Agenda Item 6
September 18, 2012
Action

MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney
Michael Faden, Senior Legislative Attorney

SUBJECT: **Action:** Bill 19-12, Human Rights and Civil Liberties – Displaced Service Workers

HHS Committee recommendation (2-1, Councilmember Leventhal opposed): approve the Bill with amendments.

Bill 19-12, Human Rights and Civil Liberties – Displaced Service Workers, sponsored by Councilmembers Ervin, Rice, Elrich, Riemer and Navarro, was introduced on May 15, 2012. A public hearing was held on June 12 and a Health and Human Services Committee worksession was held on July 30.

Bill 19-12 would:

- require certain contractors to retain certain service workers for a 90-day transition period;
- provide enforcement by the Office of Human Rights and the Human Rights Commission;
- authorize the Human Rights Commission to award certain relief; and
- generally regulate the displacement of certain service workers by a covered employer.

Background

Bill 19-12 would provide some temporary job protection for non-management service workers when their employer's service contract is terminated. A service contract is defined as a contract between an awarding authority and a contractor to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County which is used as a:

(1) private school;
(2) hospital, nursing care facility, or other health care provider;

(3) institution, such as a museum, convention center, arena, airport, or music hall;
(4) multi-family residential building or complex with more than 30 units; or
(5) commercial building or office building occupying more than 75,000 square feet.

Property owners who hire contractors to provide these services often replace the contractor with little or no notice to the affected service employees. The successor contractor is not required to retain the incumbent service workers and must quickly recruit new employees. This process often results in sudden unemployment for many of these low-wage service workers.

Bill 19-12 would require the terminated contractor to give their service workers 15 days notice before the contract is terminated. The Bill would also require the successor contractor to offer to retain the incumbent service workers for a temporary 90-day transition period. Bill 19-12 would permit the successor contractor to hire less than all of the incumbent workers if they can perform the contract with fewer employees. The successor contractor may also release an incumbent service worker during the 90-day transition period for cause. The County Executive supports this Bill (see ©10).

Public Hearing

There were 5 speakers at the June 12 public hearing. Gigi Godwin, representing the Montgomery County Chamber of Commerce, (©11-12) and Shaun Pharr, representing the Apartment and Office Building Association of Metropolitan Washington, (©20) each opposed the Bill as an unnecessary infringement on competitiveness in the relevant marketplace. Jaime Contreras, representing the Service Employees International Union (SEIU), (©13-14) and Ross Eisenbrey, representing the Economic Policy Institute, (©15-26) each supported the Bill as a small measure of job security for low wage employees. Finally, Rafael Sanchez, a service worker who lost his janitor job at a Silver Spring office building when a new contractor was hired to provide janitorial work for the building, (©19) testified in support of the Bill.

The Council also received written testimony opposing the Bill from the Greater Silver Spring Chamber of Commerce (©27-29) and written testimony supporting the Bill from 4 different local cleaning contractors (See ©30-33).

July 30 HHS Worksession

Councilmembers Ervin and Elrich attended the worksession in addition to the Committee members. Kathleen Boucher, Assistant Chief Administrative Officer, and James Stowe, Director of the County Office of Human Rights, represented the Executive Branch. Jaime Contreras, President of SEIU Maryland, Katie Dunn, SEIU attorney, Shaun Pharr, representing the Apartment and Office Building Association of Metropolitan Washington, and Rick Powell, Metropolitan Washington Council, AFL-CIO answered questions from Councilmembers.

The Committee approved (3-0) the following amendments:

1. Extend the Bill to apply to a service contract awarded by the County. See lines 68-69 at ©4.

2. Amend lines 153-155 on ©7 as follows:

   2. Each successor contractor must give each affected service employee a written offer of employment for the 90-day transition period

3. Substitute "offer employment" or "offer to retain" for "retain" on lines 149, 161, and 177. See ©7-8.

4. Amend lines 134-135 on ©6 as follows:

   (4) ensure that the terminated contractor conspicuously posts, at any affected work site, a written notice to all affected service

5. Add the following after line 138 at ©7:

   (5) Where the County is the awarding authority in this Section:
   (A) *terminated or cancelled* means a termination for default, termination for convenience, or mutual termination as defined in Chapter 11B and the County procurement regulations; and
   (B) this Section does not apply to a County service contract awarded by an emergency procurement or direct purchase as defined in Chapter 11B and the County procurement regulations.

6. Add the following language that was inadvertently omitted from the Bill as introduced on lines 173-175 at ©8:

   (4) Each successor contractor must not discharge a service employee retained under this Section without just cause during the transition period.

The Committee recommended approval of the Bill as amended (2-1, Councilmember Leventhal opposed).

Issues

1. Are there similar laws in other jurisdictions?

Laws providing similar protection for certain employees have been enacted in other jurisdictions, including the District of Columbia, San Francisco, Los Angeles, Providence, and New York City. Recently, both the Supreme Court of California, in *California Grocer's Association v. City of Los Angeles,* 52 Cal. 4th 177 (2011), and the United States Court of

Appeals for the 1st Circuit, in *Rhode Island Hospitality Association v. City of Providence,* 667 F.3d 17 (1st Cir. 2011), held that this type of local law was *not* preempted by the National Labor Relations Act. In addition, President Obama issued an Executive Order on January 30, 2009 requiring similar 90-day job protection for service workers employed by a Federal contractor (©34-36). The Maryland General Assembly considered a similar Bill in the 2012 session but did not enact it.

The most relevant similar law is the District of Columbia Displaced Worker Protection Act of 1994 (DC ST §§32-101 – 32-103). The law was first enacted in 1994 to cover janitors and amended in 2006 to cover other types of service workers. The law provides a similar 90-day transition period for service workers and creates a cause of action for an employee who alleges a violation of the law, which is enforceable by filing suit in the D.C. Superior Court. It is likely that many contractors providing these services in the District also provide similar services in Montgomery County. On August 31, the Washington Post published a commentary written by Councilmember Valerie Ervin and District of Columbia Council Chair Phil Mendelson explaining the purpose of Bill 19-12 and the effect of the District of Columbia Act. See ©67-68.

2. Should enforcement of the law be delegated to the Office of Human Rights and the Human Rights Commission?

Each law in another jurisdiction providing displaced service worker protection creates an original cause of action in the local court system. Bill 19-12 would permit an individual to file a complaint with the County Office of Human Rights (HR). The complaint would be investigated by HR and would authorize the Human Rights Commission to hold an adjudicatory hearing and order appropriate relief. A case filed under this Bill would be substantively different than the discrimination complaints generally handled by the Office, but would follow the same procedure. The budget for the County Office of Human Rights has been reduced in recent years as a result of the historic drop in County revenue.

Although creating a private cause of action to enforce this Bill in the Maryland courts would be preferable, the County does not have the authority to do so. In *McCrory Corp. v. Fowler,* 319 Md. 12, 570 A.2d 834 (1990), the Maryland Court of Appeals held that the County did not have the authority under the Express Powers Act to create a private cause of action because it would be a public general law. Therefore, the County must delegate enforcement to a County agency that can hold an adjudicatory hearing, such as the Office of Human Rights. The Council could choose a different County enforcement agency, such as the Office of Consumer Protection, but the County does not have an agency that is the local equivalent to the Maryland Department of Labor, Licensing, and Regulation or the United States Department of Labor.[1]

3. Should the Bill apply to service contracts awarded by a government agency?

Bill 19-12 excludes service contracts awarded by a Federal, State, County, or municipal government. Some public hearing testimony questioned this exclusion. County contracts are awarded publicly, after advertising, through a long bidding process. A new County contractor

[1] Councilmember Leventhal Amendment 5 would move enforcement to the Office of Consumer Protection. See ©57.

must pay service employees at least as much as the County living wage. Therefore, a County contractor cannot fire the old employees and bring on a new staff at minimum wage to gain a competitive advantage. Councilmember Ervin, Bill 19-12's lead sponsor, offered an amendment to include the County (see ©37).

The County does not have the authority to regulate Federal and State government contracts. As mentioned, President Obama already issued an Executive Order requiring a similar 90-day retention period for service contractors on Federal contracts. The General Assembly considered but did not enact a similar law in the 2012 legislative session.

Committee recommendation (3-0): apply this Bill to County service contracts by amending the Bill follows:

Amend lines 68-69 at ©4:

County. *Awarding authority* includes the County, but does not include a Federal, State, [[County,]] or municipal government.

4. Would Bill 19-12 require the successor contractor to retain the employees at the same pay and benefits?

No. The Bill is silent on this issue. If the employer is a union shop, the National Labor Relations Act (NLRA) would control the obligations of the successor employer to retain wages and benefits. Although the NLRB has adopted a successor employer doctrine that may require the successor employer to maintain some wages and benefits, the NLRB has not yet decided if this doctrine applies to a successor contractor who retains service employees for a 90-day transition period as required by a state or local law.

Although this opinion is not controlling, an NLRB Administrative Law Judge held that the employer does not become a successor employer unless the employer retains the employees after the 90-day mandatory transition period. See *M & M Parkside Towers, LLC*, 2007 NLRB LEXIS 27 (January 30, 2007). The ALJ reasoned that the successor employer doctrine is based on the employer's conscious decision to retain the former employer's workers, and that an employer subject to a State or local displaced workers law does not make a "conscious decision" to retain the workers until the 90-day transition period is over.

5. Would the Bill require an employer to retain the former workers after the 90-day transition period?

Testimony by the Greater Silver Spring Chamber of Commerce questioned whether Bill 19-12 would require an employer to make a written offer of employment beyond the 90-day transition period. The Bill does not attempt to create any job security beyond the 90-day transition period. **Committee recommendation (3-0)**: amend the Bill for clarity as follows:

Amend line 154 at ©7:

employee a written offer of employment for the 90-day transition period and send a copy to the

6. Amendments requested by the Executive.

Council staff received several requested amendments from the Executive late on July 26. (See email from Kathleen Boucher at ©38). The Executive requested the following amendments:

a. *Substitute references to "offer of employment" for references to "retain" on lines 149, 161, and 177.* This amendment would make it clear that a successor contractor has satisfied the requirements of the Bill when a service worker rejects an offer of employment from the successor employer. Although Council staff believes this is implied in the Bill as drafted, this is reasonable as long as the offer of employment by the successor contractor is not withdrawn before the service worker can accept it. **Committee recommendation (3-0):** approve these amendments to clarify intent.

b. *Amend line 134 to add that the awarding authority must ensure that "the terminated contractor conspicuously posts, at any affected work site," the written notice.* This amendment would clarify the responsibility to post the notice to the affected workers. **Committee recommendation (3-0):** approve this amendment.

c. *Add the following paragraph after line 138 at ©7 if the Bill is amended to include County service contracts:*

(5) Where the County is the awarding authority:
(A) In this Section, *terminated or cancelled* means a termination for default, termination for convenience, or mutual termination as defined in Chapter 11B and the County procurement regulations; and
(B) This Section does not apply to a County service contract awarded by an emergency procurement or direct purchase as defined in Chapter 11B and the County procurement regulations.

Committee recommendation (3-0): approve this amendment.

d. *Add language that was inadvertently omitted from the Bill as introduced on line 173 as follows:*

(4) Each successor contractor must not discharge a service employee retained under this Section without just cause during the transition period.

Committee recommendation (3-0): approve this amendment.

7. Questions from William Kominers.

Council staff received a list of 36 questions from an attorney, William Kominers. See ©39-44. Although some of these questions are answered in the issues described above, Council staff also received detailed responses to these questions from one of the proponents of the Bill, the SEIU. See ©45-52. Council staff believes the responses from SEIU fairly answer the questions. We have the following additional responses:

a. *Questions 9 & 10.* A dismissal for cause during the 90-day transition period would not be subject to a grievance procedure in a collective bargaining contract unless the successor contractor enters into a collective bargaining agreement with a union that covers this. However, an employee who is dismissed for cause during the 90-day transition period would have the right to file a complaint with the County Office of Human Rights challenging the employer's decision.

b. *Questions 17-20, 23.* The awarding authority can obtain this information from the terminated contractor by making it a requirement of the contract. The only enforcement mechanism in the Bill is filing a complaint with the County Office of Human Rights.

c. *Question 24.* Seniority is a common method of filling these service worker jobs.

d. *Question 30.* The Bill only requires retention during a 90-day transition period. A contractor's poor performance may be due to poor management, poor staff, or both. The Bill does not require the successor contractor to retain managers and the Bill permits the successor contractor to dismiss workers for poor performance.

8. Councilmember Leventhal's Amendments.

Councilmember Leventhal requested the following amendments:

a. *Amendment 1* would replace the requirement to retain existing workers for a 90-day transition period with a requirement to provide these workers with 90 days notice that the service contract is scheduled to end. See ©53.

b. *Amendment 2* would exempt service contracts awarded by a homeowner's association, a condominium, and a housing cooperative from the requirements of the Bill. See ©54.

c. *Amendment 3* would remove security employees from the requirements of the Bill. See ©55.

d. *Amendment 4* would remove the restrictions in the Bill on retaining less than all of the affected service workers during the 90-day transition period if the successor contractor finds that fewer service workers are needed. See ©56.

Committee recommendation (2-1, Councilmember Leventhal opposed): reject each of these amendments.

e. *Amendment 5* would change the enforcement agency from the Office of Human Rights to the Office of Consumer Protection. See ©57-61. This amendment was not offered at the Committee worksession and includes the amendments that were approved by the HHS Committee on July 30.

9. Amendments requested by Councilmembers Rice and Riemer.

Councilmembers Rice and Riemer requested the following amendments:

a. *Amendment 6* would permit a successor contractor to refuse to offer employment to a service employee who fails a pre-employment ineligibility test, such as a drug test or security background check. The ineligibility test must be routinely used by the contractor and be included in a written employment policy adopted before the date of the service contract. See ©62-63.

b. *Amendment 7* would exempt homeowners' associations, condominiums, and housing cooperatives from the requirements of the Bill. This amendment is identical to Leventhal Amendment 2, except that it includes the Committee amendment that adds the County as an awarding authority. See ©64.

c. *Amendment 8* would exempt food service workers from the Bill. See ©65.

d. *Amendment 9* would limit eligibility to a service employee who has worked for the terminated contractor for 90 days or more. See ©66.

This packet contains:	Circle #
Bill 19-12	1
Legislative Request Report	9
County Executive Memorandum	10
Testimony	
Gigi Godwin	11
Jaime Contreras	13
Ross Eisenbrey	15
Rafael Sanchez	19
Shaun Pharr	20
Greater Silver Spring Chamber of Commerce	27
Building Service Management, Inc.	30
Total Quality	31

Integrity National Corporation	32
EMI	33
Federal Executive Order	34
Councilmember Ervin's July 16 Memorandum	37
Kathleen Boucher July 26 Email	38
Questions from William Kominers	39
Responses from SEIU	45
Leventhal Amendment 1	53
Leventhal Amendment 2	54
Leventhal Amendment 3	55
Leventhal Amendment 4	56
Leventhal Amendment 5	57
Rice and Riemer Amendment 6	62
Rice and Riemer Amendment 7	64
Rice and Riemer Amendment 8	65
Rice and Riemer Amendment 9	66
Ervin and Mendelson Commentary	67

Bill No. 19-12
Concerning: Human Rights and Civil Liberties – Displaced Service Workers
Revised: July 30, 2012 Draft No. 6
Introduced: May 15, 2012
Expires: November 15, 2013
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Ervin, Rice, Elrich, Riemer and Navarro

AN ACT to:

(1) require certain contractors to retain certain service workers for a transition period;
(2) provide enforcement by the Office of Human Rights and the Human Rights Commission;
(3) authorize the Human Rights Commission to award certain relief; and
(4) generally regulate the displacement of certain service workers by a covered employer.

By amending
Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-7 and 27-8, and

By adding
Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Article X, Displaced Service Workers

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 27-7 and 27-8 are amended and Chapter 27, Article X is added as follows:

27-7. Administration and enforcement.

(a) *Filing complaints.* Any person subjected to a discriminatory act or practice in violation of this Article, or any group or person seeking to enforce this Article or Article X, may file with the Director a written complaint, sworn to or affirmed under the penalties of perjury, that must state:

(1) the particulars of the alleged violation;

(2) the name and address of the person alleged to have committed the violation; and

(3) any other information required by law or regulation.

* * *

(f) *Initial determination, dismissal before hearing.*

(1) The Director must determine, based on the investigation, whether reasonable grounds exist to believe that a violation of this Article or Article X occurred and promptly send the determination to the complainant and the respondent.

(2) If the Director determines that there are no reasonable grounds to believe a violation occurred, and the complainant appeals the determination to the Commission within 30 days after the Director sends the determination to the complainant, the Director promptly must certify the complaint to the Commission. The Commission must appoint a case review board to consider the appeal. The board may hear oral argument and must:

(A) dismiss the complaint without a hearing;

(B) order the Director to investigate further; or

(C) set the matter for a hearing by a hearing examiner or the board itself, and consider and decide the complaint in the same manner as if the Director had found reasonable grounds to believe that [discrimination] a violation of this Article or Article X occurred.

(3) If the Director determines that there are reasonable grounds to believe a violation occurred, the Director must attempt to conciliate the matter under subsection (g).

* * *

27-8. Penalties and relief.

(a) *Damages and other relief for complainant.* After finding a violation of this Article or Article X, the case review board may order the payment of damages (other than punitive damages) and any other relief that the law and the facts warrant, such as:

(1) compensation for:

* * *

(F) financial losses resulting from the discriminatory act or a violation of Article X; and

(G) interest on any damages from the date of the discriminatory act or violation, as provided in subsection (c);

(2) equitable relief to prevent the discrimination or the violation of Article X and otherwise effectuate the purposes of this Chapter;

(3) consequential damages, such as lost wages from employment discrimination or a violation of Article X or higher housing costs from housing discrimination, for up to 2 years after the [discrimination] violation, not exceeding the actual difference in

expenses or benefits that the complainant realized while seeking to mitigate the consequences of the [discrimination] violation (such as income from alternate employment or unemployment compensation following employment discrimination); and

(4) any other relief that furthers the purposes of this Article or Article X or is necessary to eliminate the effects of any discrimination prohibited under this Article.

* * *

ARTICLE X. DISPLACED SERVICE WORKERS PROTECTION ACT.

27-64. Definitions.

(a) As used in this Article:

Awarding authority means any person that awards or enters into a service contract or subcontract with a contractor to be performed in the County. *Awarding authority* includes the County, but does not include a Federal, State, [[County,]] or municipal government.

Contractor means any person, including a subcontractor, which enters into a service contract to be performed in the County and employs more than 20 service employees in the entire company.

Director means the Executive Director of the Office of Human Rights and includes the Executive Director's designee.

Person means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ persons or enter into a service contract.

Service contract means a contract between an awarding authority and a contractor to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County which is used as a:

(1) private school;

(2) hospital, nursing care facility, or other health care provider;

(3) institution, such as a museum, convention center, arena, airport, or music hall;

(4) multi-family residential building or complex with more than 30 units; or

(5) commercial building or office building occupying more than 75,000 square feet.

Service employee means an individual employed on a full or part-time basis by a contractor as a:

(1) building service employee, including a janitor, security officer, groundskeeper, door staff, maintenance technician, handyman, superintendent, elevator operator, window cleaner, or building engineer;

(2) food service worker, including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor;

(3) non-professional employee performing health care or related service.

Service employee does not include:

(1) a managerial or confidential employee;

(2) an employee who works in an executive, administrative, or professional capacity;

(3) an employee who earns more than $30 per hour; or

(4) an employee who is regularly scheduled to work less than 10 hours per week.

Successor contractor means a contractor that:

(1) is awarded a service contract to provide, in whole or in part, services that are substantially similar to those provided at any time during the previous 90 days;

(2) has purchased or acquired control of a property located in the County where service employees were employed at any time during the previous 90 days; or

(3) terminates a service contract and hires service employees as its direct employees to perform services that are substantially similar, within 90 days after a service contract is terminated or cancelled.

(b) This Article does not limit the ability of an awarding authority to terminate a service contract or replace a contractor with another contractor.

27-65. Transition employment period.

(a) *Awarding authority.* At least 15 days before a service contract is terminated, an awarding authority must:

(1) request the terminated contractor to give the successor contractor a complete list of the name, date of hire, and job classification of each service employee working on the service contract;

(2) give the successor contractor a complete list of the name, date of hire, and job classification of each service employee of the terminated contractor working on the service contract;

(3) notify the collective bargaining representative, if any, of the affected service employees of the pending termination of the service contract; and

(4) ensure that the terminated contractor conspicuously posts, at any affected work site, a written notice to all affected service

employees describing the pending termination of the service contract and the employee rights provided by this Article [[is conspicuously posted at any affected work site]].

(5) Where the County is the awarding authority in this Section:

(A) *terminated or cancelled* means a termination for default, termination for convenience, or mutual termination as defined in Chapter 11B and the County procurement regulations; and

(B) this Section does not apply to a County service contract awarded by an emergency procurement or direct purchase as defined in Chapter 11B and the County procurement regulations.

(b) *Successor contractor.*

(1) Subject to paragraph (3), each successor contractor must offer to retain each affected service employee at an affected site for 90 days or until the successor contract is terminated, whichever is earlier.

(2) Each successor contractor must give each affected service employee a written offer of employment for the 90-day transition period and send a copy to the employee's collective bargaining representative, if any. Each offer must:

(A) state the date by which the service employee must accept the offer; and

(B) allow the employee at least 10 days after receiving the notice to accept the offer.

(3) Each successor contractor may [[retain]] offer employment to less than all of the affected service employees during the 90 day transition period if the successor contractor:

(A) finds that fewer service employees are required to perform the work than the terminated contractor had employed;

(B) retains service employees by seniority within each job classification;

(C) maintains a preferential hiring list of those employees not retained; and

(D) hires any additional service employees from the list, in order of seniority, until all affected service employees have been offered employment;

(4) Each successor contractor must not discharge a service employee retained under this Section without just cause during the transition period.

27-66. Enforcement.

A service employee who was not [[retained]] offered employment or who was discharged during the transition period [[, or who was discharged]] in violation of this Article, may file a complaint with the Director under Section 27-7.

Approved:

Roger Berliner, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

LEGISLATIVE REQUEST REPORT

Bill 19 -12
Human Rights and Civil Liberties – Displaced Service Workers

DESCRIPTION: This Bill would require certain successor contractors to retain certain service workers for a 90-day transition period after taking over the contract and provide enforcement by the Office of Human Rights and the Human Rights Commission.

PROBLEM: Property owners who hire contractors to provide building services often replace the contractor with little or no notice to the affected service workers. The successor contractor is not required to retain the incumbent service workers and must quickly recruit new employees. This process often results in sudden unemployment for many of these low-wage service workers.

GOALS AND OBJECTIVES: To provide notice to and temporary employment for service workers who are subject to unemployment due to their employer's loss of a service contract.

COORDINATION: CAO, Office of Human Rights, Human Rights Commission

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: Laws providing similar protection for certain employees have been enacted in other jurisdictions, including the District of Columbia, San Francisco, Los Angeles, Providence, and New York City.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney, 240-777-7895

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Damages awarded by Human Rights Commission

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

May 11, 2012

TO: Roger Berliner, President
County Council

FROM: Isiah Leggett
County Executive

SUBJECT: Bill 19-12, Human Rights and Civil Liberties - Displaced Service Workers

I am writing to express my support for Bill 19-12, Human Rights and Civil Liberties - Displaced Service Workers. This legislation will help us reach the important goals of protecting our service sector workers and their families who live or work in Montgomery County while assuring that our business environment remains competitive for companies that provide security, building maintenance, food preparation, or non-professional health care services.

It can be extremely disruptive to employees when they lose their livelihood in a sudden manner. Many in these service industries are already supporting themselves and their families on a thin financial margin, and can be irreparably harmed even by short-term interruptions in their income. The displaced workers legislation protects these workers while allowing service companies the flexibility to make personnel decisions and be responsive to client needs and bidding specifications – including terminating employees for just cause.

Similar legislation has been in place in Washington, DC for many years with much success. It has not caused disruption to the cleaning contractor community there, nor has it been a financial burden to the DC government. This legislation allows responsible contractors to stay competitive while at the same time providing fair wages and benefits to employees. It will improve standards for workers, and foster stability for the clients of the service companies.

For these reasons, I urge the Council to support Bill 19-12.

The Voice of Montgomery County Business

MONTGOMERY COUNTY COUNCIL

BILL 19-12, HUMAN RIGHTS AND CIVIL LIBERTIES – DISPLACED SERVICE WORKERS

JUNE 12, 2012

TESTIMONY BY GIGI GODWIN

MONTGOMERY COUNTY CHAMBER OF COMMERCE

Good Afternoon.

My name is Gigi Godwin and I am the President & CEO of the Montgomery County Chamber of Commerce. The Chamber **opposes** Bill 19-12 for several reasons:

- The Chamber opposes efforts to undermine the at-will employment doctrine;
- The Chamber opposes favoring group of employees over another, and;
- The Chamber opposes limiting competitiveness and choice in the marketplace.

Similar legislation was introduced in the Maryland General Assembly in 2011 and received an unfavorable report by the Economic Matters Committee. The County Council should also vote this legislation down.

Bill 19-12 abrogates the doctrine of at will employment which allows employers to terminate an employee at any time, for any reason, or no reason. The protections that belong to employees outside of a collective bargaining agreement have been limited by law to circumstances where employees were discharged for exercising certain public responsibilities (jury duty) or statutory rights (civil rights protections). The scope of this legislation extends well beyond existing protections.

Bill 19-12 puts the interests of the predecessor contractor's employees ahead of the successor contractor's employees. **Favoring one group of employees over another should not be sanctioned by Montgomery County law**. The legislation mirrors protections provided through the collective bargaining process, despite the fact that, in this instance, there is no negotiation between an employer and a union. Furthermore, enforcement of this legislation by the Human Rights Commission is unclear because their jurisdiction is limited to claims of discrimination of designated protected classes (employment civil rights laws). Bill 19-12 also favors the workers described in the bill over all other private sector workers, which is fundamentally unfair.

This legislation limits competition among contractors because it forces building managers to continue to use the existing contractor for services. Bill 19-12 also limits building owners' choice and flexibility to employ a contractor that meets their needs.

For those reasons, the Chamber **opposes** Bill 19-12.

Thank you.

32BJ SEIU
Stronger Together

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

MICHAEL P. FISHMAN
President

KEVIN J. DOYLE
Executive Vice President

HÉCTOR J. FIGUEROA
Secretary-Treasurer

VICE PRESIDENTS
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Testimony of Jaime Contreras before the Health and Human Services Committee

June 12, 2012

Displaced Building Service Workers Protection Act Bill 19-12

Good afternoon Chairman Leventhal and Councilmembers Rice and Navarro. Thank you for giving me the opportunity to testify in favor of the Displaced Service Workers Protection legislation. My name is Jaime Contreras, and I am Capital Area Director for 32BJ SEIU and President of the SEIU Maryland and DC State Council. Nearly 10,000 SEIU members live or work in Montgomery County.Local 32BJ represents about 18,000 property service workers in Maryland, DC, and Northern Virginia, including over 2,000 in Montgomery County.We represent 3,500 workers in Maryland and 7,000 residents of Maryland.

Our members are janitors, security officers and food service workers. They clean and secure commercial office buildings, government facilities, and schools and universities. They work hard to make ends meet, and many live paycheck-to-paycheck.

That's why things are especially tough for these workers when bad-actor contractors take over at their worksites. Contractor turnover occurs at a high rate in our competitive service contract industry. Usually, a new contractor will keep-on the experienced workers already employed at a worksite. However, some bad-actors seek short term profits by avoiding these experienced workers and hiring a set of entirely new workers that it hires at lower wages. This practice is devastating for the terminated workers. Some are fired with less than 24-hours' noticeand have no time to save a little money to take care of children while hunting for a new job.Hard-working men and women are already struggling to make ends meet and their families will only suffer more without that income or the transition time needed to find another job.

But it is not like this for property service workers everywhere, because several jurisdictions have passed legislation similar to the bill you are considering today. Displaced building service worker legislation ensures vulnerable, low-wage workers are not arbitrarily dismissed when the building owner, property manager or contractor they work for changes. The legislation provides a 90 day transition period for workers to have the opportunity to prove their value to the new contractor.

This legislation has been a success in several localities across the country – including Washington DC, where it has been in place since 1994 for janitors and since 2006 for security officers and other service workers. The DC market is made up largely of the same contractors as Montgomery County's markets. The State of California, and New York City, St. Louis City have also passed legislation. In addition, President Obama issued an executive order offering service employees employed by Federal contractors similar protections.

Displaced worker legislation does not just benefit and protect workers. It also guarantees tenants in buildings are able to retain quality services by providing continuity in the workforce who takes care of their cleaning and security.

The bill has caused no major disruption to industry. It has been in effect for over 17 years in Washington DC, which remains one of the strongest commercial real estate markets in the nation.At the request of 32BJ, Real Estate expert Hugh Kelly made a study of any possible detrimental effects of a Displaced Worker Protection bill in Montgomery County.[1] He found that it would not drive up costs for building owners nor impact the real estate market.

The legislation does not apply to small buildings or employers with fewer than 20 employees. In addition, if the new employer has just cause to believe that a worker isn't up to par, they are free to make personnel changes. They are also free to downsize the workforce if they determine that is necessary. I know that several cleaning contractors have submitted letters in support of the legislation.

Displaced worker legislation would have minimal cost or financial impact on the County. Enforcement of the legislation in Washington DC has been simple in hundreds of instances over the past 17 years. In the vast majority of cases, a letter or phone call to the new employer has been sufficient to ensure compliance. To our knowledge, in only three cases in all of these years, have workers been forced to pursue enforcement through other means.

Displaced worker legislation has a track record of success in providing protection to some of our most vulnerable workers. It is time for Montgomery County's property service workers to have the same protection. On behalf of our members and all property service workers, I urge you to support this simple, effective legislation. Thank you for your time.

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[1] Hugh Kelly, PhD, consultant with *Real Estate Economics*; former chief economist for Landauer Associates; findings summarized in 2012 Memorandum: 'Montgomery Co. (MD) Displaced Worker Protection Bill' 2/13/12. On file with SEIU 32BJ, New York City.

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Testimony of
Economic Policy Institute Vice President
Ross Eisenbrey
Montgomery County Council
June 12, 2012
Bill No. 19-12, the Displaced Service Worker Protection Act

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Thank you for allowing me to testify on this model legislation to protect service workers, folks near the bottom of the economic ladder, from unnecessary economic harm. The National Apartment Association has a good description of the New York's Displaced Service Worker Protection Act and its successors, including the bill we are discussing today:

> This act protects service workers (i.e., janitors and security guards) from losing their jobs when a company is sold or the employer changes hands. To keep track of protected workers, new employers are required to create a list containing the name, address, date of hire and occupational classification of each building service employee. The employer is then required to retain the workers' employment for a set transitional period, lasting between 90 to 190 days. After this period, the workers have preferential hiring status for employment. In 2002, New York City Mayor Michael Bloomberg signed the Displaced Building Service Worker Protection Act into law with almost unanimous backing from the city council. This law serves as model legislation for many cities with a strong labor force.

The janitors and food service workers who would be covered by the Act are low wage workers. Despite the high cost of living in Montgomery County, the median wage for Montgomery County janitors in 2011 was only $11.60 an hour, $24,128 on an annual basis. Food service workers were paid even less: $9.59 an hour or $19,947 on an annualized basis – a poverty wage for breadwinners in Montgomery County.

Protecting these workers from the economic disaster of unemployment when their employers terminate or sell service contracts will make a major difference in workers' economic security and ensure continuity for tenants. Meanwhile it will have little or no impact on building owners, because the industry norm is for new contractors to retain incumbent workers who are familiar with the tenants and building operations. Management is always free to fire underperforming workers for cause, even during the 90-day transition period. The contractors who would be adversely affected are a few "low-road" employers who try to squeeze out cost savings by undermining labor standards.

Since *total* labor costs associated with maintenance and security workers are a small part of building expenses – about 3.4% of revenues, according to the analysis by Hugh Kelly, clinical professor of real estate economics at NYU – any savings wrung from these workers would be too small to make a significant difference to building owners and would likely cause a significant deterioration of services for many tenants. And since the

affected workers already live at the edge of poverty, the repercussions would surely extend beyond these workers and increase demand for social services.

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The jurisdictions that have enacted laws or ordinances like New York City's include Philadelphia, San Francisco, Los Angeles, and Washington, D.C., all among the most robustly performing office markets since 2001. They have achieved high levels of pricing per square foot, a high ratio of price to net income, and strong volumes of capital flow, as shown in the following table, prepared by Hugh Kelly for his written testimony, which was submitted to the Council.

The table reflects investment data from all buyer categories 2001 - 2008. The returns on operating income in jurisdictions with displaced service worker protection laws are favorable both for the property owners and for municipalities that rely upon the commercial real estate tax as a source of public revenue. The displaced service worker protection laws do not appear to impede or compromise such commercial property tax revenues. I would note especially that Washington, DC, the first jurisdiction to enact legislation to protect displaced service workers, outperforms the national average in price relative to net operating income.

City	DWP Law	Price per Square Foot	Price/NOI Ratio	Total Investment Volume (Millions)
Atlanta	No	$176	12.3	$5,761
Boston	No	$370	13.2	$25,103
Chicago	No	$200	12.7	$30,970
Dallas	No	$128	12.5	$5,530
Las Vegas	No	$164	13.0	$1,528
Los Angeles	Yes	$251	13.7	$12,589
Miami	No	$287	13.5	$4,949
New York	Yes	$560	14.1	$114,585
Philadelphia	Yes	$137	12.3	$5,637
Phoenix	No	$190	12.7	$3,083
San Francisco	Yes	$390	13.3	$23,190
Seattle	No	$331	13.5	$13,393
Washington, DC	Yes	$405	13.5	$30,714
Avg. of DWP Cities		$348.60	13.4	$37,235
Avg. of non-DWP Cities		$205.11	13.1	$9,865

My own research found no evidence to suggest that any of the jurisdictions had had any difficulty implementing a displaced service worker protection law. As you know, a legal challenge to the DC law was upheld by the U.S. Court of Appeals for the DC Circuit in

1995 (*Washington Service Contractors Coalition v. District of Columbia).* Hugh Kelly recently conducted a survey and interviews with more than 200 real estate professionals, owners and public officials, and none of them identified displaced worker protection laws as a factor in building investment, pricing, or operations.

This Act would be a low cost way to provide a modicum of economic security to workers who need all the help they can get in in our very tough economy.

Testimony of Rafael Sanchez before the Health and Human Services Committee

June 12, 2012

Displaced Building Service Workers Protection Act

Bill 19-12

Good afternoon Councilmembers. Thank you for the chance to tell my story. My name is Rafael Sanchez. I live in Silver Spring. I used to work at 8601 Georgia Ave, Silver Spring MD (Lee Building) as a janitor in Montgomery County

In 2010, the contractor who I worked at the Lee Plaza Office Building in Silver Spring lost the cleaning contract. The new contractor immediately fired me and my co-workers. We were given only a few days noticebefore we were out of work and without a paycheck. The new contractor said they would not deal with any of the former employees because we were in a union. They even threatened to call the police on us. This caused lots of stress and financial hardship to me and my family. I have a family to support. Without that job, it was almost impossible to get by. The union fought to get our jobs back, but it took 7 months and the contractor still has not finished paying us all of the backpay they owe us.

The contractor changing at the building was not my fault. I had always got positive evaluations on my work from the previous contractor. If this law had been in place then, all of those problems could have been avoided.

We are not asking for any special favors, if someone is not performing their job they should be let go – and the bill would allow the contractors to do this. All we are asking for is a fair chance to show the new contractor that we can get the work done. That's why I support the transition period that the Displaced Worker bill would provide.

I hope you will vote in favor of this bill.

AOBA
Apartment and Office Building Association of Metropolitan Washington

TESTIMONY BEFORE THE

MONTGOMERY COUNTY COUNCIL

ON BILL 19-12

HUMAN RIGHTS AND CIVIL LIBERTIES – DISPLACED SERVICE WORKERS

June 12, 2012

Presented By:

W. Shaun Pharr, Esq.

AOBA Senior Vice President, Government Affairs

GOOD AFTERNOON PRESIDENT BERLINER AND MEMBERS OF THE COUNCIL, I AM SHAUN PHARR, SENIOR VICE PRESIDENT OF GOVERNMENT AFFAIRS FOR THE APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON (AOBA). AOBA IS A NON-PROFIT TRADE ASSOCIATION WHOSE MEMBERS ARE OWNERS AND MANAGERS OF MORE THAN 96,000 APARTMENTS UNITS AND OVER 21 MILLION SQUARE FEET OF OFFICE SPACE IN SUBURBAN MARYLAND, THE MAJORITY OF WHICH ARE IN MONTGOMERY COUNTY. I APPRECIATE THE OPPORTUNITY TO APPEAR TODAY ON BILL 19-12, THE DISPLACED SERVICE WORKERS ACT.

FIRST, LET ME ADVISE THE COUNCIL THAT AOBA MEMBERS CATEGORICALLY REJECT THE ASSERTION THAT BUILDING OWNERS PUT SERVICE CONTRACTS OUT FOR BID AT EVERY OPPORTUNITY, SOLELY TO WRING OUT SAVINGS FROM SERVICE CONTRACTORS. THE PRIMARY GOAL IN BOTH OFFICE AND APARTMENT BUILDINGS IS TO ATTRACT AND RETAIN TENANTS. WHEN TENANTS ARE SATISFIED, BUILDINGS ARE MORE FULLY OCCUPIED, PEOPLE ARE EMPLOYED, RENTS AND TAXES ARE PAID, AND EVERYONE BENEFITS. SIMPLY PUT, TENANT SATISFACTION IS PARAMOUNT. WHEN CURRENT TENANTS ARE NOT SATISFIED, OR WHEN SOME ASPECT OF A BUILDING'S MAINTENANCE OR OPERATION REDUCES ITS APPEAL TO CURRENT OR PROSPECTIVE TENANTS, THEN BUILDING MANAGERS MUST TAKE STEPS TO SEE THAT ESSENTIAL, POSITIVE CHANGES OCCUR.

EFFORTS ARE ALMOST ALWAYS MADE FIRST TO OBTAIN IMPROVED PERFORMANCE FROM THE SERVICE PROVIDER WHICH IS CURRENTLY UNDER CONTRACT. PUTTING A PARTICULAR SERVICE CONTRACT OUT FOR COMPETITIVE BID IS AND ALWAYS HAS BEEN ONE OF THE PRIMARY MEANS OF SECURING ESSENTIAL IMPROVMENTS WHICH THE CURRENT CONTRACTOR HAS BEEN UNABLE OR UNWILLING TO MAKE. QUALITY AND COST ARE THE TWO FUNDAMENTAL REASONS WHY A SERVICE CONTRACT IS PUT

OUT FOR COMPETITIVE BID, WITH UNACCEPTABLE PERFORMANCE BY THE INCUMBENT CONTRACTOR ACCOUNTING FOR THIS DECISION IN THE GREAT MAJORITY OF CASES.

THE BILL WOULD REQUIRE A NEW CONTRACTOR TO, AT LEAST INITIALLY, HIRE EVERY EMPLOYEE OF THE PREVIOUS CONTRACTOR. YET, IN MANY CASES, IT IS THE PERFORMANCE OF THE WORK FORCE WHICH HAS DICTATED THE NEED FOR CHANGE. DOES THE COUNCIL REALLY WANT TO PASS A STATUTE WHICH FORCES A NEW CONTRACTOR TO RETAIN EMPLOYEES WHOSE WORK WAS NOT MEETING THE BUILDING'S STANDARDS? HOW LOGICAL IS IT TO BELIEVE THAT PERFORMANCE PROBLEMS LIE WITH POOR SUPERVISORS AND MANAGERS, WHEN PERSONS USUALLY BECOME SUPERVISORS BECAUSE THEY THEMSELVES HAVE DEMONSTRATED THAT THEY ARE QUALITY PERFORMERS THEMSELVES? EVEN ASSUMING THAT SUPERVISION IS THE PROBLEM, THE FACT IS THAT MANY SUPERVISORY PERSONNEL WOULD ALSO HAVE TO BE RETAINED UNDER BILL 19-12.

THE SAME PROBLEM FACES THE CONTRACTOR WHO HAS WON A CONTRACT BECAUSE ITS SERVICES WERE THE MOST COMPETITIVELY PRICED. PERHAPS ITS LOWER BID WAS POSSIBLE BECAUSE A MORE EFFICIENT MANAGEMENT APPROACH, OR USE OF STATE-OF-THE-ART EQUIPMENT, ENABLE IT TO DO A BETTER JOB WITH FEWER EMPLOYEES THAN THE OUTGOING CONTRACTOR USES. WHAT HAPPENS TO THAT LOWER BID WHEN THE NEW CONTRACTOR IS FORCED TO HIRE MORE EMPLOYEES THAN IT NEEDS TO DO THE JOB? THIS BILL FORCES IT TO, FIRST, HIRE ALL OF THE PREVIOUS INCUMBENT'S EMPLOYEES; AND THEN IT DICTATES THAT, IN CLASSIC TRADE UNION FASHION, THE CONTRACTOR MAY SUBSEQUENTLY DECIDE WHICH ONES MUST BE RETAINED AND WHO CAN BE LET GO BASED SOLELY ON SENIORITY-- NOT ON SKILLS OR PERFORMANCE.

THE CONCERNS OF PROPERTY OWNERS AND MANAGERS REGARDING BILL 19-12 ARE STRAIGHTFORWARD. IT WILL IMPAIR THE ABILITY OF SERVICE PROVIDERS TO MAINTAIN THE COMPETITIVE ADVANTAGES THEY HAVE RIGHTLY ACHIEVED THROUGH MORE STRINGENT EMPLOYEE PERFORMANCE STANDARDS AND COST-EFFECTIVE METHODS THAN THOSE USED BY THEIR INDUSTRY COUNTERPARTS. IN DOING SO, IT WILL SEVERELY RESTRICT THE ABILITY OF ANY SUBSEQUENT CONTRACTOR TO MAKE THOSE POSITIVE CHANGES WHICH ARE NECESSARY FOR A BUILDING'S MANAGEMENT TO MAINTAIN TENANT SATISFACTION. AS A RESULT, TENANT SATISFACTION WILL SUFFER, TENANT SAFETY CONCERNS WILL BE RAISED AND LIABILITY RISKS OF BOTH CONTRACTORS AND BUILDING OWNERS AND MANAGEMENT WILL BE INCREASED.

FROM THE CONTRACTORS' PERSPECTIVE, IT POSES MANY OTHER CONCERNS. FOR EXAMPLE, WHAT WILL BE THE EFFECT ON PROVIDERS WITH MORE STRINGENT EMPLOYEE SCREENING REQUIREMENTS? CAN AN INHERITED EMPLOYEE BE REQUIRED TO SUBMIT TO DRUG TESTING, IF THAT IS THE NEW EMPLOYER'S POLICY? IS REFUSAL TO DO SO "JUST CAUSE" FOR DISMISSAL? IF THE SUCCESSOR CONTRACTOR DOES NOT HIRE PERSONS WHO HAVE BEEN CONVICTED OF CERTAIN CRIMES, SUCH AS THEFT, BUT THE PRIOR CONTRACTOR DID, MUST THE NEW CONTRACTOR LOWER ITS EMPLOYMENT STANDARDS? IF THE OUTGOING CONTRACTOR HAD UNDOCUMENTED ALIENS IN ITS WORK FORCE, BUT THE SUCCESSOR CONTRACTOR STRICTLY ABIDES BY U.S. IMMIGRATION LAWS, ARE THOSE EMPLOYEES GUARANTEED CONTINUED EMPLOYMENT UNDER THIS BILL? COULD A MINORITY CONTRACTOR BE FORCED TO INHERIT AN EXISTING ALL-WHITE WORK FORCE? OR ONE WHICH SPEAKS A LANGUAGE WHICH NONE OF ITS SUPERVISORS ARE CONVERSANT IN?

THERE ARE ALSO COMPLICATED ISSUES REGARDING BASIC TERMS OF EMPLOYMENT WHICH THE BILL RAISES BUT LEAVES UNADDRESSED. MUST THE NEW CONTRACTOR

PAY THE SAME WAGES AS THE PREVIOUS ONE? CAN IT REQUIRE THAT DIFFERENT HOURS BE WORKED? CAN IT ASSIGN ADDITIONAL LOCATIONS TO THE INHERITED EMPLOYEE? MUST IT MAINTAIN ANY OTHER BENEFITS THE PRIOR EMPLOYER HAD PROVIDED? MOREOVER, WHILE THE FUNDAMENTAL QUESTION OF FEDERAL PREEMPTION MAY HAVE BEEN SETTLED, THE BILL STILL RAISES SERIOUS QUESTIONS AND CONFUSION ABOUT OTHER ASPECTS OF LABOR LAW. WHEN AN EMPLOYER'S WORK FORCE IS COMPRISED OF FIFTY PERCENT OR MORE OF UNIONIZED EMPLOYEES FROM THE PRIOR EMPLOYER, FEDERAL LAW USUALLY REQUIRES THAT THE NEW EMPLOYER RECOGNIZE AND BARGAIN WITH THAT UNION, EVEN THOUGH THE NEW EMPLOYER HAS BEEN NON-UNION. IN SOME INSTANCES, THE NEW EMPLOYER MAY EVEN BE OBLIGED TO ACCEPT THE PRIOR EMPLOYER'S CONTRACT WITH THE UNION. BY ENACTING BILL 19-12, THE COUNCIL COULD BE FORCING THOSE COUNTY SERVICE PROVIDERS WHO HAVE CHOSEN TO BE NON-UNION INTO THESE VERY CIRCUMSTANCES. IT WOULD SEEM HIGHLY INAPPROPRIATE FOR THE COUNCIL TO TAKE SUCH AN ACTIVE, AGGRESSIVE ROLE IN DETERMINING PRIVATE SECTOR LABOR-MANAGEMENT RELATIONSHIPS.

A RELATED AREA WHICH THE BILL SIGNIFICANTLY CONFUSES IS WHAT IMPACT THE COUNCIL INTENDS IT TO HAVE ON THE EMPLOYMENT AT WILL DOCTRINE. THE BILL WOULD CLEARLY MAKE THAT DOCTRINE INAPPLICABLE TO INHERITED EMPLOYEES IN THE FIRST NINETY DAYS UNDER A NEW CONTRACTOR; WHAT IS ITS APPLICABILITY THEREAFTER? AND WHAT OF THE NEW CONTRACTOR'S OTHER EMPLOYEES—IS EMPLOYMENT AT WILL STILL APPLICABLE TO THEM—SO THAT TWO PERSONS DOING IDENTICAL WORK FOR THE SAME EMPLOYER AT THE SAME SITE WILL HAVE TWO ENTIRELY DIFFERENT SETS OF RULES GOVERNING THEIR EMPLOYMENT RIGHTS?

EVEN IF ALL THESE ISSUES COULD SOMEHOW BE DEALT WITH, THE COUNCIL SHOULD HAVE GRAVE DOUBTS ABOUT TAKING A STEP WHICH FEW OTHER LEGISLATURES HAVE TAKEN: MANDATING THAT PRIVATE EMPLOYERS MUST HIRE CERTAIN PERSONS WHOM YOU, AS LAWMAKERS, HAVE DEEMED TO BE ESPECIALLY ENTITLED TO PROTECTION FROM THE DYNAMIC ECONOMIC ACTIVITY THAT IS AT THE HEART OF OUR SYSTEM OF GOVERNMENT. THE MAY 11, 2012 STAFF MEMORANDUM SPEAKS OF PROTECTING SELECTED WORKERS FROM "SUDDEN UNEMPLOYMENT." IF THIS IS THE ELIGIBILITY STANDARD TO BE USED FOR JOB SECURITY, THEN SURELY BILL 19-12 IS ONLY THE BEGINNING. THE COMPETITIVE BID PROCESS IS HARDLY THE MAIN CAUSE OF INNOCENT LOSS OF JOBS. THOSE WHO LOSE THEIR JOBS WHEN THEIR EMPLOYER GOES OUT OF BUSINESS, OR CLOSES A STORE OR BRANCH, ARE WITHOUT FAULT AND HAVE NO NOTICE; SHOULD THEY NOT BE PROTECTED? WHAT ABOUT WORKERS NOT COVERED BY THIS BILL, BUT WHO LOSE THEIR JOB DUE TO A LOST CONTRACT? WHO WOULD SEEM ENTITLED TO PROTECTION? WHERE, AND ON WHAT RATIONAL BASIS, WILL THE POLICY END?

AOBA RECOGNIZES THAT SOME WORKERS ARE INEVITABLY DISPLACED AS A RESULT OF CONTRACTS LOST IN COMPETITIVE BIDDING. NO RELIABLE EVIDENCE HAS BEEN PRESENTED, HOWEVER, AS TO THE NET NUMBER OF WORKERS AFFECTED. HOW MANY ARE NEITHER RETAINED BY THE NEW CONTRACTOR, NOR PLACED IN OTHER LOCATIONS BY THEIR PRESENT EMPLOYER? OF THIS NUMBER, HOW MANY HAVE OTHER FULL-TIME JOBS AND ARE, THUS, NOT PRIMARILY DEPENDENT ON THE JOB FROM WHICH THEY HAVE BEEN DISPLACED? AND FOR THOSE WHO ARE DISPLACED, HOW LONG HAS THE DISPLACEMENT TYPICALLY LASTED?

FINALLY, WHO ARE THEY BEING DISPLACED BY? IF A CLEANING CONTRACTOR, FOR EXAMPLE, HAS D.C. RESIDENTS IN ITS WORKFORCE, THIS BILL COULD EASILY

"DISPLACE" MONTGOMERY COUNTY CITIZENS IN NEED OF WORK BY MANDATING THE RENTENTION OF NON-RESIDENT WORKERS. WHO IS TO SAY WHICH OF THEM IS IN GREATER NEED OF THE JOB IN QUESTION?

UNLESS THE COUNCIL CAN ANSWER THESE QUESTIONS, IT CANNOT BE CERTAIN THAT BILL19-12 IS THE MOST APPROPRIATE MEANS OF MINIMIZING THE TYPE OF DISPLACEMENT IT SEEKS TO ADDRESS. THE COUNCIL SHOULD NOT TAKE THE EXTRAORDINARY STEP OF INSERTING THE COUNTY GOVERNMENT INTO PRIVATE CONTRACTS AND WORKPLACES IN THE MANNER THIS BILL WOULD REQUIRE.

THANK YOU AGAIN FOR THE OPPORTUNITY TO BE HERE THIS AFTERNOON AND YOUR CONSIDERATION OF AOBA MEMBERS' VIEWS. I WILL BE HAPPY TO ANSWER ANY QUESTIONS.

GREATER SILVER SPRING
CHAMBER OF COMMERCE

June 8, 2012

Council President Roger Berliner
and Members of the Council
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20854

Re: Bill 19-12, Human Rights and Civil Liberties Displaced Service Workers

Dear Council President Berliner and Members of the Council:

On behalf of the Greater Silver Spring Chamber of Commerce and our more than 400 member businesses, I am writing to express our opposition to Bill 19-12, Human Rights and Civil Liberties Displaced Service Workers. This letter is submitted in lieu of testimony for the June 12 public hearing on this matter.

Among our Chamber member businesses are companies that provide security, janitorial, and building maintenance services, as well as those business and building owners that rely on contactors to provide these services. Our members oppose Bill 19-12 as it is written for the reasons I outline below. Please also know that in addition we find that the language of the bill to be unclear and leave many unanswered questions.

Our first, and perhaps most important, concern is that while the staff memo indicates that Bill 19-12 would "require certain contractors to retain certain service workers for a 90-day transition period," the language in the bill does not make this clear. References to the "successor contractor" in lines 139 to 141 and 150 to 163 include a specific reference to a 90 day transition period. However, language in lines 142 through 149 say that the "successor contractor must give each affected service employee a written offer of employment. . . ." and includes no reference to employment for only 90 days. We hope this is merely an oversight in the drafting of the bill and does not intentionally require "successor contractors" to permanently hire a "terminated contractor's" employees.

More generally, while the Bill states that it "does not limit the ability of an awarding authority to terminate a service contract or replace a contractor with another contractor," we beg to disagree.

According to one of our member companies that provides commercial cleaning services, the most common reasons a building owner or manager will put a cleaning or maintenance contract out for bid are 1) poor performance on the part of the current contractor (that is directly related to the performance of the contractor's employees); 2) the desire of the building owner or manager to seek cost savings for the service (particularly in the current economy that sees commercial vacancy rates in Montgomery County climbing to more than 25 percent); and 3) a change in building ownership or management (wherein the new owner or manager desires to retain the services of a contractor with whom they have had a positive service experience).

Bill 19-12 makes it difficult for a building or business owner ("awarding authority") to replace a poorly performing contractor with a better one because the new contractor would be required to keep the previous contractor's employees for 90 days, despite the fact that the awarding authority may not have been happy with

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the job performance of the former contractor's employees. Bill 19-12 makes it impossible for the "awarding authority" or the "successor contractor" to assure the best possible service with the most qualified workers. Not only does the Bill allow the County government to tell a contractor whom it must hire, it also requires preference by seniority. This is wrong. Preference should be determined by job performance, not seniority. Furthermore, the County government should not be involved in telling a business whom it must hire, especially in a private business-to-business contract.

The provisions of the Bill also raise a host of unanswered questions:

Lines 123 through 137 lay out a series of requirements for the "awarding authority." Does the 15-day timeframe in line 123 relate to the actual contract termination date, or to the notice of termination date? How would the "awarding authority" know the names, dates of hire, and other details about a "terminated contractor's" employees? Aren't there privacy issues associated with this? What if the "terminated contractor" provides incorrect information to the "awarding authority" and the new contractor, or refuses to provide any information at all? Are their penalties against the "terminated contractor" for refusing to provide this information, or for providing incorrect information? Are there penalties against the "awarding authority" for not getting the information to provide to the new contractor?

It seems that this Bill (particularly in lines 125 to 137) is inappropriately putting the "awarding authority" in the middle of an employer/employee relationship. In a sense, this defeats some of the purpose of using a contractor for certain services. Companies rely on contractors to perform certain services and rely on the contractor to handle all personnel matters. The "awarding authority" has no direct relationship with the contractor's employees and should not have such a relationship. Likewise the "awarding authority" should have no relationship with a "collective bargaining unit for a contractor's employees." That relationship should remain between contractor employer and its employees, not the business (awarding authority) that hired the contractor.

If, indeed, the "successor contractor" is required to retain the "terminated contractor's" employees, even for just 90 days, at what wage and benefit scale must those employees be retained? That of the "terminated contractor," even though the new contractor bid on and won the job based on its own wage and benefit parameters? Further, if the "terminated contractor's" employees were working under a collective bargaining agreement, does the Bill require that that agreement and the provisions thereof transfer to the "successor contractor"? If so, is this only for the 90 days, or does that 90 days of paying employees represented by a collective bargaining agreement suddenly place the "successor contractor" in the position of negotiating a collective bargaining agreement for all if its employees?

The Bill allows a "successor contractor" to retain less than all the previous contractor's employees during the 90 day period if the "successor contractor finds that fewer service employees are required to perform the work than the terminated contractor had employed," but what if one of the unneeded service employees disagrees with that decision? Would that unneeded employee have the right to file a complaint with the county? Who decides how many of the workers are needed if there is a dispute on the part of an "affected employee"?

Lines 157 through 161 refer to the hiring of any employees not retained. Does this apply only to the 90 day period, or is the intent that the "successor contractor" may hire no new employees into its company (for any contract) until all of the "terminated contractor's" employees have been offered employment?

Line 162 says that a "successor contractor" must not discharge a service employee retained under this Section without "just cause" during the transition period." Who defines "just cause"?

With regard to other definitions in the Bill: Lines 112 to 118 are confusing in terms of the definition of a "contractor" versus the "awarding authority." In lines 112 to 114, it appears that the definition of "contractor" is being expanded to include a new property owner, who would be more rightly be defined as an "awarding authority," that would typically employ the contractor. Is this the intent? Likewise in lines 115 to 118, it

appears that the definition of "contractor" is being expanded again to include a company that chooses to use direct employees instead of an outside contractor for certain services. Is this also the intent of the bill?

Finally, we are compelled to ask: Why does the Bill exempt all government agencies from its requirements? If indeed, the Council is concerned about workers displaced as a result of a change in outside contractors, should not also the County take steps to protect workers displaced as a result of a change in County government contracts?

The Greater Silver Spring Chamber of Commerce believes that businesses – and individuals – should be free to choose and contract with whichever companies they believe can best provide the necessary services. We oppose any legislation that would restrict, make this more challenging, or insert County government philosophy and will into what are rightly private contracts. Likewise, we believe that any and all companies should be able to hire whichever employees they choose based on their ability to perform the necessary jobs and we oppose legislation that would restrict this.

For these reasons, we urge the Council to reject Bill 19-12.

We appreciate the opportunity to express our concerns in this matter.

Sincerely,

Jane Redicker

Jane Redicker
President

March 9, 2012

Dear Montgomery County Councilmember:

I am writing to express my support for Displaced Worker Protection legislation in Montgomery County As a cleaning contractor with accounts in Maryland, I know that this legislation will help to improve standards for workers, and create stability for our clients who are commercial property owners.

My company also operates in Washington DC, where similar legislation has been in place for many years, and with much success. The legislation has not caused any disruption to the cleaning contractor community, nor been a financial burden to the DC government. I credit this legislation with helping responsible contractors like ours stay competitive, while at the same time providing fair wages and benefits to our employees.

Our industry is very competitive, and contracts are generally written with very short termination notice requirements. In the absence of Displaced Worker protection janitors and other service employees could get caught in turmoil when contracts change at facilities. Displaced Worker legislation allows us to compete on the quality of our services without hurting employees - something all responsible contractors are pleased to do. In addition, most responsible contractors typically look to keep the employees who know their buildings and the tenants. It saves on hiring and training and makes sense from a security perspective.

In addition, the law still allows us the flexibility to make personnel decisions that we need to stay competitive – including terminating employees for just cause and being responsive to clients concerns and bidding specifications.

For these reasons, I urge you to support Displaced Worker Protection legislation in Maryland.

Sincerely,

Gene C. Nguyen
President, BSMI

Cc: Ike Leggett, Montgomery County Executive

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March 2, 2012

Dear Montgomery County Councilmember

I am writing to express my support for Displaced Worker Protection legislation in Montgomery County As a cleaning contractor with accounts in Maryland, I know that this legislation will help to improve standards for workers, and create stability for our clients who are commercial property owners.

My company also operates in Washington DC, where similar legislation has been in place for many years, and with much success. The legislation has not caused any disruption to the cleaning contractor community, nor been a financial burden to the DC government. I credit this legislation with helping responsible contractors like ours stay competitive, while at the same time providing fair wages and benefits to our employees.

Our industry is very competitive, and contracts are generally written with very short termination notice requirements. In the absence of Displaced Worker protection janitors and other service employees could get caught in turmoil when contracts change at facilities. Displaced Worker legislation allows us to compete on the quality of our services without hurting employees - something all responsible contractors are pleased to do. In addition, most responsible contractors typically look to keep the employees who know their buildings and the tenants. It saves on hiring and training and makes sense from a security perspective.

In addition, the law still allows us the flexibility to make personnel decisions that we need to stay competitive – including terminating employees for just cause and being responsive to clients concerns and bidding specifications.

For these reasons, I urge you to support Displaced Worker Protection legislation in Maryland and I will be happy to testify at hearings in support of the bill.

Sincerely,

Victor Moran

President

Cc: Ike Leggett, Montgomery County Executive

INTEGRITY
NATIONAL CORPORATION
A Facilities Management Company

April 13, 2012

Dear Montgomery County Councilmember

I am writing to express my support for the Displaced Worker Protection legislation currently under consideration in Montgomery County. As a cleaning contractor with accounts in Maryland, I know that this legislation will help to improve standards for workers, and create stability for our clients in the commercial property arena.

My company also operates in Washington DC, where similar legislation has been in place for many years. The legislation has not caused any disruption to the cleaning contractor community, nor been a financial burden to the D.C. Government. I credit this legislation with helping responsible contractors like ours stay competitive, while at the same time providing fair wages and benefits to our employees.

Our industry is very competitive, and contracts are generally written with very short termination notice requirements. In the absence of Displaced Worker protection janitorial personnel and other service employees could get caught in the turmoil when contracts change at facilities. The Displaced Worker legislation allows us to compete on the quality of our service without hurting employees, something all responsible contractors are pleased to do. In addition, most responsible contractors typically look to keep the employees who know their buildings and the tenants. It saves on hiring and training expense and this consistency tends to enhance overall security at a buildng .

In addition, the law still allows us the flexibility to make personnel decisions that we need to stay competitive, including terminating employees for just cause and being responsive to clients concerns and bidding specifications.

For these reasons, I urge you to support the Displaced Worker Protection legislation in Maryland. .

Sincerely,

INTEGRITY NATIONAL CORPORATION

Antonius Hines, CEO

cc: Ike Leggett, Montgomery County Executive

7421 Washington Boulevard
Elkridge, MD 21075
T (410) 579-8300
F (410) 579-1250
info@executivemaintenance.net
www.executivemaintenance.net

Dear Montgomery County Councilmember,

I am writing to express my support for Displaced Worker Protection legislation in Montgomery County As a cleaning contractor with accounts in Maryland, I know that this legislation will help to improve standards for workers, and create stability for our clients who are commercial property owners.

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For these reasons, I urge you to support Displaced Worker Protection legislation in Maryland and I will be happy to testify at hearings in support of the bill.

Sincerely,

Cc: Ike Leggett, Montgomery County Executive

For Immediate Release January 30, 2009

EXECUTIVE ORDER

NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

Sec. 2. Definitions.

(a) "Service contract" or "contract" means any contract or subcontract for services entered into by the Federal Governmentor its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq., and its implementing regulations.

(b) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

Sec. 3. Exclusions. This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts ith sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

BLOG POSTS ON THIS ISSUE

July 05, 2012 2:09 PM EDT

From the Archives: President Obama Travels to Russia, Italy, and Ghana

Check out a photo gallery from President Obama's 2009 trip to Russia, Italy, and Ghana.

July 05, 2012 11:51 AM EDT

Fourth of July at the White House

President Obama welcomes servicemembers and their families to the White House on Independence Day.

July 04, 2012 1:39 PM EDT

President Obama Salutes New American Citizens

The President told the military service members who took the oath of citizenship today at the White House that America is bound together not only by ethnicity and bloodlines, but by fidelity to a set of ideas

VIEW ALL RELATED BLOG POSTS

34

Sec. 4. Authority to Exempt Contracts.
If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

Sec. 5. Contract Clause. The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

"NONDISPLACEMENT OF QUALIFIED WORKERS

"(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of thecontract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

"(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

"(c) In accordance with Federal Acquisition Regulation 52.222–41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

"(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) _____, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

"(e)
In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about th employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States."

Sec. 6. Enforcement. (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further

Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

Sec. 7. Revocation. Executive Order 13204 of February 17, 2001, is revoked.

Sec. 8. Severability. If any provision of this order, or the application of such provision or amendment to any person or

circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 9. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 10. Effective Date. This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

VALERIE ERVIN
COUNCILMEMBER
DISTRICT 5

Memorandum

To: Roger Berliner, Council President
George Leventhal, HHS Committee Chair
From: Valerie Ervin, ED Committee Chair
Date: July 16, 2012
Subject: Bill 19-12, Human Rights and Civil Liberties – Displaced Service Workers

As you know, I sponsored Bill 19-12 along with Councilmembers Rice, Elrich, Riemer and Navarro to enact a modest, temporary mechanism to provide stability to a sector that already operates on thin financial margins and workers who lives can be irreparably harmed by even short-term income interruptions. County Executive Leggett has also issued a letter of support for this bill. Similar laws are already enacted in the District of Columbia, San Francisco, Los Angeles, Providence and New York City.

The goal of this bill is to provide notice to, and temporary employment for, service workers who are subject to unemployment due to their employer's loss of a service contract. Contracted security, cleaning and other property service industries are subject to rapid contractor turnover with little or no notice to employees.

Concerns have been raised about why County Government was exempt from the introduced version of the bill. The County's Living Wage Law reduces a contractor's motivation to replace their workforce with entry-level employees. In addition, the County's existing procurement process ensures that there will be sufficient notice before a contractor change. However, I am proposing an amendment to expand this legislation to include County Government. The attached version of this bill makes the necessary changes to apply this bill to Montgomery County. This will be yet an additional protection to the County's existing laws, policies and practices. I have discussed this issue with the County Executive and his staff and they support this amendment.

c: Councilmembers
County Executive Isiah Leggett
Kathleen Boucher, Assistant Chief Administrative Officer
Marc Hansen, County Attorney
David Dise, Director Department of General Services
Bob Drummer, Council Legislative Attorney
Amanda Mihill, Council Legislative Attorney

Attachment

Drummer, Bob

From: Boucher, Kathleen

Sent: Thursday, July 26, 2012 9:05 PM

To: Faden, Michael; Drummer, Bob

Cc: Ervin, Valerie; Healy, Sonya; Dise, David E.; Jones, Pam; Stowe, James L.; Adler, Joseph; Nurmi, Joy; Melnick, Richard; Federman-Henry, Karen; Kassiri, Fariba

Subject: Displaced Workers Bill

Attachments: Displaced Service Workers - Bill 19-12.doc

Mike,

I am following up on our conversation today. As you know, the CE supported the introduced version of this bill, which did not apply the bill to the County, because he felt that existing Living Wage and Procurement Laws already provided the intended protections to employees of County contractors. However, he has since made it clear that, if the Council feels that it is necessary to make this bill applicable to the County in order to insure that the intended protections in the bill extend to employees of County contractors, he would support that change. DGS and OCA staff will be present at Monday's workession to discuss existing laws and the types of notice and protections that already exist for employees of County contractors. They will also be prepared to speak to how the County can comply with the bill if it is amended to apply to the County.

DGS and OCA staff have carefully reviewed the procurement law to understand clearly how the bill could be integrated with that law. They have proposed a couple of clarifying amendments as well as amendments that eliminate a potential conflict with State law by clarifying that a successor contractor must extend an offer of employment to employees of the terminated contractor. The attached amendments do the following: (1) substitute references to "offer of employment" for references to "retain" in several places; (2) clarify that the awarding authority must ensure that a terminated contractor conspicuously posts notice of the contract termination to its employees; (3) where the County is the awarding authority, define "terminated" and "cancelled" in a manner consistent with the procurement law and to exclude emergency procurements or direct purchases; and (4) add some language at the end of the bill that seems to have been inadvertently omitted in the introduced version of the bill.

DGS and OCA staff have a question about the meaning of 27-65(a)(1) and (2). These 2 paragraphs seem to be either redundant or inconsistent in the context of the County as an "awarding authority" -- and would appreciate the opportunity to talk to the Committee about the intent of this part of the bill and to clarify that intent. They are also open to discussing the intent behind their proposed amendments and any alternative amendments that might achieve the same goals.

Best regards,

Kathleen

LERCH EARLY & BREWER
ideas that work

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3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814-5367
www.lerchearly.com
William Kominers

Tel. (301) 841-3829
Fax (301) 347-1783
wkominers@lerchearly.com

July 18, 2012

VIA FEDERAL EXPRESS

Ms. Patty Vitale
Chief of Staff
Office of Councilmember George Leventhal
Stella B. Werner Office Building
100 Maryland Avenue
Rockville, MD 20850

Re: Bill No. 19-12

Dear Ms. Vitale:

In accordance with previous discussions, I enclose a number of questions and interpretations issues regarding Bill No. 19-12 for consideration during the Committee work session on July 26. I offer these as possible lines of inquiry or clarification in the review of Bill No. 19-12.

Please contact me if you have any questions on these materials.

Thank you for your consideration of this material.

Very truly yours,

LERCH EARLY & BREWER, CHTD.

William Kominers

WK/lyn
Enclosure
cc: Ms. Jane Redicker

BILL NO. 19-12

Questions and Interpretations

1. Must the Terminated Contractor release the employees from their individual contracts if the New Contractor wants to hire them? Can the Terminated Contractor refuse and continue to use them at other jobs?

2. The Legislative memo suggests that the New Contractor must "quickly recruit new employees." But the New Contractor would be expected to already have his own employees to begin with and would therefore not need the other employees.

3. Do the "carryover employees" bring with them their status as union/nonunion workers to the New Contractor? Does the New Contractor have to accept those employees in that status? Does the number of union employees that are hired by compulsion of Bill 19-12, cause the New Contractor to become unionized, even if they are previously nonunion? How does this affect other, ongoing costs/business of that New Contractor?

4. Must the carryover employees be hired at levels of salary and benefits that are identical to what they receive from the Terminated Contractor? Wouldn't this retrospectively affect the bid price in the New Contractor's proposal to the Awarding Authority? Could this then make that proposal either more expensive for the Awarding Authority or uneconomical for the New Contractor?

5. If the carryover employees must be retained, even if just for 60 for 90 days, at what wage and benefit scale? The New Contractor presumably won the bid based on using its own existing wage and benefit scale. Using the wages and benefits scale of the Terminated Contractor may radically alter the economic basis on which the New Contractor won the contract.

6. If the Terminated Contractor's employees work under collective-bargaining agreement, does the Bill require that such agreement and its provisions be transferred to the New Contractor lock, stock, and barrel? If so, is this only effective for the 90 days? How is this affected in the event that the New Contractor desires to retain some of those carryover employees beyond 90 days?

7. Does paying those employees who are represented by a collective-bargaining agreement suddenly place the New Contractor in the position of requiring a collective-bargaining agreement for <u>all</u> of its employees, <u>not</u> just those that are carryover from the prior contractor?

8. What happens after the 90 day period? Can the New Contractor release the employee without cause?

9. When the New Contractor dismisses the carryover employee within 90 days, for cause, is that dismissal subject to grievance procedures? If so, which grievance procedures apply?

10. If the New Contractor dismisses the carryover worker at the end of 90 days (or after 90 days) without cause, is that dismissal subject to grievance procedures? If so, which grievance procedures apply?

11. What qualifies as "just cause" for discharge of the service employee retained under this Bill?

12. Who defines that "just cause" term?

13. Lines 123 through 124. The Awarding Authority must give 15 days notice before a service contract is terminated. Does this mean 15 days before the date when that contractor will actually cease work, or does it mean 15 days before the date in the contract by which notice to terminate is required to be given to the contractor?

14. By providing notice to the service workers 15 or more days before the old contract is terminated, how does the Awarding Authority prevent retaliation at the job site? What is to prevent those workers -- who know they are being terminated -- from damaging the business or removing material ("theft") from the business?

15. Has the Bill considered the risk that food preparation workers who have been advised of termination may retaliate in preparation of food? How is this risk avoided under this Bill?

16. How does an office building prevent theft, damage or other disruption by disgruntled workers in the time between their notice of termination and actual vacating of the building? Those service workers (janitorial, maintenance, etc.) are inherently in the building when none of the tenants or owners are present.

17. Lines 128 through 130. The Awarding Authority is required to give the New Contractor a complete list of each service employee, including name, date of hire and job classification. How would the Awarding Authority obtain this information? Is this information not subject to privacy restrictions while in the hands of the Terminated Contractor? How does the Awarding Authority get this information? What happens if the Terminated Contractor refuses to provide the information? What penalty? What is the penalty for the Awarding Authority's

failure to get the information? What is the penalty for the Awarding Authority's failure to give the information?

18. By providing personal data on each service employee to the Awarding Authority, does the Terminated Contractor breach privacy requirements that it owes to the individual service employees? If the Awarding Authority is able to obtain the private information on each service employee and then provides that personal data to the New Contractor, does the Awarding Authority breach privacy obligations to those service employees?

19. Lines 131 through 133. The Awarding Authority is supposed to "notify the collective-bargaining representative" of the affected service employees about the pending termination of the contract. How does the Awarding Authority: (i) know who the employees are, and (2) obtain collective-bargaining information so as to give the notice required under the Bill?

20. What happens if the Terminated Contractor provides incorrect information about the employees to the Awarding Authority and/or the New Contractor? Or what if Terminated Contractor refuses to provide any information at all? Are there any penalties against the Terminated Contractor for refusing to provide this information or for providing incorrect information?

21. The Awarding Authority has no direct relationship with the employees of either contractor. Yet this Bill seeks to create a relationship where one does not, and should not, exist.

22. Similarly, the Awarding Authority should have no relationship with the "collective-bargaining unit for a contractor's employees," yet this Bill creates a similar relationship.

23. Lines 142 through 145. The New Contractor is required to give a written offer of employment to each service employee and send a copy to their collective-bargaining representative. How does the New Contractor obtain that information on each employee? Does the New Contractor breach privacy obligations to those potential employees by passing such information on to third parties?

24. The New Contractor is required to retain employees by "seniority." Does this not impair the ability of the New Contractor to hire for his or her company and thereby affect whether the company can provide services to customers in the most effective manner possible? Why should the obligation to retain by seniority trump the obligation to hire or retain employees by "capability" or "qualifications"?

25. In applying this Bill to private schools, is the New Contractor authorized to require background checks on the carryover workers? Will failure of a background check be sufficient cause for dismissal or non-retention?

26. In those facilities that include day care on the premises (private school, etc.) can the offer of employment be delayed pending necessary background investigation?

27. Application of this Bill to security service seems short-sighted. Selection of security services and the qualifications for the workers, such as bonding, should override the considerations in the Bill. This would apply whether those security workers are employed in a hospital, museum, airport, music hall, or residential building. Application of this Bill to security staff in these particular locations, as well as to the others set forth in Section 27-64 (a) in the definition of "service contract," seems even more egregious than for janitorial services.

28. As to security services, there are many concerns with the clearances and background information on these employees. Will the New Contractor be able to conduct background investigations of the carryover workers? Will the results of these background investigations satisfy the "just cause" for either: (i) terminating an employee within the 90 day period or (ii) not hiring them at all?

29. The most common reasons that a building owner or manager will put a cleaning or maintenance contract out for bid are: (i) poor performance on the part of the current contractor (that is directly related to the performance of the contractor's employees), (ii) the desire of the building owner or manager to seek cost savings for the service, (iii) a change in building ownership or management (whereby the new owner or manager wishes to retain a services contract or with whom they had a previous and positive experience). How does this Bill allow the owner the right to operate the building in an economical manner of his or her choosing?

30. Why should a building or business owner (or "awarding authority") want to keep the previous contractor's employees, if the reason why the contract may have been terminated is unhappiness with the performance of the former contractor's employees? The Bill allows the County government to tell the contractor what employees to hire. Similarly, the County government is being allowed to tell the property owner who to hire. The County should not intrude into these business decisions of the owner.

31. If the New Contractor decides that fewer employees are required to perform the work, (and therefore hires only some of the carryover employees) is that decision subject to challenge by the carryover employees (or, particularly, by one of those who was <u>not</u> carried over to the new company)? Would that unneeded employee have the right to file a complaint with the County? How the decision made as to

the appropriate number of employees if there is a dispute on this issue by an affected employee? How does this decision ripple through the contract with the Awarding Authority?

32. If during the 90 day period the New Contractor wishes to hire additional employees for other contracts it has, (not the one taken over with this Awarding Authority), may that New Contractor hire new employees for its other work who are not members of the carryover employee group? That is to say, may the New Contractor hire other employees for its company, or is it limited to only hiring new employees for its company from the pool who are of the terminated employees unless and until all of those employees have been offered employment? If so, how long does this restriction remain in place (i.e., for how long is the New Contractor restricted in is choice of employees for work at other sites)?

33. Is an Awarding Authority that undertakes these same types of services with its own forces (i.e., its own employees) classified as a "contractor" for purposes of this Bill? How would that classification affect its ability to hire and discharge its service employees who are direct employees of the Awarding Authority?

34. Why does the Bill exempt all government agencies from these requirements?

35. What has actually occurred over time in the District of Columbia and New York City after similar legislation was enacted? What has been the effect on the Awarding Authorities? The contractors? The employees?

36. Why does the local government (i.e. County government) not lead by example on this issue?

Many of the questions raised and addressed below relate to a misunderstanding of the scope of Bill 19-12 as well as the way in which service contracting actually works. To be perfectly clear, the Bill would do the following:

Bill 19-12 will provide a 90 day transition period in which incumbent service workers are to be offered the opportunity to remain on the job by new contractor. The new contractor will determine appropriate staffing levels and is not required to retain more employees than are needed. Moreover, the new contractor will have the power to terminate incumbent employees for cause. Finally, Bill 19-12 does not set any required standards with regard to wages and benefits to be offered to incumbent workers.

This is not a significant departure from the normal practice in service contracting. Due to the slim financial margins in the industry, service contractors cannot afford to retain a standing workforce between contracts. They have to recruit workers once they have won a contract, and the norm is to retain the incumbent workers. The proposed legislation merely enshrines this norm and ensures continuity of services and smooth transition. It also protects against bad-actor motivations for firing the entire incumbent workforce in order to eliminate seniority or get rid of a union.

Question 1: Must the Terminated Contractor release the employees from their individual contracts if the New Contractor wants to hire them? Can the Terminated Contractor refuse and continue to use them at other jobs?

Bill 19-12 applies to the employees of contractors. Generally, service employees do not sign individual employment contracts with the contractors. Most workers in these industries are direct employees of the contractors, not independent contractors. In nearly all of these jobs, it would be illegal to classify employees as independent contractors.

Bill 19-12 requires the successor contractor to offer employment to the employees. If the predecessor contractor wished to retain some or all of the predecessor employees, it could certainly offer the incumbent employees positions at another work site. If an employee has two competing job offers (i.e. one from each contractor), it would be within the employee's discretion which offer to accept. Neither contractor would violate the offer and retention provisions of Bill 19-12 in this situation.

Moreover, in the few instances where contracted service employees have signed employment contracts with their employers that contained non-compete clauses, these clauses have been found invalid, unenforceable and against the public interest in several states. Thus, it is likely that the predecessor contractor would be unable to enforce such a clause.

Question 2: The Legislative memo suggests that the New Contractor must "quickly recruit new employees." But the New Contractor would be expected to already have his own employees to begin with and would therefore not need the other employees.

The service contract industries affected by Bill 19-12 are not structured in a way that the question pre-supposes. The financial margins in these service industries preclude, by and large, service contractors from having a large staff on hand that is not performing work on a particular contract. Rather, service contractors generally retain the incumbent employees.

Questions 3- 7

3. Do the "carryover employees" bring with them their status as union/nonunion workers to the New Contractor? Does the New Contractor have to accept those employees in that status? Does the number of union employees that are hired by compulsion of Bill9-12, cause the New Contractor to become unionized, even if they are previously nonunion? How does this affect other, ongoing costs/business of that New Contractor?

4. Must the carryover employees be hired at levels of salary and benefits that are identical to what they receive from the Terminated Contractor? Wouldn't this retrospectively affect the bid price in the New Contractor's proposal to the Awarding Authority? Could this then make that proposal either more expensive for the Awarding Authority or uneconomical for the New Contractor?

5. If the carryover employees must be retained, even if just for 60 for 90 days, at what wage and benefit scale? The New Contractor presumably won the bid based on using its own existing wage and benefit scale. Using the wages and benefits scale of the Terminated Contractor may radically alter the economic basis on which the New Contractor won the contract.

6. If the Terminated Contractor's employees work under collective-bargaining agreement, does the Bill require that such agreement and its provisions be transferred to the New Contractor lock, stock, and barrel? If so, is this only effective for the 90 days? How is this affected in the event that the New Contractor desires to retain some of those carryover employees beyond 90 days?

7. Does paying those employees who are represented by a collective-bargaining agreement suddenly place the New Contractor in the position of requiring a collective-bargaining agreement for all of its employees, not just those that are carryover from the prior contractor?

Bill 19-12 does not pre-empt existing Federal labor law. Under the National Labor Relations Act, if the existing employees are covered under a collective bargaining agreement, the new contractor must agree only to bargain in good faith with the union. Wages, benefits and terms of employment would be subject to bargaining between the union and the employer as set forth in

existing federal law. Bill 19-12 does not set any requirements about wages and benefits of the new contractor.

Question 8: What happens after the 90 day period? Can the New Contractor release the employee without cause?

Bill 19-12 imposes no requirements on the contractor after the transition period.

Questions 9- 10

9. When the New Contractor dismisses the carryover employee within 90 days, for cause, is that dismissal subject to grievance procedures? If so, which grievance procedures apply?

10. If the New Contractor dismisses the carryover worker at the end of 90 days (or after 90 days) without cause, is that dismissal subject to grievance procedures? If so, which grievance procedures apply?

A dismissal within 90 days would only be subject to a grievance procedure if the new contractor has agreed to a collective bargaining agreement with the union.

Questions 11-12

11. What qualifies as "just cause" for discharge of the service employee retained under this Bill?

12. Who defines that "just cause" term?

"Just cause" in the employment context is defined and interpreted by arbitral, state and Federal labor law. Bill 19-12 does not define or change this. In essence, it means that the contractor must have a substantiated reason for firing an employee, for example, absenteeism, stealing, poor performance, etc.

Question 13: Lines 123 through 124. The Awarding Authority must give 15 days notice before a service contract is terminated. Does this mean 15 days before the date when that contractor will actually cease work, or does it mean 15 days before the date in the contract by which notice to terminate is required to be given to the contractor?

15 days before work on the contract transitions to a new contractor.

Question 14-16

14. By providing notice to the service workers 15 or more days before the old contract is terminated, how does the Awarding Authority prevent retaliation at the job site?

What is to prevent those workers -- who know they are being terminated -- from damaging the business or removing material ("theft") from the business?

15. Has the Bill considered the risk that food preparation workers who have been advised of termination may retaliate in preparation of food? How is this risk avoided under this Bill?

16. How does an office building prevent theft, damage or other disruption by disgruntled workers in the time between their notice of termination and actual vacating of the building? Those service workers (janitorial, maintenance, etc.) are inherently in the building when none of the tenants or owners are present.

These are odd, hypothetical questions and insulting to the workers. Has there ever been a documented case in which a worker who was given advance notice of the termination of a service contract "retaliate[d] in the preparation of food"? Most service workers have been present on the job site for many years, and have worked for numerous contractors. There is no reason why they would want to sabotage their worksite, or the successor contractor.

Questions 17-20, 23.

17. Lines 128 through 130. The Awarding Authority is required to give the New Contractor a complete list of each service employee, including name, date of hire and job classification. How would the Awarding Authority obtain this information? Is this information not subject to privacy restrictions while in the hands of the Terminated Contractor? How does the Awarding Authority get this information? What happens if the Terminated Contractor refuses to provide the information? What penalty? What is the penalty for the Awarding Authority's failure to get the information? What is the penalty for the Awarding Authority's failure to give the information?

18. By providing personal data on each service employee to the Awarding Authority, does the Terminated Contractor breach privacy requirements that it owes to the individual service employees? If the Awarding Authority is able to obtain the private information on each service employee and then provides that personal data to the New Contractor, does the Awarding Authority breach privacy obligations to those service employees?

19. Lines 131 through 133. The Awarding Authority is supposed to "notify the Collective-bargaining representative" of the affected service employees about the pending termination of the contract. How does the Awarding Authority: (i) know who the employees are, and (2) obtain collectivebargaininginformation so as to give the notice required under the Bill?

20. What happens if the Terminated Contractor provides incorrect information about the employees to the Awarding Authority and/or the New Contractor? Or what if Terminated Contractor refuses to provide any information at all? Are there any

penalties against the Terminated Contractor for refusing to provide this information or for providing incorrect information?

23. Lines 142 through 145. The New Contractor is required to give a written offer of employment to each service employee and send a copy to their collective-bargaining representative. How does the New Contractor obtain that information on each employee? Does the New Contractor breach privacy obligations to those potential employees by passing such information on to third parties?

The Awarding Authority would simply get the list of employees and the collective bargaining representative from the previous contractor. If the workers are covered by a collective bargaining agreement, the union representative will already have the information. Penalties for violations are discussed in Section 27-8. No specific penalties are prescribed in Bill 19-12; they are at the discretion of the Director of the Office of Human Rights. No private information is required - only name, date of hire and job classification - so privacy concerns are unwarranted.

Questions 21-22

21. The Awarding Authority has no direct relationship with the employees of either contractor. Yet this Bill seeks to create a relationship where one does not, and should not, exist.

22. Similarly, the Awarding Authority should have no relationship with the "collective-bargaining unit for a contractor's employees," yet this Bill creates a similar relationship.

Bill 19-12 only requires the Awarding Authority to interact with entities with which a contractual relationship already exists, or which it intends to enter into a contractual relationship with. It is a mis-reading of the Bill to state that it creates a relationship between the Awarding Authority and contracted employees or their representative.

Question 24

24. The New Contractor is required to retain employees by "seniority." Does this not impair the ability of the New Contractor to hire for his or her company and thereby affect whether the company can provide services to customers in the most effective manner possible? Why should the obligation to retain by seniority trump the obligation to hire or retain employees by "capability" or "qualifications"?

As set forth above, the successor contractor is free to reduce the unit, or to discharge an employee for just cause. Retaining the incumbent employees, who usually know the building, the service and the customers well, often increases the level of service at the work site. Seniority at a work site means that the employee has experience.

Questions 25-26, 28

25. In applying this Bill to private schools, is the New Contractor authorized to require background checks on the carryover workers? Will failure of a background check be sufficient cause for dismissal or non-retention?

26. Inthose facilities that include day care on the premises (private school, etc.) can the offer of employment be delayed pending necessary background investigation?

28. As to security services, there are many concerns with the clearances and background information on these employees. Will the New Contractor be able to conduct background investigations of the carryover workers? Will the results of these background investigations satisfy the "just cause" for either: (i) terminating an employee within the 90 day period or (ii) not hiring them at all?

Bill 19-12 does not create or eliminate any requirements for background checks. Failure to pass a background check could be considered "just cause." Indeed, one reason to retain incumbent employees is that it is likely that they have already successfully passed background checks. This can save the successor employee time and money.

Question 27: Application of this Bill to security service seems short-sighted. Selection of security services and the qualifications for the workers, such as bonding, should override the considerations in the Bill. This would apply whether those security workers are employed in a hospital, museum, airport, music hall, or residential building. Application of this Bill to security staff in these particular locations, as well as to the others set forth in Section 27-64 (a) in the definition of "service contract," seems even more egregious than for janitorial services.

Many nationally recognized security experts have stated an opinion contrary to the one posed in the question. High turnover among private security officers is a leading cause of concern about the protection of facilities[i]. Bill 19-12 would have the effect of reducing turnover, and thus could be an important factor in improving security. Indeed, retaining security officers who are already familiar with the building, the tenants, and the regular customers is as important, if not more, than retaining employees in other service industries. It helps to ensure that the security officers on guard already know who is supposed to be on the premises and who is not, increasing security for everyone.

Questions 29 and 35.

29. The most common reasons that a building owner or manager will put a cleaning or maintenance contract out for bid are: (i) poor performance on the part of the current contractor (that is directly related to the performance of the contractor's employees), (ii) the desire of the building owner or manager to seek cost savings for the service, (iii) a change in building ownership or management (whereby the new owner or manager wishes to retain a services contract or with whom they had

a previous and positive experience). How does this Bill allow the owner the right to operate the building in an economical manner of his or her choosing?

35. What has actually occurred over time in the District of Columbia and New York City after similar legislation was enacted? What has been the effect on the Awarding Authorities? The contractors?The employees?

A study of the impact of similar legislation on other markets conducted by a leading real estate economist concluded that:

"There was not a single instance where a senior real estate manager, owner, or investor mentioned the Displaced Worker Protection as a factor in building investment, pricing, or operations.

Moreover, the cities covered by such laws have been amongst the most robustly performing office markets over the long period of my study. They have achieved higher levels of pricing per square foot, a higher ratio of price to net income, and stronger volumes of capital flow.[ii]"

Question 30: Why should a building or business owner (or "awarding authority") want to keep the previous contractor's employees, if the reason why the contract may have been terminated is unhappiness with the performance of the former contractor's employees? The Bill allows the County government to tell the contractor what employees to hire. Similarly, the County government is being allowed to tell the property owner who to hire. The County should not intrude into these business decisions of the owner.

Federal, state and local law regulate employee-employer relations extensively, many to a degree far exceeding the very modest scope of this legislation. There is no legal question or concern raised; it is speculation and a biased statement of opinion.

Questions 31-32

31. If the New Contractor decides that fewer employees are required to perform the work, (and therefore hires only some of the carryover employees) is that decision subject to challenge by the carryover employees (or, particularly, by one of those who was not carried over to the new company)? Would that unneeded employee have the right to file a complaint with the County? How the decision made as to the appropriate number of employees if there is a dispute on this issue by an affected employee? How does this decision ripple through the contract with the Awarding Authority?

32. If during the 90 day period the New Contractor wishes to hire additional employees for other contracts it has, (not the one taken over with this Awarding

Authority), may that New Contractor hire new employees for its other work who are not members of the carryover employee group? That is to say, may the New Contractor hire other employees for its company, or is it limited to only hiring new employees for its company from the pool who are of the terminated employees unless and until all of those employees have been offered employment? If so, how long does this restriction remain in place (i.e., for how long is the New Contractor restricted in is choice of employees for work at other sites)?

Bill 19-12 does not hamper a contractor's ability to downsize or to hire as needed. The decision to downsize is at the discretion of the contractor, based on the specifications of the service contract. Bill 19-12 does not affect work at a contractors other worksites. It concerns only the work site(s) where there was a change in contractors.

Question 33: Is an Awarding Authority that undertakes these same types of services with its own forces (i.e., its own employees) classified as a "contractor" for purposes of this Bill? How would that classification affect its ability to hire and discharge its service employees who are direct employees of the Awarding Authority?

In the event an Awarding Authority transitions a service contract from a service contractor to employing the workers as direct employees, Bill 19-12 would apply.

Questions 34, 36

34. Why does the Bill exempt all government agencies from these requirements?
36. Why does the local government (i.e. County government) not lead by example on this issue?

Bill 19-12 has been amended to include Montgomery County contractors. Federal Government contractors are covered by an Executive Order signed by President Obama in 2009, which offers similar protections to displaced service contract workers.

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[i] Congressional Research Service Report for Congress "Guarding America: Security Guards and U.S. Critical Infrastructure Protection". November 12, 2004.

[ii] Memo to SEIU 32BJ from Hugh Kelly, Ph.D., CRE.Clinical Associate Professor of Real Estate at New York University. February 13, 2012.

Amendment 1 to Bill 19-12
By Councilmember Leventhal

Purpose: revise Bill to only require notice of termination or expiration of applicable contracts.

1) Replace lines 122-167 with:

27-65. Required notice.

(a) At least 90 days before a service contract is scheduled to expire or terminate, the terminated contractor must notify each service employee in writing that the contract either:

(1) is scheduled to end on a specific date; or

(2) has been terminated as of a specific date.

(b) The terminated contractor also must:

(1) notify the collective bargaining representative, if any, of the affected service employees of the pending expiration or termination of the service contract; and

(2) assure that a written notice describing the pending expiration or termination of the service contract and the employee rights provided by this Article is conspicuously posted at each affected work site.

(c) A service employee who was not notified as required by this Section may file a complaint with the Director under Section 27-7.

2) Delete lines 108-118:

[[*Successor contractor* means a contractor that:

(1) is awarded a service contract to provide, in whole or in part, services that are substantially similar to those provided at any time during the previous 90 days;

(2) has purchased or acquired control of a property located in the County where service employees were employed at any time during the previous 90 days; or

(3) terminates a service contract and hires service employees as its direct employees to perform services that are substantially similar, within 90 days after a service contract is terminated or cancelled.]]

Amendment 2 to Bill 19-12
By Councilmember Leventhal

Purpose: exempt homeowners' associations, condominiums, and housing cooperatives from law.

1) Amend lines 66-69:

> *Awarding authority* means any person that awards or enters into a service contract or subcontract with a contractor to be performed in the County. *Awarding authority* does not include a Federal, State, County, or municipal government, or a common ownership community, as defined in Section 10B-2(b).

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Amendment 3 to Bill 19-12
By Councilmember Leventhal

Purpose: remove security employees from law.

1) Amend lines 78-81:

Service contract means a contract between an awarding authority and a contractor to provide [[security,]] janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County which is used as a:

2) Amend lines 90-95:

Service employee means an individual employed on a full or part-time basis by a contractor as a:

(1) building service employee, including a janitor, [[security officer,]] groundskeeper, door staff, maintenance technician, handyman, superintendent, elevator operator, window cleaner, or building engineer;

3) Amend lines 101-104:

Service employee does not include:

(1) a managerial or confidential employee;

(2) an employee who works in an executive, administrative, security, or professional capacity;

Amendment 4 to Bill 19-12
By Councilmember Leventhal

Purpose: remove restrictions on employee termination during 90-day transition period.

1) Amend lines 150-161:

(3) Each successor contractor may retain less than all of the affected service employees during the 90 day transition period if the successor contractor[[:]]

[[(A)]] finds that fewer service employees are required to perform the work than the terminated contractor had employed;

[[(B) retains service employees by seniority within each job classification;

(C) maintains a preferential hiring list of those employees not retained; and

(D) hires any additional service employees from the list, in order of seniority, until all affected service employees have been offered employment;]]

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Amendment 5 to Bill 19-12
By Councilmember Leventhal

Purpose: change the enforcement agency to the Office of Consumer Protection.

1) Delete everything from ©2, line 1 to ©8, line 179, and replace with:

Sec. 1. Section 11-4C is added and Sections 11-6 and 11-10 are amended as follows:

11-4C. Displaced Service Worker Protection.

(a) *Definitions.* As used in this Section:

Awarding authority means any person that awards or enters into a service contract or subcontract with a contractor to be performed in the County. *Awarding authority* includes the County, but does not include a Federal, State, County, or municipal government.

Contractor means any person, including a subcontractor, which enters into a service contract to be performed in the County and employs more than 20 service employees in the entire company.

Director means the Director of the Office of Consumer Protection, or the Director's designee.

Person means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ persons or enter into a service contract.

Service contract means a contract between an awarding authority and a contractor to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County which is used as a:

(1) private school;

(2) hospital, nursing care facility, or other health care provider;

(3) institution, such as a museum, convention center, arena, airport, or music hall;

(4) multi-family residential building or complex with more than 30 units; or

(5) commercial building or office building occupying more than 75,000 square feet.

Service employee means an individual employed on a full or part-time basis by a contractor as a:

(1) building service employee, including a janitor, security officer, groundskeeper, door staff, maintenance technician, handyman, superintendent, elevator operator, window cleaner, or building engineer;

(2) food service worker, including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor;

(3) non-professional employee performing health care or related service.

Service employee does not include:

(1) a managerial or confidential employee;

(2) an employee who works in an executive, administrative, or professional capacity;

(3) an employee who earns more than $30 per hour; or

(4) an employee who is regularly scheduled to work less than 10 hours per week.

Successor contractor means a contractor that:

(1) is awarded a service contract to provide, in whole or in part, services that are substantially similar to those provided at any time during the previous 90 days;

(2) has purchased or acquired control of a property located in the County where service employees were employed at any time during the previous 90 days; or

(3) terminates a service contract and hires service employees as its direct employees to perform services that are substantially similar, within 90 days after a service contract is terminated or cancelled.

(b) This Section does not limit the ability of an awarding authority to terminate a service contract or replace a contractor with another contractor.

(c) *Transition employment period.*

(1) *Awarding authority.* At least 15 days before a service contract is terminated, an awarding authority must:

(A) request the terminated contractor to give the successor contractor a complete list of the name, date of hire, and job classification of each service employee working on the service contract;

(B) give the successor contractor a complete list of the name, date of hire, and job classification of each service employee of the terminated contractor working on the service contract;

(C) notify the collective bargaining representative, if any, of the affected service employees of the pending termination of the service contract; and

(D) ensure that the terminated contractor conspicuously posts, at any affected work site, a written notice to all affected service employees describing the pending termination of the service contract and the employee rights provided by this Article.

(E) Where the County is the awarding authority in this Section:

(i) *terminated or cancelled* means a termination for default, termination for convenience, or mutual termination as defined in Chapter 11B and the County procurement regulations; and

(ii) this Section does not apply to a County service contract awarded by an emergency procurement or direct purchase as defined in Chapter 11B and the County procurement regulations.

(d) *Successor contractor.*

(1) Subject to paragraph (3), each successor contractor must offer to retain each affected service employee at an affected site for 90 days or until the successor contract is terminated, whichever is earlier.

(2) Each successor contractor must give each affected service employee a written offer of employment for the 90-day transition period and send a copy to the employee's collective bargaining representative, if any. Each offer must:

(A) state the date by which the service employee must accept the offer; and

(B) allow the employee at least 10 days after receiving the notice to accept the offer.

(3) Each successor contractor may offer employment to less than all of the affected service employees during the 90 day transition period if the successor contractor:

(A) finds that fewer service employees are required to perform the work than the terminated contractor had employed;

(B) retains service employees by seniority within each job classification;

(C) maintains a preferential hiring list of those employees not retained; and

(D) hires any additional service employees from the list, in order of seniority, until all affected service employees have been offered employment;

(4) Each successor contractor must not discharge a service employee retained under this Section without just cause during the transition period.

(e) *Enforcement.*

A service employee who was not offered employment or who was discharged during the transition period in violation of this Section, may file a complaint with the Director under Section 11-6.

11-6. Filing complaints.

(a) Definition. In this section "domestic worker" has the meaning stated in Section 11-4B and service employee has the meaning stated in Section 11-4C.

(b) Complaint. Any consumer, [[or]] domestic worker, or service worker may file a written complaint with the Director.

* * *

11-10. Administrative hearing.

* * *

(g) In addition to the requirements of Section 2A-10, if the hearing officer finds by a preponderance of the evidence that a person has violated this Chapter, the hearing officer may order the violator to:

(1) stop committing the violation;

(2) restore money or property;

(3) pay any costs of investigation or related activities of the Department;

(4) post a performance bond or other security;

(5) pay a civil penalty authorized under Section 11-11; **[[or]]**

(6) pay a service employee lost wages and reasonable attorney's fees for a violation of Section 11-4C; or

(7) take any other action that would:

(A) assist the public in obtaining relief; or

(B) prevent future violations.

* * *

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Amendment 6 to Bill 19-12
By Councilmembers Rice and Riemer

Purpose: to permit a successor contractor to screen each service worker with that contractor's pre-existing, written pre-employment eligibility test.

Amend lines

(b) *Successor contractor.*

(1) Subject to paragraph (3), each successor contractor must offer to retain each affected service employee at an affected site for 90 days or until the successor contract is terminated, whichever is earlier.

(2) Each successor contractor must give each affected service employee a written offer of employment for the 90-day transition period and send a copy to the employee's collective bargaining representative, if any. Each offer must:

(A) state the date by which the service employee must accept the offer; and

(B) allow the employee at least 10 days after receiving the notice to accept the offer.

(3) Each successor contractor may:

(A) **[[**retain**]]** offer employment to less than all of the affected service employees during the 90 day transition period if the successor contractor:

[[(A)**]]** (i) finds that fewer service employees are required to perform the work than the terminated contractor had employed;

[[(B)**]]** (ii) retains service employees by seniority within each job classification;

[[(C)**]]** (iii) maintains a preferential hiring list of those employees not retained; and

[[(D)]] (iv) hires any additional service employees from the list, in order of seniority, until all affected service employees have been offered employment; and

(B) refuse to retain a service employee who fails a pre-employment ineligibility test administered by the successor contractor if the successor contractor:

(i) routinely requires all service employees to undergo the ineligibility test as a condition of employment; and

(ii) adopted the ineligibility test as part of a written employment policy prior to bidding on the successor contract.

(4) Each successor contractor must not discharge a service employee retained under this Section without just cause during the transition period.

Amendment 7 to Bill 19-12
By Councilmembers Rice and Riemer

Purpose: exempt homeowners' associations, condominiums, and housing cooperatives from law.

1) Amend lines 66-69:

> *Awarding authority* means any person that awards or enters into a service contract or subcontract with a contractor to be performed in the County. *Awarding authority* includes the County, but does not include a Federal, State, [[County,]] or municipal government, or a common ownership community, as defined in Section 10B-2(b).

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Amendment 8 to Bill 19-12
By Councilmembers Rice and Riemer

Purpose: remove food service employees from law.

1) Amend lines 78-81:

Service contract means a contract between an awarding authority and a contractor to provide security, janitorial, building maintenance, [[food preparation,]] or non-professional health care services in a facility located in the County which is used as a:

2) Amend lines 90-100:

Service employee means an individual employed on a full or part-time basis by a contractor as a:

(1) building service employee, including a janitor, security officer, groundskeeper, door staff, maintenance technician, handyman, superintendent, elevator operator, window cleaner, or building engineer; or

(2) [[food service worker, including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor;

(3)]] non-professional employee performing health care or related service.

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Amendment 9 to Bill 19-12
By Councilmembers Rice and Riemer

Purpose: limit coverage to a service employee who has worked for the terminated contractor at an affected site for 90 days or more.

1) Amend lines101-107:

Service employee does not include:

(1) a managerial or confidential employee;

(2) an employee who works in an executive, administrative, or professional capacity;

(3) an employee who earns more than $30 per hour; **[[**or**]]**

(4) an employee who is regularly scheduled to work less than 10 hours per week; or

(5) an employee who has worked for the terminated contractor at an affected site for less than 90 days.

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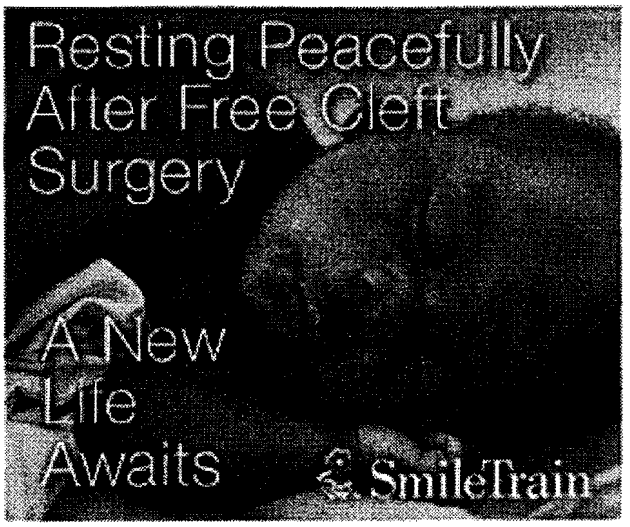
The Washington Post

Back to previous page

A measure of security for some of Montgomery County's lowest-paid workers



By Valerie Ervin and Phil Mendelson,
Published: August 31

Metropolitan Washington is among the most vibrant and successful regions in the nation. On Labor Day, we honor all the men and women who help make it so.

One group of workers, however, deserves a special salute: those who often get taken for granted — janitors, food service workers, nurse's aides, security guards and others who work hard at tough jobs in a low-wage world.

Even a temporary income disruption for these service workers can result in hunger and homelessness. That's why, despite representing opposite sides of the Montgomery County-Washington boundary, we join together here to draw attention to a modest but important step that local governments can take to help protect these workers against sudden layoffs.

The Displaced Service Workers bill, now before the Montgomery County Council, would ensure that experienced employees in the county are not arbitrarily replaced when a service contract changes hands. A similar law has long been in place in the District.

Montgomery's law would provide a degree of financial security to workers who often survive paycheck to paycheck — without unduly burdening the business community — by requiring a new contractor to offer temporary employment to incumbent employees for the first 90 days of the new contract. The bill would not regulate compensation.

The District's law, which has been in place for 18 years, has provided this stability for service workers while creating no noticeable financial difficulties for businesses. Similar laws are in place in San Francisco, Los Angeles, Providence, R.I.; and New York, also with no apparent adverse impact. In fact, these cities have enjoyed some of the strongest-performing office markets for a considerable length of time. Contractors in the District report that the law enables them to compete fairly on the quality of their services without hurting employees, a hallmark practice of any responsible contractor.

Service workers and their families are among those who do not share in the overall economic strength of our region. Already, in Montgomery County, 57,000 people are enrolled in the Supplemental Nutrition Assistance Program (formerly the food stamp program), up 125 percent in the past four years. Nearly a third of public-school students are eligible for free or reduced-price meals. Almost 120,000 people do not have health insurance. When low-income workers lose their jobs without warning, they often must turn to these programs for help, increasing the costs to government.

The Displaced Service Workers bill is about fundamental fairness for some of our region's lowest-paid employees. During this time of unprecedented fiscal stress, the bill simply represents what the District and other cities have already shown: There is a modest and workable way to make their lives more secure.

Valerie Ervin (D-District 5) is a member of the Montgomery County Council. Phil Mendelson (D-At Large) is chairman of the D.C. Council.