

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0524-07
Bill No.: Perfected SS #2 for SCS for SB 43
Subject: Employees - Employers; Housing; Public Buildings
Type: Original
Date: March 1, 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 15 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

Oversight was unable to receive some of the agency responses in a timely manner due to the short fiscal note request time. Oversight has presented this fiscal note on the best current information that we have or on prior year information regarding a similar bill. Upon the receipt of agency responses, Oversight will review to determine if an updated fiscal note should be prepared and seek the necessary approval of the chairperson of the Joint Committee on Legislative Research to publish a new fiscal note.

In response to a previous version of this proposal (0524-02), officials at the **Department of Labor and Industrial Relations (DOLIR)** assumed a negative fiscal impact to federal funds.

DOLIR stated there could be possible conformity issues with the Missouri Commission on 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).

In response to a previous version of this proposal (0524-06), officials at the **Office of Administration - General Services (OA-GS)** were unable to estimate a fiscal impact based on the following information.

ASSUMPTION (continued)

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 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.

In response to a previous version of this proposal (0524-06), Officials at the **Department of Transportation (MoDOT)** assumed an unknown positive fiscal impact from this proposal which is unquantifiable at this time and based on the following information.

MoDOT stated 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.

In response to a previous version of this proposal (0524-06), officials at the **Office of Administration - Personnel** assumed the proposal would not have a fiscal impact on their organization.

ASSUMPTION (continued)

In response to a previous version of this proposal (0524-02), Officials at the **Department of Economic Development**, and **Department of Health and Senior Services** each deferred to the Office of Administration - Personnel for a fiscal impact.

In response to a previous version of this proposal (0524-02), officials at the **Attorney General's Office** assumed that any potential costs arising from this proposal can be absorbed with existing resources.

In response to a previous version of this proposal (0524-06), officials at the **Department of Conservation (MDC)** assumed these proposals could have an unknown positive fiscal impact estimated to be less than \$100,000. This estimate was based on legal costs if a claim was brought against MDC for employment actions.

Officials at the **Department of Agriculture**, **Missouri Consolidated Health Care Plan**, and the **Missouri Ethics Commission** each assume this proposal will not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-06), officials at the **Office of Administration - Administrative Hearing Commission**, the **Office of Administration - Budget and Planning**, the **State Auditor's Office**, the **Department of Corrections**, the **Department of Higher Education**, the **Missouri House of Representatives**, the **Joint Committee on Administrative Rules**, the **Joint Committee on Public Employee Retirement**, 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 State Employees' Retirement System**, the **State Highway Employees Retirement System**, the **Department of Natural Resources**, the **Department of Social Services**, 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 **Department of Revenue**, the **Office of State Courts Administrator**, the **Office of the Secretary of State**, the **Missouri Senate**, the **Department of Transportation**, the **State Treasurer's Office**, and the **Missouri Tax Commission** each assumed the 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 **Department of Elementary and Secondary Education** assumed the proposal would not have a fiscal impact on

ASSUMPTION (continued)

their organization.

In response to a previous version of this proposal (0524-06), officials at the **City of Kansas City** assumed the proposal would have an unknown positive fiscal impact on their organization based on the following information.

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.

In response to a previous version of this proposal (0524-02), officials at **Callaway County** and **St. Louis County** assumed the proposal would not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-06), officials at the **Missouri State University**, **Missouri Western State University**, **Northwest Missouri State University**, and **State Technical College of Missouri** each assumed the proposal would not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-02), officials at **University of Missouri** assumed the proposal would not have a fiscal impact on their organization.

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

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

ASSUMPTION (continued)

In response to a previous version of this proposal (0524-02), officials at the school district of **Forsyth R-III** assumed the proposal would have a negative impact.

In response to a previous version of this proposal (0524-06), officials at the school districts of **Bakersfield R-IV**, **Kirksville R-III**, and **West Plains R-VII** each assumed the proposal would not have a fiscal impact on their respective organizations.

In response to a previous version of this proposal (0524-02), officials at the school districts of **Everton R-III** and **Kansas City** each assumed the proposal would not have a fiscal impact on their respective organizations.

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**, **Sarcoie R-II**, and **Warren County R-III** each assumed 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,

ASSUMPTION (continued)

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, 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, 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

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 the motivating factor. The motivating factor is defined to mean that the employee's protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action. The person must further prove that such action was the direct proximate cause of the claimed damages.

EMPLOYERS AND EMPLOYMENT AGENCIES 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 following from the definition of employment:

- 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;
- Private membership clubs; and
- Corporations and associations owned or operated by religious or sectarian organizations.

Under current law, any person acting in the interest of a person or agency that regularly undertakes to procure employees for an employer or to procure for employees opportunities to work for an employer is considered to be an employment agency. This act repeals that provision.

UNLAWFUL DISCRIMINATORY PRACTICES

This act provides that the entities subject to prohibitions on certain unlawful discriminatory practices are limited to employers, employment agencies, labor organizations, or places of public accommodations.

FISCAL DESCRIPTION (continued)

EXCLUSIVE REMEDY

The act provides that the MHRA, the Workers' Compensation chapter, and the general employment law chapter shall be the exclusive remedy for any and all claims for injury or damages arising out of the employment relationship.

FILING OF COMPLAINTS WITH THE COMMISSION

Current law provides that any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign, and file with the Missouri Human Rights Commission a verified complaint in writing. This act stipulates that such persons shall file such a complaint as a precedent to filing a civil action under the MHRA. Furthermore, the failure to timely file a complaint with the Commission shall deprive the commission of jurisdiction to investigate the complaint. Complainants shall file such complaint with the Commission within 180 days of the alleged act of discrimination. Failure to timely file may be raised as a complete defense by a respondent or defendant at any time.

Current law provides that the Commission shall issue to aggrieved persons a "right to sue" letter if:

- The person has filed a complaint with the Commission and the person requests such a letter in writing; and
- After 180 days from filing a complaint with the Commission, the Commission has not completed its administrative process and the person has requested such a letter in writing.

This act stipulates that the Commission may not at any other time or for any other reason issue a letter indicating a complainant's right to bring a civil action.

JUDICIAL INTERPRETATION

The act abrogates *McBryde v. Ritenour School District*. Furthermore, it shall be a presumption that for a fair presentation of a case, a jury shall be given an instruction expressing the "business judgment rule."

The act recommends the use of the burden shifting analysis used by the U.S. Supreme Court in *McDonnell-Douglas Corp. v. Green* when it is not a case involving direct evidence of discrimination.

The act expressly abrogates all existing Missouri approved jury instructions concerning the MHRA.

FISCAL DESCRIPTION (continued)

RELIEF AVAILABLE UNDER MHRA CASES

Parties to a discrimination case under the MHRA have a right to 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 \$500,000 for employers with more than 500 employees.

WHISTLEBLOWER'S PROTECTION ACT

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

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

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 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. Attorney's fees may be recovered upon a showing that the case was without foundation.

This act contains a severability clause.

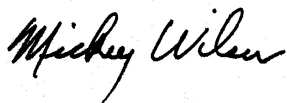
This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

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 - Gaming Commission
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
Missouri Ethics Commission
Missouri Consolidated Health Care Plan
Missouri State Employees' Retirement System
State Highway Employees Retirement System

SOURCES OF INFORMATION (continued)

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 Missouri
School Districts of:
Avilla R-XIII
Bakersfield R-IV
Concordia R-II
Eldon R-I
Everton R-III
Forsyth R-III
Kansas City
Kingston 42
Kirksville R-III
Parkway
Sarcoxie R-II
Warren County R-III
West Plains R-VII
Leeton R-X
Macon County R-IV
Malta Bend
Middle Grove



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