Trust.

However, each exempt entity is subject to specified provisions of State procurement law; the bill makes them all subject to the bill's requirements.

State Revenues: Special fund revenues increase from the payment of the \$150 application fee from each contractor that applies for an equal pay certificate. The bill requires that revenues from the application fee be distributed to a special fund to be used only to administer the provisions of the bill. However, no special fund is mentioned or established by the bill, so it is unclear into which fund the money is deposited.

Eligibility for the certificate is limited to firms with at least 40 employees that work on State contracts valued at \$500,000 or more. DGS advises that approximately 39,000 vendors are registered on eMaryland Marketplace, the State's online procurement portal. These represent businesses that either have existing contracts with the State or that may wish to do business with the State. Data on Maryland businesses from the U.S. Census Bureau shows that 92% of businesses have fewer than 50 employees, so this analysis assumes that 90% have fewer than 40 employees, leaving 10% that need to apply for a certificate.

Based on this estimate, 3,900 businesses (10% of 39,000) apply for an equal pay certificate in the first year and 200 new businesses apply for a certificate in each intervening year. Therefore, special fund revenues increase by \$585,000 in fiscal 2017 from the application fees; as the certificates are valid for four years, revenues are just \$30,000 for each of the next three years for new businesses applying for the certificates. However, in fiscal 2021, when the original applicants apply for renewal certificates, revenues are estimated to be \$615,000, which includes new businesses applying for certificates as well. The bill's October 1, 2016 effective date has no effect on revenues as it is assumed that all eligible businesses apply for the certificates in the shortened year.

To the extent that the actual number of firms applying for and receiving certificates differs from these assumptions, or that the commissioner grants a substantial number of exemptions, revenues vary accordingly.

State Expenditures: The bill requires DLLR’s Division of Labor and Industry to establish a new office to process thousands of equal pay certificate applications, audit contractors, and otherwise ensure compliance with the bill’s provisions. DLLR anticipates establishing a new online certificate application process that also requires substantial expenditure for contractual information technology (IT) developers.

Therefore, general fund and special fund expenditures by DLLR increase by a combined total of \$626,147 in fiscal 2017, which reflects the bill’s October 1, 2016 effective date. This estimate includes the cost of hiring a program administrator, administrative assistant, and wage and hour investigator to implement the provisions of the bill. It also includes a contractual assistant Attorney General for the first two years to develop regulations, policies, and procedures for the program. It includes salaries, fringe benefits, one-time expenditures, including IT contractors, and ongoing operating expenses.

Regular Positions	3.0
Contractual Position	1.0
Salaries and Fringe Benefits	\$191,214
IT Contractors	400,000
Operating Expenses	<u>34,933</u>
Total FY 2017 DLLR Expenditures	\$626,147

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.

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses and the termination of the contractual position and IT costs.

The bill requires that revenues from the application fee go into an unspecified special fund to cover the costs of administering the program. Based on these assumptions, those revenues do not cover the costs of the program in each of the first four years. Thus, it is assumed that general funds are used to cover any funding gap in those years. Although special funds should be sufficient to cover all attributable costs of the program in fiscal 2021 and again in fiscal 2022 (assuming the unnamed special fund is allowed to maintain a fund balance), in fiscal 2023 and 2024, general fund support is likely needed again.

Small Business Effect: The bill does not apply to businesses with fewer than 40 employees, so most small businesses are not affected. However, as businesses with fewer than 50 employees are considered small businesses for the purpose of fiscal and policy notes, those with between 40 and 50 employees are subject to the bill's requirements. Any such companies wishing to do business with the State must pay the \$150 application fee every four years and submit the necessary application for an equal pay certificate. They are also subject to audits by DLLR and any penalties for lack of compliance with the bill's provisions, including cancellation of their contract with the State.

Additional Information

Prior Introductions: None.

Cross File: HB 343 (Delegate K. Young, *et al.*) - Economic Matters and Health and Government Operations.

Information Source(s): State Board of Contract Appeals; Office of the Attorney General; University System of Maryland; Public School Construction Program; Department of General Services; Department of Labor, Licensing, and Regulation; Department of Public Safety and Correctional Services; Board of Public Works; Maryland Department of Transportation; U.S. Census Bureau; U.S. Equal Employment Opportunity Commission; Department of Legislative Services

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