

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 4028-01
Bill No.: SB 691
Subject: Courts; Attorneys; Administrative Law; Administrative Rules; Civil and Criminal Procedure; State Departments; Insurance - General; Attorney General's Office
Type: Original
Date: February 5, 2018

Bill Summary: This proposal modifies provisions regarding insurance coverage of the cost to defend a claim in an administrative proceeding, proposed administrative rules affecting real property, and procedures for judicial review of action by a state agency.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
General Revenue Fund	\$0 to (\$2,552,490)	\$0 to (\$2,798,936)	\$0 to (\$2,827,841)
Total Estimated Net Effect on General Revenue	\$0 to (\$2,552,490)	\$0 to (\$2,798,936)	\$0 to (\$2,827,841)

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
Various State Funds	(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 2019	FY 2020	FY 2021
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0	\$0	\$0

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
General Revenue Fund	0 to 32 FTE	0 to 32 FTE	0 to 32 FTE
Total Estimated Net Effect on FTE	0 to 32 FTE	0 to 32 FTE	0 to 32 FTE

☒ 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 2019	FY 2020	FY 2021
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

Officials from the **Attorney General's Office (AGO)** assume the following:

§536.017 (Takings Analysis)

- Mandates that the AGO "shall" perform a "takings analysis" of all proposed rules or regulations relating to the use of real property

It is unknown how many regulations each year would either fall under the category or how many agencies would request the AGO do an analysis to ensure this provision doesn't apply. An AAG would have to complete this analysis.

§536.087 (attorneys' fees)

- Currently, attorneys' fees are only awarded when the decision of an agency is not substantially justified.
- The amendment would expand attorneys' fees to any case in which the agency's action is overturned.

This section will substantially increase the number of attorneys fee cases the AGO needs to defend. The AGO estimated 2 new AAGs (at \$55,750 annually) would be needed to cover the increased caseload and that the Legal Expense Fund would have to pay more attorneys' fees judgments.

§536.140 (judicial review)

- Currently, judicial review of an agency's decision involves a review at the Circuit Court solely on the record from the agency, a review at the Appellate Court on the record, and potentially a review at the Supreme Court on the record.

The new provisions would permit an additional level of review in the form of a de novo jury trial with full civil discovery. The Governmental Accountability section currently has approximately 150 licensing cases open. Under this provision, each of those could add a jury trial in addition to the current administrative action. The AGO estimates the increased caseload would require an additional 20 AAGs (15 line attorneys (at \$55,750 annually) and 5 unit leaders (at \$75,000 annually) and 10 support staff. (3 paralegals (at \$42,000 annually) and 7 Legal Secretaries (at \$31,514 annually)).

ASSUMPTION (continued)

In summary, AGO assumes an additional 32 FTE's and a cost of \$2,552,490 in FY 2019, \$2,798,936 in FY 2020 and \$2,827,841 in FY 2021 to provide for the implementation of the changes in this proposal.

Oversight notes, in response to a similar proposal from 2017 (SB 448), officials from the AGO assumed no fiscal impact. Oversight inquired with the AGO regarding the change in estimates, but have not received a response by the time this fiscal note was prepared. Therefore, Oversight will range AGO's response from \$0 (like their response to SB 448 from 2017) to their estimate for SB 691.

Officials from the **Department of Social Services (DSS)** assume the following:

Division of Legal Service (DLS)

DLS assumes this bill would create a right to request a new, evidentiary hearing at the circuit court level for appeals from Agency administrative hearing decisions and from the Administrative Hearing Commission (AHC). It will give a party the right to request case to be tried a second time at the circuit court. This can reasonably expected to double the cost of these cases to the parties and the state. The bill also gives claimants the choice to have the facts established by a jury in a new trial. Under current law, the cases are first tried to an administrative hearing officer at hearings on the record. The administrative level tribunal decides the facts, applies the law to the facts and issues a written decision. If a party disagrees with the decision then the party can request judicial review by a court. The Courts generally do not hold a new trial to reestablish the facts; they review the record and then decide whether the agency made an error in interpreting and applying the law. The Courts also decide whether constitutional rights and principles of due process have been applied properly. The impact of the bill will enable a party who disagrees with a decision to completely retry the case at the judicial level. It will substantially increase legal costs and liabilities of state agencies.

DSS has two different classes of administrative appeal cases that would be impacted by this bill. The first class is appeals from decisions from the DLS Administrative hearings unit. The appeals from the Hearings unit are handled by the Attorney General's Office, so the fiscal impact of defending those cases will fall on the Attorney General's Office. The second is appeals by Medicaid providers to the AHC. These cases are also defended by the Attorney General's Office and the fiscal impact of the legal costs of defense will primarily fall on the AG's Office. The second class is DSS personnel cases, which are tried administratively to the AHC with a right of appeal to Circuit Court. The Personnel cases are defended by DLS at the AHC and the Circuit Court level, therefore the fiscal impact will fall on DLS to defend these cases.

ASSUMPTION (continued)

Appeals from both DLS Administrative Hearings and Medicaid Providers: The Attorney General's Office handles the vast majority of these types of cases, and will incur any additional cost.

DSS does not have any data to accurately estimate how many jury trials will be requested for appeals from the DLS Hearings decisions. Over the past year, the Division of Legal Services' Administrative Hearings Unit has heard 18,105 public assistance benefit, licensure and child support cases. Of that number, approximately 307 cases were appealed to the circuit court. Under current law these appeals are primarily reviews of the administrative record for legal error and not new evidentiary hearings to re-determine the facts. DSS would therefore be participating in some capacity in up to 307 new trials de novo in circuit court. If 5% of those trials are jury trials then that would mean DSS would have to defend approximately 15 jury trials each year. The vast majority of those cases would be handled by the Attorney General's Office and therefore the department defers to their fiscal impact analysis.

Merit system employees have the right to appeal to the Administrative Hearings Commission when they are dismissed or suspended for more than 5 days. These appeals are handled by DLS and not the Attorney General's Office. The proposed legislation will give the employee a new right to facts established again at the circuit court level. In those AHC personnel cases, the potential would exist for every single AHC case to be appealed to the Circuit Court. DLS anticipates that many plaintiffs will use the tool of requesting a trial de novo and/or requesting a jury trial to attempt to leverage a settlement with the agency due to the additional work involved with the process of a jury trial resulting in a significant expenditure of time and attorney hours which would have a significant fiscal impact to DSS. The skill set that is required for handling jury trials is different from a bench trial and the preparation time is more extensive. The preparation time for attorneys and the clerical and paralegals involved will vary with the complexity of each case. DLS estimates each case could require as much as 80 hours additional work for judge tried cases and 100 hours of preparation time for complex jury cases such as personnel cases. The number of personnel cases could mirror the number of internal appeals to the agency each year. For personnel cases that average would be 15 cases per year. Each case would potentially be tried 2 separate times for a total of 30 different hearings. Of the 15 cases that could be filed in Circuit Court it is estimated that 8 would be requested to be jury trials per year. Thus, for non-jury cases the estimate would be for 350 hours of additional legal time (7 x 80 hours) and for jury cases the estimate would be for 800 hours of additional legal time (8 x 100 hours). DLS therefore estimates it would need 1 additional FTE attorney at \$41,964 annually to handle the personnel cases.

ASSUMPTION (continued)

In addition to the additional attorney hours the additional legal proceedings will require agency staff to testify at the additional hearings. DLS defers to the program divisions as to the potential impact of this additional staff time and resources.

The agency can also reasonably expect to incur additional expenses to subpoena witnesses and pay for expert witnesses. The AG's Office would cover the fees in cases handled by that office. However, DSS would have to absorb the costs of the additional litigation costs in personnel cases. If we assume that each case averages \$500 in costs, DLS anticipates additional annual costs in the range of \$4,000 - \$7,500.

Under some circumstances when the state does not prevail in a case, the Court can order the state to pay the attorney fees for the adverse party. The loss of a de novo review of one of these cases could also result in attorneys' fees issued against the Department if the court makes a requisite finding as listed in Sections 536.087 and 536.140, RSMo. Again, DLS assumes it takes an attorney approximately 65 hours to prepare and try a contested case. Section 536.085 states that the statutory cap for attorney fees per hour would be \$75.00 per hour. Thus, DLS anticipates a potential cost of (65hrs x \$75= \$4,875) \$4,875 per case lost. However, under section 536.085 the court is allowed to use special factors to determine and justify higher hourly rate for attorney fees, thus, attorney fees can range from \$75.00 to the prevailing hourly rate of the court in question. DLS anticipates the prevailing hourly rate could reach \$200.00 per hour in some venues. At a rate of \$200/hour, this could result in costs of approximately (65hrs x \$200 = \$13,000) \$13,000 for every case lost for a cost estimate of between \$39,000 to \$195,000 for the personnel cases.

In addition to the costs listed above, Children's Division anticipates this legislation may be interpreted to allow cases heard by the Child Abuse and Neglect Review Board (CANRB) to become subject to a jury trial. Traditionally, CANRB hearings have not been considered an "agency proceeding" as the term is defined in section 536.085, or a "contested case" as the term is defined in Section 536.010, RSMo. (See *Lipic v. State*, 93 S.W.3d 839, E.D. 2002). Children's Division assumes that this legislation will not alter this interpretation and this bill should have no impact.

However, should this legislation become subject to interpretation that a CANRB hearing is now an "agency proceeding" or a "contested case," then the de novo judicial review allowed pursuant to Sections 210.152-210.153, RSMo, could become a jury trial. In calendar year 2016, the CANRB held 498 hearings; 146 of these hearings were appealed to Circuit Court. DLS could anticipate an additional 10-20 hours to prepare these cases for jury trial, for a total of 1,460 to 2,920 hours, resulting in the need for 1 additional FTE attorney at \$41,964 annually.

ASSUMPTION (continued)

In addition to the additional attorney hours, the additional legal proceedings will require agency staff to testify at the additional hearings. DLS defers to the program divisions as to the potential impact of this additional staff time and resources.

Children's Division

In Section 536.063 this bill modifies provisions regarding judicial review of agency decisions in contested cases. Language is repealed which specifies that the court shall hear a contested case without a jury.

When hearing a case, the court shall first make a determination of whether the agency action violated the constitution, exceeded statutory authority, was unsupported by evidence, was unauthorized by law, arbitrary, capricious or unreasonable, or abused discretion. If the court finds that the agency acted in such a way, then the court shall reverse or modify the agency's order.

Currently, the court may conduct a de novo review only when the action being reviewed is the application of the law to the facts and does not involve agency discretion. This act states that any party, other than the agency, may apply for de novo review. The de novo review may be conducted before a jury.

Administrative review processes that would be impacted and would require jury trials would be:

The de novo appeal process for Child Abuse and Neglect Investigations and licensure denials and revocations for foster care, adoption and child care registrations.

CF 2017 - Child Abuse and Neglect Appeals

- o 476 CA/N Reviews were held
- o 329 were upheld
- o 147 were reversed
- o 68 were appealed to de novo hearings.

FY 2017 - Licensure denials/revocations

- o 14- Foster care licensure
- o 7 - Adoption Services
- o 0 - Residential Licensure

ASSUMPTION (continued)

Possibly could lead to a de novo hearing request for a jury trial

329 - CA/N Review that were upheld
68 - De Novo hearings (if upheld)
14 - Foster care licensure
7 - Adoption Services

Assumption: 50% of Foster Care Licensure and Adoption Approvals will be appealed to court and $\frac{1}{2}$ of those will be jury trials:

- 7 - Foster care licensure (4 to bench judgment, 3 of those on to jury trial)
- 4 - Adoption Services (2 to bench judgment, 2 on to jury trial)
- 68 CANRB De Novo hearings all jury trials

Total Appealed to Circuit Court:

Foster Care Licensure: 7

Adoption Approval: 4

CANRB: 68

TOTAL: 79

Breakdown of Children's Division Appeals

Total Bench Judgments:

Foster Care Licensure: 4

Adoption Approval: 2

CANRB: 0

TOTAL: 6

Assume in 50% of cases, the state agency does not prevail (3 cases)

Total Jury Trials:

Foster Care Licensure: 3

Adoption Approval: 2

CANRB: 68

TOTAL: 73

Assume in 50% of cases, the state agency does not prevail (37 cases)

ASSUMPTION (continued)

For bench trials, if the opposing party prevails, CD would be expected to be ordered to pay their court costs. It is estimated between 30 and 40 hours of preparation by opposing party attorneys at a cost of \$200/hour would be incurred. This would be \$6,000 to \$8,000 per case x 3 cases = \$18,000 to \$24,000 in opposing party legal fees.

For jury trials, if the opposing party prevails, CD would be expected to be ordered to pay their court costs. It is estimated between 50 and 60 hours of preparation by opposing party attorneys at a cost of \$200/hour would be incurred. This would be \$10,000 per case x 37 cases = \$370,000 in opposing party legal fees.

Therefore, the total fiscal impact would be \$0 - \$394,000 depending upon the number of administrative hearings that go to bench judgment or jury trial level and the number of cases in which the opposing party prevails and we are ordered to pay their attorney costs.

Family Support Division

Sections 563.063, 536.085, 536.087, 536.140: The provisions of this bill do not affect eligibility, policies, or procedures for any programs FSD administers. However, this bill may require additional travel for FSD staff to testify at jury trials. The cost estimated for travel was calculated by taking the average daily State Meal Per Diem (\$39), average statewide lodging rate (\$97) and the maximum possible mileage of 562 (1124 round trip) miles that FSD staff may be reimbursed for travel at the standard mileage rate of \$.37 for total mileage reimbursement of \$416. The maximum potential travel cost per day is estimated to be \$552.

FSD completes an average of 18,000 administrative hearings per year. Of those, 11,000 are from Income Maintenance programs and 7,000 are from Child Support. DLS provided an estimate that 10% of those hearings, 1800 (IM 11,000*.10=1100) and (CS 7,000*.10= 700), are appealed to the Circuit Court. FSD made the assumption that approximately 5% of those cases, 90 (IM 1100*.05 = 55) and (CS 700*.05= 35), could go to jury trial. FSD expects that the average length of a jury trial for this purpose would last approximately one day. Based on this assumption, the fiscal impact for IM could range from \$0-\$30,360 (\$552 *55) and for Child Support could range from \$0- \$19,320 (552*35).

The fiscal impact for FSD could range from \$0 - \$49,680 (\$30,360+\$19,320).

ASSUMPTION (continued)

Officials from the **Department of Labor and Industrial Relations (DOLIR)** state that their organization does not have a way to accurately predict the number of cases that would be affected by the changes in Sections 536.063, 536.085, and 538.087; if the number were minimal, DOLIR would be able to handle the additional work with its current resources. However, if the number of cases is significant, the impact could be substantial enough that DOLIR could not absorb the additional work or expenses without additional resources and would request such through the appropriation process.

Officials from the **Department of Transportation** state that this proposal will result in potentially significant additional administrative costs for all state agencies, including the Commission and MoDOT, in contested case administrative hearings for additional jury trials authorized under SB 691. This cost will be in additional legal counsel time, Department witness testimony, and other costs.

Officials from the **Office of the State Auditor** assume any potential cost arising from this proposal can be absorbed with existing resources.

Officials from the **Missouri Department of Conservation (MDC)** assume an unknown negative fiscal impact to the MDC as a result of this proposal, but likely to be less than \$100,000 due to expenses and cost associated with administrative proceedings.

Officials from the **Department of Public Safety - Missouri Veterans Commission** assume the fiscal impact to their organization can not be determined, but will potentially double all cost and expenses associated with agency actions, including personnel cases, arising under Chapter 536.

Officials from the **Department of Insurance, Financial Institutions and Professional Registration (DIFP)** believes the provisions of this bill can be handled within current appropriations; however should the cost be more than anticipated, the DIFP would request an increase to our FTE and appropriations as appropriate through the budget process.

Officials from the **Office of the Secretary of State (SOS)** assume 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 Secretary of State's Office 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.

ASSUMPTION (continued)

However, we also recognize 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 our office can sustain with our core budget. Therefore, we reserve 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.

Oversight assumes the SOS could absorb the costs of printing and distributing regulations related to this proposal. If multiple bills pass which require the printing and distribution of regulations at substantial costs, the SOS could request funding through the appropriation process.

Officials from the **Joint Committee on Administrative Rules** state this legislation is not anticipated to cause a fiscal impact beyond its current appropriation.

Officials from the **Department of Mental Health** defer to the Attorney General's Office to estimate the fiscal impact of the proposed legislation on their respective organization.

Officials from the **Department of Economic Development** each defer to the Office of Administration - General Services to estimate the fiscal impact of the proposed legislation on their respective organization.

Officials from the **Department of Public Safety (Directors Office, Capitol Police, Missouri National Guard, Division of Alcohol and Tobacco Control, Missouri Highway Patrol, Missouri Gaming Commission, Division of Fire Safety, State Emergency Management Agency), State Tax Commission, Missouri Consolidated Health Care Plan, Department of Agriculture, Office of Prosecution Services, Office of the State Public Defender, Missouri Lottery Commission, Office of the State Treasurer, Department of Health and Senior Services, Office of the State Courts Administrator, MoDOT & Patrol Employees' Retirement System, Department of Higher Education, Missouri Senate, Office of the Governor, Department of Corrections, Missouri State Employee's Retirement System, Department of Natural Resources, Missouri Ethics Commission, Administrative Hearing Commission, Office of Administration - Division of General Services, Department of Revenue, Missouri House of Representatives, Office of Administration - Budget and Planning, Office of the Lieutenant Governor and Department of Elementary and Secondary Education** each assume the proposal will have no fiscal impact on their respective organizations.

<u>FISCAL IMPACT - State Government</u>	FY 2019 (10 Mo.)	FY 2020	FY 2021
GENERAL REVENUE FUND			
<u>Cost - AGO</u>	\$0 to.....	\$0 to.....	\$0 to.....
Personal Service	(\$2,552,490)	(\$2,798,939)	(\$2,827,841)
Fringe Benefits	(\$689,156)	(\$831,959)	(\$836,980)
Equipment and Expense	(\$472,211)	(\$280,936)	(\$287,959)
<u>Total Cost - AGO</u>	<u>(\$2,552,490)</u>	<u>(\$2,798,939)</u>	<u>(\$2,827,841)</u>
FTE Change - AGO	0 to 32 FTE	0 to 32 FTE	0 to 32 FTE
ESTIMATED NET EFFECT ON THE GENERAL REVENUE FUND	<u>\$0 to</u> <u>(\$2,552,490)</u>	<u>\$0 to</u> <u>(\$2,798,936)</u>	<u>\$0 to</u> <u>(\$2,827,841)</u>
Estimated Net FTE Change on the General Revenue Fund	0 to 32 FTE	0 to 32 FTE	0 to 32 FTE
VARIOUS STATE FUNDS			
<u>Cost - Various State Agencies</u>			
Further Appeals	(Unknown)	(Unknown)	(Unknown)
ESTIMATED NET EFFECT ON VARIOUS STATE FUNDS	<u>(Unknown)</u>	<u>(Unknown)</u>	<u>(Unknown)</u>
<u>FISCAL IMPACT - Local Government</u>	FY 2019 (10 Mo.)	FY 2020	FY 2021
	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

FISCAL IMPACT - Small Business

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

FISCAL DESCRIPTION

This act provides that an insurer issuing commercial casualty insurance policies must cover costs associated with the defense of certain claims made in administrative proceedings, as defined in the act. The payment of the defense costs is in addition to the limit of liability.

Currently, if an agency proposes a rule that affects the use of real property, the agency must have a takings analysis performed. This act provides that such analysis shall be performed by the Attorney General's office and removes the provisions providing that an analysis is not necessary where the rule is federally mandated or where the rule codifies existing law.

The act also modifies provisions regarding the award of fees and expenses to the prevailing party in an agency proceeding or civil action arising from an agency proceeding. The act repeals the requirement that a prevailing party must have a net worth of under two million dollars or own a business with a net worth not exceeding seven million dollars in order to qualify for an award of fees and expenses. The court or agency may award the expenses and fees only if the court finds that the agency acted in ways as provided in the act, which include violating constitutional provisions, acting arbitrarily, or abusing discretion, or if the agency action was not substantially justified.

Additionally, the act modifies provisions regarding judicial review of agency decisions in contested cases. When hearing a case, the court shall, rather than may, make a determination of whether the agency action violated the constitution, exceeded statutory authority, was unsupported by evidence, was unauthorized by law, was arbitrary, capricious or unreasonable, or abused discretion. If the court finds that the agency did not act in such a way, then the court shall affirm that agency's action.

Currently, the court may conduct a de novo review only when the action being reviewed is the application of the law to the facts and does not involve agency discretion. This act states that any party, other than the agency, may apply for de novo review. The de novo review may be conducted before a jury.

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
Department of Agriculture
Department of Economic Development
 Public Service Commission
 Office of the Public Council
 Division of Energy
Department of Elementary and Secondary Education
Department of Higher Education
Department of Health and Senior Services
Department of Insurance, Financial Institutions and Professional Registration
Department of Mental Health
Department of Natural Resources
Department of Corrections
Department of Labor and Industrial Relations
Department of Revenue
Department of Public Safety
 Office of the Director
 Division of Alcohol and Tobacco Control
 Capitol Police
 Fire Safety
 Missouri Gaming Commission
 Missouri Highway Patrol
 Missouri National Guard
 State Emergency Management Agency
 Veterans Commission
Department of Social Services
Office of the Governor
Joint Committee on Administrative Rules
Missouri Lottery Commission
Missouri Consolidated Health Care Plan
Missouri Department of Conservation
Missouri Ethics Commission
Missouri House of Representatives
Office of the Lieutenant Governor
Department of Transportation
Office of Prosecution Services
Missouri State Employee's Retirement System

SOURCES OF INFORMATION (continued)

MoDOT & Patrol Employees' Retirement System
Office of Administration
 Administrative Hearing Commission
 Budget and Planning
Office of the State Courts Administrator
Office of the State Auditor
Missouri Senate
Office of the Secretary of State
Office of the State Public Defender
Office of the State Treasurer
State Tax Commission

Ross Strobe

A handwritten signature in black ink, appearing to read "Ross Strobe", with a stylized, flowing script.

Acting Director
February 5, 2018