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Dylan McDonough
Policy Analyst
Maryland Department of Labor
1100 N. Eutaw Street
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Re: Maryland Economic Stabilization Act Regulations – Public Comment

Dear Mr. McDonough,

As an employment attorney with Shawe Rosenthal LLP, I provide these written comments regarding the forthcoming regulations implementing the Maryland Economic Stabilization Act ("the Act"). As expressed during the legislative process, including during the process of proposing amendments to the Act in 2021, many provisions of this law lack clarity that we had hoped would be addressed in the Maryland Department of Labor's Regulations. After review of the proposed regulations, there is still significant uncertainty surrounding many provisions of this law that we believe need clarity to ensure employers are sufficiently on notice of their obligations under the Act.

1. **There must be clarification regarding the definition of "Employer".**

The proposed regulations provide a definition of "Employer" that is essentially identical to the definition of "Employer" set forth in the Act. Section 11-301(c)(1)-(2) of the Act states:

> (c)(1) "Employer" means any person, corporation, or other entity that employs at least 50 employees and operates an industrial, commercial, or business enterprise in the State.
>
> (2) "Employer" does not include the State or its political subdivisions or any employer who has been doing business in the State less than 1 year.

It is unclear whether a person, corporation, or other entity must employ 50 employees in Maryland or 50 employees total, regardless of the location of the employees, to be an "Employer" under the Act. We have received informal guidance that the threshold was 50 employees anywhere rather than 50 employees in Maryland, however, we had hoped that this would be made clear in the regulations.

2. There must be clarification regarding the requirements in the event of a sale of part or all of a business.

With regard to the sale of a business, the Act states:

> (d)(1) Subject to paragraph (2) of this subsection, for a reduction in operations that will result from a sale of part or all of an employer's business, the notice required under subsection (a) of this section shall be provided both by:
>
> (i) the seller on or before the effective date of sale; and
>
> (ii) the purchaser after the effective date of sale.
>
> (2) An individual who is an employee of the seller as of the effective date of sale shall be considered an employee of the purchaser immediately after the effective date of sale.

Md. Code Ann., Lab. & Empl. § 11-305(d).

If the seller employs the entire workforce up to the time of the sale, but the buyer does not hire the entire workforce and the reduction is sufficient to meet the definition for a reduction in operations, is the seller also responsible for providing notice? The "both by" phrase would seem to indicate that the seller would also need to provide the notice, however, the seller may not know the buyer's intentions with regard to its workforce, making it impossible to provide notice on or before the effective date of the sale. We believe that the regulations should clarify both the buyer and the seller's obligations in such scenarios.

3. There must be clarification to the definition of "Reduction in operations."

The proposed regulations refer to the definition of "Reduction in operations" contained in §11-301(e) of the Act, which states that a "Reduction in operations" includes:

> (1) the relocation of a part of an employer's operation from an initial workplace to another existing or proposed site that may reduce the total number of employees at the initial workplace by at least 25% or 15 employees, whichever is greater; or
>
> (2) the shutting down of a workplace or a portion of the operations of a workplace that reduces the total number of employees by at least 25% or 15 employees, whichever is greater, over any 3-month period.

In subsection (1), it is clear that the reduction of the total number of employees by at least 25% or 15 employees refers to employees at the initial workplace, given that "initial workplace" modifies the phrase "the total number of employees." No such modifier is present in subsection (2), making

it unclear whether the 25%/15 calculation refers to employees at the workplace, or employees Company-wide.

For example, if an employer with 1,000 employees in various locations closes a plant in Maryland that results in the termination of 100 employees, it is unclear whether the greater of 25%/15 employees is calculated using the number of employees at the Maryland plant or Company-wide. If the calculation is done by using the employees at the Maryland plant, this would be a reduction in operations given that there will be 100 layoffs and the greater of 15 employees or 25% of the 100 employee plant is 25.

If, however, these thresholds are calculated using the total number individuals employed by the Company, this would not be a reduction in operations because there will need to have been 250 layoffs to trigger the Act's requirements (25% of 1,000 employees is 250 employees, which is greater than 15).

We presume the intent of subsection (2) is for the reduction to reduce the total number of employees at the workplace by at least 25% or 15 employees, whichever is greater. This, however, must be clarified by the regulations to ensure that employers know whether their employment actions meet the "reduction in operations" definition and thus trigger the Act's requirements.

4. The regulations do not contain the written notice referenced in § 11-304(b)(2)(i)

Section 11-304(b)(2)(i) of the Act states that the "mandatory guidelines" implemented will include "subject to § 11-305 of this subtitle, a written notice that an employer expects to terminate employees due to a reduction in operations." The regulations do not contain such a notice, which would be of great assistance to employers in complying with their obligations under the Act.

5. There must be clarification regarding the Act's application to remote workers

In addition to the statutory definition of "Workplace," the Department has further proposed that "Workplace" shall include "locations in the State where employees may be teleworking." Considerable additional guidance is needed as to the application of the Act to remote workers.

Indeed, the proposed definition raises significant questions including how this aligns with the fact that the Act is triggered only when the greater of at least 25% or 15 employees are impacted. If, as discussed in Section 3 above, the Act is indeed triggered when the greater of at least 25% or 15 employees are impacted at "a workplace," it is unclear how this applies to teleworkers given that an employee working from home works from a workplace of one employee. In such a scenario, the Act would never be triggered because in a remote workplace of one, the greater of 25% or 15 employees would never be terminated (15 employees is greater than 25% of one employee, and the termination of one teleworking employee would result in only one termination at that workplace).

Does the Department intend for teleworking employees to be deemed to report into the physical workplace to which they reported or to the workplace where their work assignments are generated, despite not physically working at those locations? If this is the Department's intent, how would this apply to an employee working remotely in Maryland for an out of state employer, or vice versa? Indeed, the regulations must clarify how the Department intends for the Act to apply to remote workers.

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We look forward to working with the Department in developing regulations that provide clarity and certainty for employers striving to comply with the Act's requirements.

Sincerely,

SHAWE ROSENTHAL LLP

/s/ Paul D. Burgin

Paul D. Burgin