

In This Issue:

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New legislation recently signed into law by the Governor of Maryland requires retail establishments to offer nonworking shift breaks to their employees. In addition, the Maryland General Assembly amended the Maryland Wage Payment and Collection law to include possible treble damage for overtime violations and an administrative enforcement mechanism for claims under \$3,000.

Maryland Enacts “The Healthy Retail Employee Act” and Amends Its Wage Payment and Collection Law

By H. Tor Christensen and Steven E. Kaplan

Effective March 1, 2011, retailers who conduct business in Maryland must provide their employees with mandatory shift breaks or be subject to substantial fines of up to \$300 per employee for a first offense. The Healthy Retail Employee Act (the “Act”), was signed into law by Governor Martin O’Malley on May 20, 2010. The Act applies to retail establishments with 50 or more retail employees. For purposes of the Act, a *retail establishment* is defined as a “place or business with the primary purpose of selling goods to a consumer who is present at the place of business at the time of sale.” Notably, the Act is similar to the shift break bill the Maryland General Assembly unsuccessfully attempted to enact last year, which would have targeted most employers with 50 or more employees, regardless of the industry. As such, it appears likely that the General Assembly will attempt to expand the reach of the Act in the future.

Specifically, the Act mandates that a retailer must provide the following breaks to nonexempt employees, depending on the length of the shift:

- 4 to 6 consecutive hours requires a nonworking shift break of at least 15 minutes;
- 6 or more consecutive hours requires a nonworking shift break of at least 30 minutes;
- 8 or more consecutive hours in a single shift requires an additional nonworking shift break of at least 15 minutes for every 4 consecutive hours.

An employee may waive his or her right to the nonworking shift break in a written agreement if his/her hours do not exceed 6 consecutive hours.

The Act also provides for a “working shift break” if the employee’s work prevents him or her from being relieved during the shift break, or the employee is allowed to consume a meal while working and is paid. However, a working shift break under either circumstance must be mutually agreed to by the employer and the employee in writing.

If an employee believes that the Act has been violated, he or she may file a complaint with the Maryland Department of Labor, Licensing, and Regulation (DLLR). However, the Act does not give the DLLR any guidance on how to resolve a complaint. In particular, the Act simply instructs the DLLR to “try to resolve the issue informally,” or “determine whether the employer has violated [the Act].” If the DLLR determines that the Act has been violated, it may fine a retailer up to \$300 for each employee for whom the employer is not in compliance. If the DLLR finds a similar violation within 3 years, it may assess a civil penalty up to \$600 for each affected employee. In assessing the amount of any civil penalty, the DLLR shall consider the: (1) seriousness of the violation; (2) size of the employer’s business; (3) employer’s good faith; and (4) employer’s history of compliance.

If an employer is fined, it may request an administrative hearing in accordance with Title 10, Subtitle 2 of the State Government Article. If an employer is unsuccessful at an administrative hearing, it may appeal the decision to a Circuit Court. The court may overturn the administrative decision if it is unsupported by competent, material, and substantial evidence, or is arbitrary or capricious.

What Retailers Should Do to Ensure Compliance with New Break Requirements

Maryland retailers must establish break policies to ensure that they are in compliance with the Act. Any Maryland Retailer who already has a break policy in place should have it reviewed to ensure it meets the minimum requirements of the Act. In addition, retailers must implement systems in order to track – and later prove if necessary – that an employee has taken the required break. If an employee will be taking “working shift breaks,” the employer must make sure to obtain the employee’s consent in writing.

Amendments to the Maryland Wage Payment and Collection Law

The Maryland General Assembly also amended the Maryland Wage Payment and Collection Law in two significant ways. First, the General Assembly added “overtime wages” to the definition of “wage.” Now, if a court finds that an employer withheld overtime wages, the employee may be entitled to treble damages in some circumstances. This is a departure from existing court precedent that held an employee could sue for overtime wages under only the federal Fair Labor Standards Act and the Maryland Wage and Hour Law. Second, the General Assembly provided the DLLR with the authority to investigate and adjudicate claims that an employer failed to pay wages of up to \$3,000. Previously, such small claims had to be filed in a court.

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