COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 2036H.01I
Bill No.: HB 873
Subject: Labor And Management; Employees - Employers; Employment Security; Unemployment Compensation; Emergencies; Labor And Industrial Relations, Department Of; Health, Public
Type: Original
Date: February 10, 2021

Bill Summary: The proposal prohibits the state of Missouri from recollecting certain incorrectly distributed employment security benefits.

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 Other State Funds	**$0**	**$0**	**$0**

Numbers within parentheses: () indicate costs or losses.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2022	FY 2023	FY 2024
Unemployment Insurance Trust Fund	(Unknown)	(Unknown)	(Unknown)
Unemployment Insurance Administration Fund	(Unknown)	(Unknown)	(Unknown)
Total Estimated Net Effect on All Federal Funds	**(Unknown)**	**(Unknown)**	**(Unknown)**

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.

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

FISCAL ANALYSIS

ASSUMPTION

Oversight was unable to verify 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 to publish a new fiscal note.

Officials from the **Department of Labor and Industrial Relations (DOLIR) assume the** proposal prohibits the Division of Employment Security (DES) from attempting to collect unemployment insurance (UI) benefits incorrectly distributed. In addition, this legislation appears to prohibit DES from collecting funds overpaid from the state UI trust fund during the state of emergency as well as those paid out under federal programs such as the CARES Act. Specifically, it prohibits DES collection efforts "notwithstanding any provision of law to the contrary" and does not limit the reach of the proposed statute to federal benefits. Such language appears to conflict with the existing requirement in Chapter 288 that DES collect overpayments from the state trust fund. Resolving the conflict between these two provisions favors the more recent, more specific enactment contained in HB 873 were it to become law. Earth Island Institute v. Union Electric Co. 456 S.W. 3d 27, 34 (Mo. banc 2015).

Violation of Federal Agreement:

In March of 2020, the State of Missouri signed an agreement with the United States Department of Labor (USDOL) in which Missouri agreed to collect overpayment of federal funds. In exchange, Missouri became eligible for receipt of funds under the federal CARES Act. A statutory provision in state law prohibiting the recovery or attempted recovery of such funds would violate this agreement. If the agreement were to be violated, penalties by the USDOL could include a refusal to allow Missouri to participate in future payments of Federal Pandemic Unemployment Compensation (FPUC), Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Mixed Earner Unemployment Compensation (MEUC) and other federal UI programs.

In calendar year 2020, Missouri paid over $3.8 Billion dollars in CARES Act and other federal benefits. If the USDOL were to refuse to allow Missouri to receive future benefits under these programs it is estimated to result in the potential loss to otherwise eligible claimants of between $1 Billion and $5 Billion.

Process for Evaluating Overpayment Waivers:

Assuming enactment of legislation requiring the waiver of overpayments, the following assesses the cost to DES.

Notice to Claimants to Request a Waiver: Under federal law, DES would need to contact each potentially eligible claimant with notice of their ability to seek a waiver for CARES Act overpayments. The decision to seek a review would be up to each claimant who would need to notify DES. Assuming approximately 45,000 individuals in calendar year 2020 have received overpayments and 95% would apply for a waiver, this would amount to 42,750 individuals. The DES estimates it would need to hire 20 to 25 Benefit Program Specialist FTE to complete this work which would cost $1,211,555 in federal funds for salary and fringe benefits.

Individualized Determinations: Under federal law, DES would need to develop procedures for an individualized, case-by-case analysis of each claim before an overpayment could be waived. No blanket waiver is allowed. This would most likely require an emergency and a proposed administrative rule to establish uniform guidelines for DES staff to make these determinations.

Federal Mandatory Waiver Standard: The CARES Act and Continued Assistance Act set forth mandatory requirements for waivers of overpayments from the CARES Act programs: (1) that the overpayment was "without fault" on the part of the claimant; and (2) repayment would be "contrary to equity and good conscience."

The states vary widely in their definitions of "without fault" and "equity and good conscience" with some states engaging in a case-by-case analysis of the claimants' income compared to the poverty line and their eligibility for various assistance programs being used as evidence of the level of an individual's need and therefore an assessment of whether waiver is appropriate.

It is estimated that DES would need to develop more specific definitions of what qualifies for being "without fault" on the part of the claimant as well as what constitutes being "contrary to equity and good conscience". In order to achieve uniform evaluations of thousands of cases, such definitions would likely need to be established though promulgation of emergency and proposed administrative rules. It is estimated that such promulgation could be accomplished with existing staff.

Develop Internal Operating Procedures/Hire and Train Staff: DES would need to establish an internal operating procedure, as many states have, for processing waiver requests. DES would need to train (and potentially hire) staff and/or contractors to assist with this process. Because state law currently prohibits waivers for overpayments, Missouri has no process for considering such requests, even for strictly federal benefits provided under the CARES Act. Establishing such procedures would likely involve the promulgation of emergency and proposed administrative rules. It is estimated that such promulgation could be accomplished with existing staff.

It should be considered that some claimants have already appealed overpayment determinations and these cases are currently pending. Such cases may have been decided by standards different than the ones contemplated in federal guidance or under pending state legislative proposals. Also, some claimants have already paid back their overpayments and might be owed a refund from the State of Missouri after an analysis of their case (see process above). This would add to the overall number of case-by-case evaluations to be made by DES staff.

Right to Appeal: Once DES has issued a denial of waiver determination, the claimant would have the right to appeal the agency decision. This would include a hearing before an Appeals Tribunal and ultimately the claimant could appeal to the Missouri Labor and industrial Relations Commission. From there, the claimant could appeal to the state Court of Appeals.

The office of general counsel estimates that the additional appeals to the Courts of Appeal could be handled with existing resources.

Oversight notes the Official from DOLIR estimate loss of potential federal fund of up to between $1 Billion and $5 Billion in federal funds. Additionally, the DOLIR would be required to hire 25 (FTE) Benefit Program Specialists at $34,553 annually; 2 (FTE) Senior Hearing / Appeal Referee at $74,400 annually; and 1 (FTE) Administrative Support Assistant at $35,573 annually. However, Oversight had a limited time to verify the DOLIR's estimate, therefore, Oversight will note an Unknown negative cost to the Federal Funds.

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 $33.4 million in federal funds the state receives each year to administer the UI program. Additionally, Missouri would lose the approximately $11.5 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 billion per year.

Oversight notes the Officials from the DOLIR – ITSD estimate cost of $231,368 in FY 2022, and ongoing maintenance of $47,430 in FY 2023, and $48,616 FY 2024. However, Oversight had a limited time to verify the DOLIR's estimate, therefore, Oversight will note unknown cost to the Federal Unemployment Administrative Funds.

Officials from the **Office of Administration (OA)** assume the proposal would have an unknown costs the State and would not recover as a result of this bill and historical data doesn't show trends that would allow OA to predict the volume or cost of claims disputed in an average year.

Oversight notes the OA Official assume the proposal would have an unknown cost to the State and that the officials are not able predict the type of costs. Oversight had a limited time to verify the OA's estimate, therefore, Oversight will note an Unknown negative cost to the Federal Funds

Oversight has presented this fiscal note on the best current information available. Upon the receipt of additional responses, Oversight will review to determine if an updated fiscal note should be prepared and seek the necessary approval to publish a new fiscal note.

FISCAL IMPACT – State Government	FY 2022 (10 Mo.)	FY 2023	FY 2024
UNEMPLOYMENT INSURANCE TRUST FUND			
Loss - DOLIR potential loss of UI uncollected funds	(Unknown)	(Unknown)	(Unknown)
ESTIMATED NET EFFECT ON UNEMPLOYMENT UNEMPLOYMENT INSURANCE TRUST FUND	**(Unknown)**	**(Unknown)**	**(Unknown)**

UNEMPLOYMENT INSURANCE ADMINISTRATIVE FUND			
Loss - DOLIR potential loss of UI uncollected funds	(Unknown)	(Unknown)	(Unknown)
ESTIMATED NET EFFECT ON UNEMPLOYMENT INSURANCE ADMINISTRATIVE FUND	(Unknown)	(Unknown)	(Unknown)

FISCAL IMPACT – Local Government	FY 2022 (10 Mo.)	FY 2023	FY 2024
	$0	**$0**	**$0**

FISCAL IMPACT – Small Business

There are over 166,000 small businesses (less than 50 employees) covered under Missouri's unemployment insurance system. Because Missouri's UI program is certified in conformity with Federal UI laws, most employers never actually pay the total 6.0% in FUTA taxes due to the credits they receive for the payment of state unemployment taxes and for paying reduced rates under an approved experience rating plan. However, this bill could cause Missouri employers to pay the full 6.0%.

FISCAL DESCRIPTION

This bill prohibits the state of Missouri from attempting to recover any insured worker benefits under Chapter 288, RSMo., that are incorrectly distributed to a claimant during an official state of emergency related to the COVID-19 pandemic. 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
Office of Administration

Julie Morff
Director
February 10, 2021

Ross Strope
Assistant Director
February 10, 2021

BB:LR:OD