

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0355-02
Bill No.: SB 36
Subject: Employees - Employers; Housing; Public Buildings
Type: Original
Date: January 20, 2015

Bill Summary: This proposal modifies the law relating to the Missouri Human Rights Act and employment discrimination.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2016	FY 2017	FY 2018
General Revenue	Unknown	Unknown	Unknown
Total Estimated Net Effect on General Revenue	Unknown	Unknown	Unknown

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2016	FY 2017	FY 2018
Conservation Commission Fund	Unknown	Unknown	Unknown
Road Fund	Unknown	Unknown	Unknown
Universities and Colleges	Unknown	Unknown	Unknown
Total Estimated Net Effect on <u>Other</u> State Funds	Unknown	Unknown	Unknown

Numbers within parentheses: () indicate costs or losses.
This fiscal note contains 9 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2016	FY 2017	FY 2018
Federal Funds	\$0 or (\$751,750)	\$0 or (\$751,750)	\$0 or (\$751,750)
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0 or (\$751,750)	\$0 or (\$751,750)	\$0 or (\$751,750)

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2016	FY 2017	FY 2018
Total Estimated Net Effect on FTE	0	0	0

Estimated Net Effect (expenditures or reduced revenues) expected to exceed \$100,000 in any of the three fiscal years after implementation of the act.

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2016	FY 2017	FY 2018
Local Government	Unknown	Unknown	Unknown

FISCAL ANALYSIS

ASSUMPTION

Officials from the **Department of Transportation**, the **Office of Administration - Personnel Division**, and the **Office of the State Courts Administrator** each assume the proposal will have no fiscal impact on their respective organizations.

The officials from the **Attorney General's Office** assume any potential cost arising from this proposal can be absorbed with existing resources.

Officials from the **Missouri Department of Conservation** assume the proposal will have an unknown fiscal impact but likely less than \$100,000 on their agency. If a claim was brought against the department the department would have to pay legal cost for employment actions. The department must comply with Missouri Human Rights Law.

Officials from the **City of Kansas City** assume the savings to the City from this bill, while difficult to quantify, will be enormous. Currently, the City has been placed in the position where it has to settle many cases that it otherwise would defend through trial, because of the low standard of liability, the reluctance of courts to grant summary judgments in MHRA (Missouri Human Rights Act) cases, and the availability of punitive damages against the City. This bill would allow the City to get summary judgment (or at least have the threat of a summary judgment), avoid punitive damages, and limit actual damages. As an example, in a single case involving two plaintiffs that reached a verdict against the City several years ago, this bill would have resulted in a \$2,000,000 savings in damages (and that assumes the same finding of liability regardless of the change in liability standard and summary judgment potential).

There could also be a potential cost to the City associated with this bill. Currently, the City has sovereign immunity over allegations of retaliation for whistle blowing, because that is a common law tort. Codification of that common law into the MHRA would make it applicable to the City. That said, the City has had few allegations of retaliation based on whistle blowing activity, and therefore, the City believes its costs will be greatly outweighed by the savings this bill will provide the City.

Officials from the **Missouri State University** state if enacted, this bill would have a positive fiscal impact on the University. The specific amount and extent of which cannot be determined and quantified at this time.

ASSUMPTION (continued)

Officials from the **Office of Administration - General Services Division** state the proposal, in 213.010, defines "because" and "because of" for purposes of the Missouri Human Rights Act ("MHRA") in order to establish a legal standard that "the protected criterion was a motivating factor." OA-General Services understands, and therefore assumes, that this legal standard creates a somewhat higher burden on plaintiffs under the MHRA. This higher burden may result in either fewer MHRA claims being made against state agencies or employees, or in more successful legal defense against such claims, either of which could result in potential savings to the legal expense fund.

However, the amount of the potential savings resulting from this proposal cannot be reasonably estimated as this language creates a new legal standard, subject to judicial interpretation, and there is no readily available information that could assist in forming a rational basis for estimating savings. In addition, the number of potential claims, the severity of those claims, and the ultimate costs associated with any settlement or judgment resulting from those claims cannot be forecasted with any degree of assurance to their accuracy.

The state self-assumes its own liability under the state legal expense fund Section 105.711, RSMo. It is a self-funding mechanism whereby funds are made available for the payment of any claim or judgment rendered against the state in regard to the waivers of sovereign immunity or against employees and specified individuals. Investigation, defense, negotiation or settlement of such claims is provided by the Office of the Attorney General. Payment is made by the Commissioner of Administration with the approval of the Attorney General.

Oversight assumes although MHRA claims may still be received, the number of claims could potentially decrease and result in a more successful legal defense against such claims based on the new legal standard in this proposal. Since the amount of potential savings resulting from this proposal is unknown (depending on the number of potential claims, the severity of those claims, and the ultimate costs associated with any settlement or judgment resulting from those claims), Oversight will assume a \$0 or Unknown savings to the General Revenue Fund, the Conservation Commission Fund, Road Fund, Colleges and Universities, and Local Governments.

Officials from the **Department of Labor and Industrial Relations** state currently the Missouri Commission on the Human Rights Act (MCHR) contracts with the Equal Employment Opportunity Commission (EEOC) to investigate complaints of discrimination. This is possible because EEOC has determined the Missouri Human Rights Act is substantially equivalent to the federal civil rights laws the EEOC enforces. The funds from this contract make up the largest part of MCHR's budget.

ASSUMPTION (continued)

This proposal, if passed, amends the Missouri Human Rights Act (the Act), changing the standard to prove discrimination [213.010(2)] and setting the standard for analyzing the merits of motions for summary judgement in discrimination law suits [213.101.4(1) & (2)]. These proposed amendments could threaten MCHR's ability to continue contracting with the EEOC. MCHR's current contract with EEOC is for \$751,750.

EEOC and the Department of Housing and Urban Development (the other federal agency MCHR contracts with) have been provided copies of SB 36 and have been asked to analyze it to determine whether it would be a barrier to continue contracting to investigate discrimination complaints.

In summary of the letter received from the EEOC, officials state this legislation could have an effect on EEOC's worksharing agreement with MCHR. After review of the changes made to the agreement, due to this legislation, EEOC may terminate their contract with MCHR if it is determined that the state statute as applied by MCHR is no longer comparable to Title VII. Although Section 213.101.4 directs the courts to employ the Price Waterhouse analysis, EEOC's ability to continue their contract depends on whether MCHR takes the same position at the administrative level.

If MCHR loses its federal contract from EEOC, it would lose funding for 13 of its employees. MCHR currently has only 30, employees, so losing 44% of its employees would seriously compromise MCHR's ability to properly carry out its statutory mission. A backlog of complaints would most likely develop.

These amendments could also affect the ability of the Kansas City Human Relations Department (HRC) and the St. Louis Civil Rights Enforcement Agency (CREA) to contract with EEOC.

The fiscal impact was calculated by using the last EEOC contract amounts, which totaled \$751,750 and funds 13 FTE's.

Oversight will range the fiscal impact of this proposal from \$0 (does not put Missouri out of compliance) to a loss of \$751,750 (if it is found by the EEOC that MCHR does not conform with the federal anti-discrimination laws EEOC enforces at the administrative level).

<u>FISCAL IMPACT - State Government</u>	FY 2016 (10 Mo.)	FY 2017	FY 2018
GENERAL REVENUE			
<u>Savings</u> - OA -General Service Legal Expenses	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ESTIMATED NET EFFECT TO THE GENERAL REVENUE FUND	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
CONSERVATION COMMISSION FUND			
<u>Savings</u> - MDC Legal Expenses	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ESTIMATED NET EFFECT TO THE CONSERVATION COMMISSION FUND	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ROAD FUND			
<u>Savings</u> - MoDOT Legal Expenses	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ESTIMATED NET EFFECT TO THE ROAD FUND	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
UNIVERSITIES AND COLLEGES			
<u>Savings</u> - Colleges and Universities Legal Expenses	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ESTIMATED NET EFFECT TO UNIVERSITIES AND COLLEGES	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>

<u>FISCAL IMPACT - State Government</u> (continued)	FY 2016 (10 Mo.)	FY 2017	FY 2018
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FEDERAL FUNDS

<u>Loss - MCHR</u> Loss of EEOC federal money	\$0 or <u>(\$751,750)</u>	\$0 or <u>(\$751,750)</u>	\$0 or <u>(\$751,750)</u>
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ESTIMATED NET EFFECT ON FEDERAL FUNDS	\$0 or <u>(\$751,750)</u>	\$0 or <u>(\$751,750)</u>	\$0 or <u>(\$751,750)</u>
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<u>FISCAL IMPACT - Local Government</u>	FY 2016 (10 Mo.)	FY 2017	FY 2018
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LOCAL POLITICAL SUBDIVISIONS

<u>Savings - Local Political Subdivisions</u> Legal Expenses	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
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ESTIMATED NET EFFECT TO LOCAL POLITICAL SUBDIVISIONS	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
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FISCAL IMPACT - Small Business

This proposal could have a direct fiscal impact to small businesses to defend against alleged discrimination.

FISCAL DESCRIPTION

Currently, under the Missouri Human Rights Act (MHRA), a practice is unlawful when the protected trait is a contributing factor in the decision to discriminate. This act changes that standard to a motivating factor standard. The plaintiffs in employment and age discrimination cases have the burden of proving these standards.

Currently, persons acting in the interest of employers are considered employers under the MHRA and are liable for discriminatory practices. This act modifies the definition of employer to exclude those individuals. The act similarly excludes the United States government, corporations owned by the United States, individuals employed by employers, Indian tribes, certain departments or agencies of the District of Columbia, and private membership clubs from the definition.

FISCAL DESCRIPTION (continued)

The act directs the courts to rely heavily on judicial interpretations of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act when deciding MHRA employment discrimination cases.

The act abrogates *McBryde v. Ritenour School District* to require courts to allow a business judgment jury instruction whenever offered by the defendant.

The act recommends two methods to the courts for analyzing employment discrimination cases as a basis for granting summary judgment. The mixed motive and burden shifting analysis are based on court rulings interpreting federal law and the act abrogates numerous Missouri cases in urging the courts to consider the methods highly persuasive.

Parties to a discrimination case under the MHRA may demand a jury trial.

Damages awarded for employment cases under the MHRA shall not exceed back pay and interest on back pay and \$50,000 for employers with between 5 and 100 employees, \$100,000 for employers with between 100 and 200 employees, \$200,000 for employers with between 200 and 500 employees, or \$300,000 for employers with more than 500 employees. Punitive damages shall not be awarded against the state of Missouri or political subdivisions in MHRA cases.

The act creates the "Whistleblower's Protection Act." Employers are barred from discharging or retaliating against the following persons:

- a person who reports an unlawful act of the employer or its agent;
- a person who reports to an employer serious misconduct of the employer or its agent that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation promulgated under statute;
- a person who refuses to carry out a directive issued by an employer or its agent that, if completed, would be a violation of the law; or
- a person who engages in conduct otherwise protected by statute or regulation where the statute or regulation does not provide for a private right of action.

The employee's protected conduct shall be the motivating factor in the employer's discharge or retaliation.

FISCAL DESCRIPTION (continued)

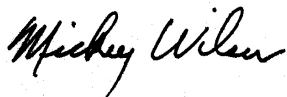
Employees have a private right of action for actual but not punitive damages under the act unless another private right of action for damages exists under another state or federal law. Remedies allowed are backpay, reimbursement of medical bills incurred in treatment of mental anguish, and double those amounts as liquidated damages if it is proven by clear and convincing evidence that the employer's conduct was outrageous because of the employer's evil motive or reckless indifference to the rights of others. The liquidated damages shall be treated as punitive damages and backpay and reimbursement shall be treated as compensatory damages in a bifurcated trial if requested by a party.

The act abrogates all Missouri case law relating to exceptions to the employment at will doctrine. Employers shall not retaliate or discriminate against employees exclusively as a result of the fact that the employee refused to violate a statute, regulation, constitutional provision, ordinance, or common law at the request of someone employed by the employer who has direct or indirect supervisory authority. The same standard shall apply when employees report an illegal act of the employer. The act establishes caps for damages for such cases identical to those created for MHRA cases with the exception of back pay and interest on back pay which are not allowed.

This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

SOURCES OF INFORMATION

Attorney General's Office
Office of Administration
Office of the State Courts Administrator
Department of Transportation
Department of Labor and Industrial Relations
Missouri Department of Conservation



Mickey Wilson, CPA
Director
January 20, 2015

Ross Strope
Assistant Director
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