

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0099H.01I
Bill No.: HB 214
Subject: Labor And Management; Employees - Employers; Business And Commerce;
Contracts And Contractors
Type: Original
Date: March 3, 2021

Bill Summary: Modifies provisions relating to the misclassification of workers.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Total Estimated Net Effect on General Revenue	\$0	\$0	\$0

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Total Estimated Net Effect on <u>Other</u> State Funds	\$0	\$0	\$0

Numbers within parentheses: () indicate costs or losses.

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ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Unemployment Compensation Administration Fund (0948)*	\$0 or (\$33,400,000)	\$0 or (\$33,400,000)	\$0 or (\$33,400,000)
Job Development and Training Fund (0155)*	\$0 or (\$11,500,000)	\$0 or (\$11,500,000)	\$0 or (\$11,500,000)
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0 or (\$44,900,000)	\$0 or (\$44,900,000)	\$0 or (\$44,900,000)

*Officials from the Department of Labor and Industrial Relations note this proposal may have non-conformity issues with federal standards and may jeopardize certain federal funding.

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Total Estimated Net Effect on FTE	0	0	0

☒ Estimated Net Effect (expenditures or reduced revenues) expected to exceed \$250,000 in any of the three fiscal years after implementation of the act or at full implementation of the act.

☐ Estimated Net Effect (savings or increased revenues) expected to exceed \$250,000 in any of the three fiscal years after implementation of the act or at full implementation of the act.

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

Officials from the **Department of Labor and Industrial Relations (DOLIR)** assume:

This bill adds Section 285.500 which provides the definition of the terms "employee", "employer" and "knowingly". It also adds Section 285.517 to define an independent contractor.

Review of this bill has identified an issue that may affect certification of Missouri's unemployment insurance (UI) program.

The federal and state governments are jointly responsible for administering the unemployment insurance (UI) system. State laws must meet certain federal requirements for the state agency to receive the administrative grants needed to operate its UI program and for employers to qualify for certain tax credits.

Each year, on October 31, the Secretary of Labor certifies the state unemployment insurance programs that conform and comply substantially with federal law. (26 U.S.C. ' 3304.) If, and only if, a state's unemployment insurance program is certified to be in conformity with Federal requirements, employers within the state are eligible to receive a credit against their Federal Unemployment Tax Act (FUTA) taxes. (26 U.S.C. ' 3302.)

Non-conformity with federal law will jeopardize the certification of Missouri's UI program. If the program fails to be certified, Missouri would lose approximately \$37.5 million in federal funds the state receives each year to administer the UI program. Additionally, Missouri would lose the approximately \$10 million in federal funds each year the Department of Higher Education and Workforce Development uses for Wagner-Peyser reemployment services.

The Federal Unemployment Tax Act (FUTA) imposes a 6.0% payroll tax on employers. Most employers never actually pay the total 6.0% due to credits they receive for the payment of state unemployment taxes and for paying reduced rates under an approved experience rating plan. FUTA allows employers tax credits up to a maximum of 5.4% against the FUTA payroll tax if the state UI law is approved by the Secretary of Labor. However, if this bill causes Missouri's program to be out of compliance or out of conformity, Missouri employers could pay the full 6.0%, or approximately an additional \$1.08 billion per year.

This bill may raise an issue with federal law since section 285.517 indicates that workers shall be considered independent contractors and not employees of the company if certain conditions are met.

The designation of independent contractor status for services performed for a company that may

include entities required to be covered under 3304(a)(6)(A), FUTA, may raise a conformity issue. In the event that the service of the individual is provided to an entity for which coverage is not required, no conformity issue would be raised. However, if the IRS determines that an employer-employee relationship exists using the common law test, the company, as the employer, would be liable for the full FUTA tax of 6.0% without the benefit of any credit as no state contributions would have been paid with respect to the services.

Section 3304(a)(6)(A), FUTA, requires, as a condition of certification of the unemployment compensation (UC) program that UC be payable based on certain services that are not subject to FUTA tax. Services performed for state and local government entities and Indian Tribes (Section 3306(c) (7), FUTA) and certain nonprofit organizations (Section 3306(c)(8), FUTA) must be covered under the UC system if an employer/employee relationship exists.

Regulations implementing Section 3306(i), FUTA, are found at 26 C.F.R. 31.3306(i)-1. These regulations specify that an individual is an employee if the relationship between the individual and the person for whom services are performed has the legal relationship of employer and employee:

“Generally such a relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished.”

The regulations go on to point out that “it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if [the employer] has the right to do so.” Concerning independent contractors, the regulations are not permissive; if an employer-employee relationship exists, “it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.” Thus, the basic determinant of whether or not service is performed by an independent contractor is the right of direction and control, whether or not it is exercised.

While this bill does not amend the Missouri UI law, the provisions in the bill that an independent contractor relationship exists may preclude the Division of Employment Security from applying the common law of agency right to control test for determination of an employment relationship as provided in Section 288.034.5 RSMo. Missouri UI law must contain a test for an employment relationship at least as strict as the test used by the IRS. The classification of an independent contractor relationship in this bill could result in the exclusion of coverage under the MO UI Law.

Certain individuals could be classified as independent contractors regardless of the outcome of a determination on employment using the common law of agency right to control test. As a result, their services would not be covered under Section 3304(a)(6)(A), FUTA. In the event that there is the right of direction and control of the services performed by the individual, and the employer

is a company that is a state and local governmental entity, certain nonprofit organizations, or Indian tribe, the services must be covered under UI law, or a conformity issue could be raised.

Oversight does not have any information to the contrary. Therefore, Oversight will reflect the fiscal estimates provided by DOLIR and range the impact \$0 (Secretary of Labor finds the new language to be compliant or (\$44,900,000) (the Secretary of Labor finds Missouri now out of compliance).

Officials from the **Missouri Department of Conservation, Office of Administration, City of Springfield, City of Ballwin, City of Corder, City of Hale, City of Kansas City, City of Springfield, City of Saint Louis – Budget Division, City of Sugar Creek** each assume the proposal will have no direct fiscal impact on their respective organization.

Oversight only reflects the responses that we have received from state agencies and political subdivisions; however, other cities and counties were requested to respond to this proposed legislation but did not. A general listing of political subdivisions in our database is available upon request.

<u>FISCAL IMPACT – State Government</u>	FY 2022 (10 Mo.)	FY 2023	FY 2024
UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND			
<u>Loss - DOLIR</u> If UI program fails to be certified	\$0 or <u>(\$33, 400,000)</u>	\$0 or <u>(\$33, 400,000)</u>	\$0 or <u>(\$33, 400,000)</u>
ESTIMATED NET EFFECT ON UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND	\$0 or <u>(\$33, 400,000)</u>	\$0 or <u>(\$33, 400,000)</u>	\$0 or <u>(\$33, 400,000)</u>

JOB DEVELOPMENT AND TRAINING FUND (0155)			
<u>Loss</u> - DED - If found to be out of compliance - Wagner-Peyser reemployment services	\$0 or <u>(\$11, 500,000)</u>	\$0 or <u>(\$11, 500,000)</u>	\$0 or <u>(\$11, 500,000)</u>
ESTIMATED NET EFFECT ON JOB DEVELOPMENT AND TRAINING FUND	\$0 or <u>(\$11, 500,000)</u>	\$0 or <u>(\$11, 500,000)</u>	\$0 or <u>(\$10, 500,000)</u>

<u>FISCAL IMPACT – Local Government</u>	FY 2022 (10 Mo.)	FY 2023	FY 2024
	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

FISCAL IMPACT – Small Business

Small businesses that have employees and/or hire independent contractors could be impacted by this proposal.

FISCAL DESCRIPTION

This bill establishes the criteria of a worker to be considered as an independent contractor. The bill states that independent contractors shall have a written contract that states the person is an independent contractor, not an employee, and that the person is responsible for all costs, fees, and taxes as an independent contractor. In addition, the person must have the right to control the manner and means by which the work is accomplished, and satisfies at least five out of nine listed requirements of an independent contractor. This bill also changes the definition of "employee" by removing the reference to the factors in IRS Rev. Rule 87-41, 1987-1 C.B.296 and stating that an individual who meets the requirements for an independent contractor as specified in this bill is not an employee.

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

Department of Labor and Industrial Relations

Missouri Department of Conservation

Office of Administration

City of Springfield

City of Ballwin

City of Corder

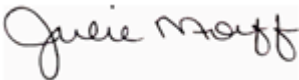
City of Hale

City of Kansas City

City of Springfield

City of Saint Louis – Budget Division

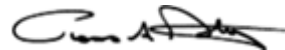
City of Sugar Creek



Julie Morff

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March 3, 2021



Ross Strobe

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March 3, 2021