

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0524-02
Bill No.: SCS for SB 43
Subject: Employees - Employers; Housing; Public Buildings
Type: Original
Date: February 3, 2017

Bill Summary: Modifies the law relating to unlawful discrimination.

FISCAL SUMMARY

| ESTIMATED NET EFFECT ON GENERAL REVENUE FUND | | | |
|--|------------|------------|------------|
| FUND AFFECTED | FY 2018 | FY 2019 | FY 2020 |
| | | | |
| Total Estimated Net Effect on General Revenue | \$0 | \$0 | \$0 |

| ESTIMATED NET EFFECT ON OTHER STATE FUNDS | | | |
|---|----------------|----------------|----------------|
| FUND AFFECTED | FY 2018 | FY 2019 | FY 2020 |
| Legal Expense 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 14 pages.

| ESTIMATED NET EFFECT ON FEDERAL FUNDS | | | |
|---|-----------------------------|-----------------------------|-----------------------------|
| FUND AFFECTED | FY 2018 | FY 2019 | FY 2020 |
| Federal Funds | \$0 to (\$1,201,900) | \$0 to (\$1,201,900) | \$0 to (\$1,201,900) |
| | | | |
| Total Estimated Net Effect on <u>All</u> Federal Funds | \$0 to (\$1,201,900) | \$0 to (\$1,201,900) | \$0 to (\$1,201,900) |

| ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE) | | | |
|---|----------------|----------------|----------------|
| FUND AFFECTED | FY 2018 | FY 2019 | FY 2020 |
| | | | |
| | | | |
| 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 2018 | FY 2019 | FY 2020 |
| Local Government | Unknown | Unknown | Unknown |

FISCAL ANALYSIS

ASSUMPTION

Officials at the **Department of Labor and Industrial Relations (DOLIR)** assume a negative fiscal impact to federal funds.

DOLIR states there could be possible conformity issues with the Missouri Commission Human Rights' (MCHR) contracts with the U.S. Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC). These federal agencies have determined that the Missouri Human Rights Act is substantially equivalent to the federal civil rights law enforced by EEOC and HUD.

If either of these agencies determines Missouri is no longer in conformity with the federal requirements, MCHR could lose the ability to continue contracting with the EEOC for \$781,900 and/or HUD for \$420,000.

The combined loss of \$1.2 million would require the elimination of 21.30 of the 32.70 FTE currently providing services to Missourians through the MCHR. A loss of 65% of staff would seriously comprise MCHR's ability to carry out its statutory mission and a backlog of complaints would develop and continue to grow.

The fiscal impact was calculated using the current contract amounts for EEOC and HUD.

Oversight will range the fiscal impact of this proposal from \$0 (does not put Missouri out of compliance) to a loss of \$1,201,900 (if it is found by the EEOC that MCHR does not conform with the federal anti-discrimination laws EEOC enforces at the administrative level).

Officials at the **Office of Administration - General Services (OA-GS)** were unable to estimate a fiscal impact based on the following information.

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 the legal standard creates a somewhat higher burden on plaintiffs under the MHRA. The higher burden may result in either fewer MHRA claims being made against the 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 potential savings resulting from this proposal cannot be reasonably estimated as the language creates a new legal standard, subject to judicial interpretation, and there is no readily available information that could

ASSUMPTION (continued)

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 an Unknown savings to the General Revenue Fund, the Conservation Commission Fund, Road Fund, Colleges and Universities, and Local Governments.

Officials at the **Department of Transportation (MoDOT)** assume an unknown positive fiscal impact from this proposal which is unquantifiable at this time and based on the following information.

MoDOT states this proposal help reduce meritless claims, reduce forum shopping, and create more consistency for employers. These changes could have a positive fiscal impact on MoDOT in that they tend to level the playing field for employers to defend against claims.

Officials at the **Office of Administration - Personnel** assume this proposal would not have a fiscal impact on their organization.

Officials at the **Department of Economic Development, and Department of Health and Senior Services** each defer to the Office of Administration - Personnel for a fiscal impact.

In response to a previous version of this proposal (524-01), officials at the **Department of Corrections** assumed the proposal could have a unknown positive fiscal impact to their organization.

In response to a previous version of this proposal (0524-01), officials at the **Attorney General's Office** assumed that any potential costs arising from this proposal can be absorbed with existing resources.

ASSUMPTION (continued)

Officials from the **Office of the Secretary of State (SOS)** state many bills considered by the General Assembly include provisions allowing or requiring agencies to submit rules and regulations to implement the act. The SOS is provided with core funding to handle a certain amount of normal activity resulting from each year's legislative session. The fiscal impact for this fiscal note to the SOS for Administrative Rules is less than \$2,500. The SOS recognizes that this is a small amount and does not expect that additional funding would be required to meet these costs. However, the SOS also recognizes that many such bills may be passed by the General Assembly in a given year and that collectively the costs may be in excess of what the office can sustain with the core budget. Therefore, the SOS reserves the right to request funding for the cost of supporting administrative rules requirements should the need arise based on a review of the finally approved bills signed by the governor.

Officials at the **Office of Administration - Administrative Hearing Commission**, the **Office of Administration - Budget and Planning**, the **Department of Agriculture**, the **Department of Higher Education**, the **Missouri House of Representatives**, the **Joint Committee on Administrative Rules**, the **Joint Committee on Public Employee Retirement**, the **Missouri Ethics Commission**, the **Department of Public Safety - Gaming Commission**, the **Governor's Office**, the **Lieutenant Governor's Office**, the **Department of Insurance**, **Financial Institutions and Professional Registration**, the **Lottery Commission**, the **Department of Mental Health**, the **Missouri Consolidated Health Care Plan**, the **Missouri State Employees' Retirement System**, the **State Highway Employees Retirement System**, the **Department of Conservation**, the **Department of Natural Resources**, the **Department of Public Safety - Alcohol and Tobacco**, the **Department of Public Safety - Director's Office**, the **Department of Public Safety - Fire Safety Division**, the **Department of Public Safety - Highway Patrol** the, **Department of Public Safety - State Emergency Management Agency**, the **Department of Public Safety - Missouri Veterans Commission**, the **Office of Prosecution Services**, the **State Public Defender's Office**, the **Office of State Courts Administrator**, the **Missouri Senate**, the **State Treasurer's Office**, and the **Missouri Tax Commission** each assume this proposal will not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-01), officials at the **State Auditor's Office**, the **Department of Elementary and Secondary Education**, the **Department of Revenue**, and the **Department of Social Services** each assumed the proposal would not have a fiscal impact on their respective organizations.

Officials at the **City of Kansas City** assume this proposal would have an unknown positive fiscal impact on their organization based on the following information.

ASSUMPTION (continued)

Savings would be experienced if the standard applicable to cases under the Act were made consistent with that applicable to federal cases brought under Title VII. Now, to reach a jury an employee need only suggest that a protected classification was a contributing factor or some consideration, rather than the City being motivated to discriminate based on a protected classification. Where a person's protected status is known (but it is not a motivating factor for any employment action) is a low threshold to reach the jury resulting in costs not related to explicit discrimination against an employee. By making the standard consistent with federal law employers will more confidently defend those cases in which a person's protected status was not a motivating factor for any employer action. Although each case may present different situations, the fact that attorney's fees are awarded if an employer was aware of a person's protected class but did not discriminate based on any motivating factor related to the status. These cases may commonly result in six figure awards for attorney's fees, with no relevance to the amount of money that might be offered or awarded to the employee. For example, an employee of Kansas City was awarded \$524 for pay that was claimed for not having access to out-of-class work for several days; the attorney's fees awarded by the Circuit Court were about \$350,000.

Officials at **Callaway County** and **St. Louis County** assume this proposal would not have a fiscal impact on their organization.

Officials at the **Missouri State University**, **Northwest Missouri State University**, **State Technical College of Missouri**, and **University of Missouri** each assume this proposal will not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-01), officials at the **Missouri State University** assumed the proposal would have a positive fiscal impact on their organization and the amount could not be determined.

In response to a previous version of this proposal (0524-01), officials at **Missouri Western State University**, and **Truman State University** each assumed the proposal would not have a fiscal impact on their respective organizations.

Oversight will show an unknown positive fiscal impact from this proposal on colleges and universities.

Officials at the school district of **Forsyth R-III** assume this proposal would have a negative impact.

Officials at the school districts of **Everton R-III**, **Kansas City**, **Kirksville R-III**, and **West Plains R-VII** each assume this proposal will not have a fiscal impact on their respective organizations.

ASSUMPTION (continued)

In response to a previous version of this proposal (0524-01), officials at the school districts of **Concordia R-II** and **Kearney R-I** each assumed the proposal would not have a fiscal impact on their respective organizations.

In response to a similar proposal from 2016 (SB 745), officials at the **Mississippi County** assumed the proposal would have a negative fiscal impact to their organization if sued by an employee.

In response to a similar proposal from 2016 (SB 745), officials at **Metropolitan Community College** and **University of Central Missouri** assumed the proposal would not have a fiscal impact on their respective organizations.

In response to a similar proposal from 2016 (SB 745), officials at the school districts of **Avilla R-XIII**, **Eldon R-I**, **Kingston 42**, **Leeton R-X**, **Macon County R-IV**, **Malta Bend**, **Middle Grove**, **Parkway**, **Sarcoixie R-II**, and **Warren County R-III** each assume this proposal will not have a fiscal impact on their respective organizations.

In response to a similar proposal from 2016 (SB 745), officials at the school district of **St. Charles** assumed the proposal would have an unknown positive impact on their organization.

In response to a similar proposal from 2016 (SB 745), officials at the school district of **Shell Knob #78** assumed the proposal would have an some fiscal impact on their organization.

Oversight will show an unknown positive fiscal impact from this proposal to Local Governments.

Officials at the following cities: Ashland, Belton, Bernie, Bonne Terre, Boonville, California, Cape Girardeau, Clayton, Columbia, Dardenne Prairie, Des Peres, Excelsior Springs, Florissant, Frontenac, Fulton, Gladstone, Grandview, Harrisonville, Independence, Jefferson City, Joplin, Kearney, Knob Noster, Ladue, Lake Ozark, Lee Summit, Liberty, Louisiana, Maryland Heights, Maryville, Mexico, Monett, Neosho, O'Fallon, Pacific, Peculiar, Pineville, Popular Bluff, Raytown, Republic, Richmond, Rolla, Sedalia, Springfield, St. Charles, St. Joseph, St. Louis, St. Robert, Sugar Creek, Sullivan, Warrensburg, Warrenton, Webb City, Weldon Spring and West Plains did not respond to **Oversight's** request for fiscal impact.

Officials at the following counties: Andrew, Atchison, Audrain, Barry, Bollinger, Boone, Buchanan, Camden, Cape Girardeau, Carroll, Cass, Christian, Clay, Cole, Cooper, DeKalb, Dent, Franklin, Greene, Holt, Jackson, Jefferson, Johnson, Knox, Laclede, Lawrence, Lincoln, Maries,

ASSUMPTION (continued)

Marion, McDonald, Miller, Moniteau, Monroe, Montgomery, New Madrid, Nodaway, Ozark, Perry, Pettis, Phelps, Platte, Pulaski, Scott, Shelby, St. Charles, St. Francois, Taney, Warren, Wayne and Worth did not respond to **Oversight's** request for fiscal impact.

Officials at the following colleges: Crowder, East Central Community College, Harris-Stowe, Jefferson College, Lincoln University, Metropolitan Community College, Moberly Area Community College, Missouri Southern State University, Southeast Missouri State University, State Fair Community College, St. Charles Community College, St. Louis Community College, Three Rivers Community College, and the University of Central Missouri did not respond to **Oversight's** request for fiscal impact.

Officials at the following school districts: Arcadia Valley R-2, Aurora R-8, Bakersfield, Belton, Benton County R-2, Bismark R-5, Bloomfield R-14, Blue Springs, Bolivar R-I, Bowling Green R-1, Branson, Brentwood, Bronaugh R-7, Campbell R-2, Carrollton R-7, Caruthersville, Cassville R-4, Central R-III, Chilhowee R-4, Chillicothe R-II, Clarkton C-4, Cole R-I, Columbia, Crawford County R-1, Crocker R-II, Delta C-7, East Carter R-2, East Newton R-6, Fair Grove, Fair Play, Fayette R-3, Fox C-6, Fredericktown R-I, Fulton, Grain Valley, Hancock Place, Hannibal, Harrisonburg R-8, Harrisonville, Hillsboro R-3, Hollister R-5, Humansville R-4, Hurley R-1, Independence, Jefferson City, Kennett #39, King City R-1, Kirbyville R-VI, Laclede County R-1, Laredo R-7, Lee Summit, Lewis County C-1, Lindbergh, Lonedell R-14, Macon County R-1, Mehville, Mexico, Midway R-1, Milan C-2, Moberly, Monroe City R-I, Morgan County R-2, New Haven, Nixa, North St. Francois Co. R-1, Northeast Nodaway R-5, Odessa R-VII, Oregon-Howell R-III, Orrick R-11, Osage County R-II, Osborn R-O, Pattonville, Pettis County R-12, Pierce City, Plato R-5, Princeton R-5, Raymore-Peculiar R-III, Raytown, Reeds Springs R-IV, Renick R-5, Richland R-1, Riverview Gardens, Salisbury R-4, Scotland County R-I, Sedalia, Seymour R-2, Shelby County R-4, Shell Knob #78, Sikeston, Silex, Slater, Smithville R-2, Special School District of St. Louis County, Spickard R-II, Springfield, St Joseph, St Louis, St. Charles, St. Elizabeth R-4, Sullivan, Tipton R-6, Valley R-6, Verona R-7, Warrensburg R-6, Webster Groves, Westview C-6 and the Wright City R-2 School District did not respond to **Oversight's** request for fiscal impact.

| <u>FISCAL IMPACT - State Government</u> | FY 2018 (10 Mo.) | FY 2019 | FY 2020 |
|---|--|--|--|
| LEGAL EXPENSE FUND | | | |
| <u>Savings</u> - Legal Expense | <u>Unknown</u> | <u>Unknown</u> | <u>Unknown</u> |
| ESTIMATED NET EFFECT TO THE LEGAL EXPENSE FUND | <u>Unknown</u> | <u>Unknown</u> | <u>Unknown</u> |
| UNIVERSITIES AND COLLEGES | | | |
| <u>Savings</u> - Colleges and Universities Legal Expense Fund | <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> |
| FEDERAL FUNDS | | | |
| <u>Loss</u> - MCHR Potential loss of federal EEOC and HUD money | \$0 or <u>(\$1,201,900)</u> | \$0 or <u>(\$1,201,900)</u> | \$0 or <u>(\$1,201,900)</u> |
| ESTIMATED NET EFFECT ON FEDERAL FUNDS | <u>\$0 or (\$1,201,900)</u> | <u>\$0 or (\$1,201,900)</u> | <u>\$0 or (\$1,201,900)</u> |
| <u>FISCAL IMPACT - Local Government</u> | FY 2018 (10 Mo.) | FY 2019 | FY 2020 |
| LOCAL GOVERNMENT | | | |
| <u>Savings</u> - Local Political Subdivisions - Legal Expenses | <u>Unknown</u> | <u>Unknown</u> | <u>Unknown</u> |
| ESTIMATED NET EFFECT TO LOCAL GOVERNMENT | <u>Unknown</u> | <u>Unknown</u> | <u>Unknown</u> |
| <u>FISCAL IMPACT - Small Business</u> | | | |

No direct fiscal impact to small businesses would be expected as a result of this proposal.

FISCAL DESCRIPTION

This act modifies and creates new provisions relating to unlawful discrimination practices.

MOTIVATING FACTOR STANDARD

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.

EMPLOYERS UNDER MHRA

Currently, persons acting in the interest of employers are considered employers under the MHRA and are each liable for discriminatory practices. This act modifies the definition of employer to exclude such 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.

JUDICIAL INTERPRETATION

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 further abrogates the cases of *Daugherty v. City of Maryland Heights*, *Korando v. Mallinckrodt, Inc.*, *Lomax v. Daimler-Chrysler*, and *Francin v. Mosby, Inc.* Missouri Approved Jury Instructions 31.24, 31.25, and 31.27 are expressly abrogated.

The act recommends two methods to the courts for analyzing employment discrimination cases as a basis for granting summary judgment: the mixed motive method used by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, and the burden shifting analysis used by the U.S. Supreme Court in *McDonnell-Douglas Corp. v. Green*.

RELIEF AVAILABLE UNDER MHRA CASES

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

FISCAL DESCRIPTION (continued)

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.

WHISTLEBLOWER'S PROTECTION ACT

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 a motivating factor in the employer's discharge or retaliation.

RELIEF AVAILABLE UNDER WHISTLEBLOWER CASES

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. Parties to an action under this provision may demand a jury trial. Remedies allowed are back pay, 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 back pay and reimbursement shall be treated as compensatory damages in a bifurcated trial if requested by a party.

This act contains a severability clause.

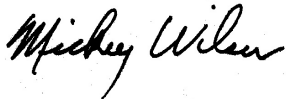
This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

SOURCES OF INFORMATION

Office of Administration - Administrative Hearing Commission
Office of Administration - Budget and Planning
Office of Administration - Personnel
Office of Administration - General Services
Department of Agriculture
Department of Conservation
Department of Health and Senior Services
Department of Labor and Industrial Relations
Attorney General's Office
Office of Secretary of State
Department of Economic Development
Department of Elementary and Secondary Education
Joint Committee on Administrative Rules
Joint Committee on Public Employee Retirement
Governor's Office
Lieutenant Governor's Office
Department of Higher Education
Missouri House of Representatives
Department of Insurance, Financial Institutions and Professional Registration
Lottery Commission
Department of Mental Health
Department of Natural Resources
Department of Public Safety - Alcohol and Tobacco
Department of Public Safety - Capitol Police
Department of Public Safety - Fire Safety Division
Department of Public Safety - Highway Patrol
Department of Public Safety - State Emergency Management Agency
Department of Public Safety - Missouri Veterans Commission
Department of Revenue
Department of Social Services
Department of Transportation
Office of State Courts Administrator
Office of Prosecution Services
State Public Defender's Office
State Auditor's Office
State Public Defender's Office
Missouri Ethics Commission
Missouri Consolidated Health Care Plan
Missouri State Employees' Retirement System

SOURCES OF INFORMATION (continued)

State Highway Employees Retirement System
Department of Public Safety - Gaming Commission
Missouri Senate
Missouri Tax Commission
State Treasurer's Office
City of Kansas City
Callaway County
Mississippi County
St. Louis County
Metropolitan Community College
Missouri State University
Missouri Western State University
Northwest Missouri State University
State Technical College of Missouri
Truman State University
University of Central Missouri
University of Missouri
School Districts of:
Avilla R-XIII
Concordia R-II
Eldon R-I
Everton R-III
Forsyth R-III
Kansas City
Kingston 42
Parkway
Sarcoxie R-II
Warren County R-III
West Plains R-VII
Kirksville R-III
Leeton R-X
Macon County R-IV
Malta Bend
Middle Grove



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