

HOUSE SUBSTITUTE
FOR
HOUSE COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 978

1 AN ACT

2 To repeal sections 536.010 and 536.050, RSMo,
3 and to enact in lieu thereof eight new
4 sections relating to small businesses.

5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI,
6 AS FOLLOWS:

7 Section A. Sections 536.010 and 536.050, RSMo, are repealed
8 and eight new sections enacted in lieu thereof, to be known as
9 sections 536.010, 536.050, 536.300, 536.305, 536.310, 536.315,
10 536.320, and 536.325, to read as follows:

11 536.010. For the purpose of this chapter:

12 (1) "Affected small business" or "affects small business",
13 any requirement imposed upon a small business through a state
14 agency's proposed or adopted rule that will cause direct and
15 significant economic burden upon a small business, or is directly
16 related to the formation, operation, or expansion of a small
17 business;

18 (2) "Agency" means any administrative officer or body
19 existing under the constitution or by law and authorized by law
20 or the constitution to make rules or to adjudicate contested

1 cases;

2 (3) "Board", the small business regulatory fairness board;

3 [(2)] (4) "Contested case" means a proceeding before an
4 agency in which legal rights, duties or privileges of specific
5 parties are required by law to be determined after hearing;

6 [(3)] (5) The term "decision" includes decisions and
7 orders whether negative or affirmative in form;

8 [(4)] (6) "Rule" means each agency statement of general
9 applicability that implements, interprets, or prescribes law or
10 policy, or that describes the organization, procedure, or
11 practice requirements of any agency. The term includes the
12 amendment or repeal of an existing rule, but does not include:

13 (a) A statement concerning only the internal management of
14 an agency and which does not substantially affect the legal
15 rights of, or procedures available to, the public or any segment
16 thereof;

17 (b) A declaratory ruling issued pursuant to section
18 536.050, or an interpretation issued by an agency with respect to
19 a specific set of facts and intended to apply only to that
20 specific set of facts;

21 (c) An intergovernmental, interagency, or intraagency
22 memorandum, directive, manual or other communication which does
23 not substantially affect the legal rights of, or procedures
24 available to, the public or any segment thereof;

1 (d) A determination, decision, or order in a contested
2 case;

3 (e) An opinion of the attorney general;

4 (f) Those portions of staff manuals, instructions or other
5 statements issued by an agency which set forth criteria or
6 guidelines to be used by its staff in auditing, in making
7 inspections, in settling commercial disputes or negotiating
8 commercial arrangements, or in the selection or handling of
9 cases, such as operational tactics or allowable tolerances or
10 criteria for the defense, prosecution, or settlement of cases,
11 when the disclosure of such statements would enable law violators
12 to avoid detection, facilitate disregard of requirements imposed
13 by law, or give a clearly improper advantage to persons who are
14 in an adverse position to the state;

15 (g) A specification of the prices to be charged for goods
16 or services sold by an agency as distinguished from a license
17 fee, or other fees;

18 (h) A statement concerning only the physical servicing,
19 maintenance or care of publicly owned or operated facilities or
20 property;

21 (i) A statement relating to the use of a particular
22 publicly owned or operated facility or property, the substance of
23 which is indicated to the public by means of signs or signals;

24 (j) A decision by an agency not to exercise a discretionary

1 power;

2 (k) A statement concerning only inmates of an institution
3 under the control of the department of corrections and human
4 resources or the division of youth services, students enrolled in
5 an educational institution, or clients of a health care facility,
6 when issued by such an agency;

7 (l) Statements or requirements establishing the conditions
8 under which persons may participate in exhibitions, fairs or
9 similar activities, managed by the state or an agency of the
10 state;

11 (m) Income tax or sales forms, returns and instruction
12 booklets prepared by the state department of revenue for
13 distribution to taxpayers for use in preparing tax returns.

14 (7) "Small business", a for-profit enterprise consisting of
15 fewer than fifty full or part-time employees;

16 [(5)] (8) "State agency" means each board, commission,
17 department, officer or other administrative office or unit of the
18 state other than the general assembly, the courts, the governor,
19 or a political subdivision of the state, existing under the
20 constitution or statute, and authorized by the constitution or
21 statute to make rules or to adjudicate contested cases.

22 536.050. 1. The power of the courts of this state to
23 render declaratory judgments shall extend to declaratory
24 judgments respecting the validity of rules, or of threatened

1 applications thereof, and such suits may be maintained against
2 agencies whether or not the plaintiff has first requested the
3 agency to pass upon the question presented. The venue of such
4 suits against agencies shall, at the option of the plaintiff, be
5 in the circuit court of Cole County, or in the county of the
6 plaintiff's residence, or if the plaintiff is a corporation,
7 domestic or foreign, having a registered office or business
8 office in this state, in the county of such registered office or
9 business office. Nothing herein contained shall be construed as
10 a limitation on the declaratory or other relief which the courts
11 might grant in the absence of this section.

12 2. Any person bringing an action under subsection 1 of
13 this section shall not be required to exhaust any administrative
14 remedy if the court determines that:

15 (1) The administrative agency has no authority to grant the
16 relief sought or the administrative remedy is otherwise
17 inadequate; or

18 (2) The only issue presented for adjudication is a
19 constitutional issue or other question of law; or

20 (3) Requiring the person to exhaust any administrative
21 remedy would result in undue prejudice because the person may
22 suffer irreparable harm if unable to secure immediate judicial
23 consideration of the claim. Provided, however, that the
24 provisions of this subsection shall not apply to any matter

1 covered by chapters 288, 302, and 303, RSMo; or

2 (4) The party bringing the action after the filing of a
3 final order of rulemaking is a small business claiming a material
4 violation of section 536.300 by the state agency regarding the
5 small business impact statement for the amendment or rule.

6 3. A nonstate party who prevails in an action brought
7 pursuant to subsection 1 of this section shall be awarded
8 reasonable fees and expenses, as defined in section 536.085,
9 incurred by that party in the action.

10 4. A nonstate party seeking an award of fees and other
11 expenses shall, within thirty days of a final disposition of an
12 action brought pursuant to subsection 1 of this section, submit
13 to the court which rendered the final disposition or judgment an
14 application which shows that the party is a prevailing party and
15 is eligible to receive an award pursuant to this section, and the
16 amount sought, including an itemized statement from any attorney
17 or expert witness representing or appearing in behalf of the
18 party stating the actual time expended and the rate at which fees
19 and other expenses are computed.

20 5. A prevailing nonstate party in an agency proceeding
21 shall submit an application for fees and expenses to the court
22 before which the party prevailed. The filing of an application
23 shall not stay the time for appealing the merits of a case. When
24 the state appeals the underlying merits of an adversary

1 proceeding, no decision on the application for fees and other
2 expenses in connection with that adversary proceeding shall be
3 made pursuant to this section until a final and unreviewable
4 decision is rendered by the court on the appeal or until the
5 underlying merits of the case have been finally determined
6 pursuant to the appeal.

7 6. The court may either reduce the amount to be awarded or
8 deny any award, to the extent that the prevailing nonstate party
9 during the course of the proceedings engaged in conduct which
10 unduly and unreasonably protracted the final resolution of the
11 matter in controversy.

12 7. The decision of a court on the application for
13 reasonable fees and expenses shall be in writing, separate from
14 the judgment or order of the court which determined the
15 prevailing party, and shall include written findings and
16 conclusions and the reason or basis therefor. The decision of a
17 court on the application for fees and other expenses shall be
18 final, subject respectively to appeal or judicial review.

19 8. If a party or the state is dissatisfied with a
20 determination of fees and other expenses made in an action
21 brought pursuant to subsection 1 of this section, that party or
22 the state may, within the time permitted by law, appeal that
23 order or judgment to the appellate court having jurisdiction to
24 review the merits of that order or judgment. The appellate

1 court's determination shall be based solely on the record made
2 before the court below. The court may modify, reverse or reverse
3 and remand the determination of fees and other expenses if the
4 court finds that the award or failure to make an award of fees
5 and other expenses, or the calculation of the amount of the
6 award, was arbitrary and capricious, was unreasonable, was
7 unsupported by competent and substantial evidence, or was made
8 contrary to law or in excess of the court's jurisdiction. Awards
9 made pursuant to this section shall be payable from amounts
10 appropriated therefor. The state agency against which the award
11 was made shall request an appropriation to pay for the award.

12 9. The general assembly or its designee shall have
13 standing, in law or equity, to intervene in any existing action
14 involving such challenge to agency action. Unless otherwise
15 provided by resolution, the general assembly's designee is the
16 joint committee on administrative rules who may, upon a
17 concurrence of a majority of the committee's members, intervene
18 in the name of the members of the committee in their
19 representative capacity. Nothing in this section shall confer
20 upon the committee any duty to so act or intervene.

21 536.300. 1. Prior to submitting or filing with the
22 secretary of state any proposed rules for adoption, amendment,
23 revision, or repeal pursuant to this chapter, the state agency
24 shall determine whether the proposed rules affect small business

1 and, if so, the availability and practicability of less
2 restrictive alternatives that could be implemented to achieve the
3 same results of the proposed rule. This section shall not apply
4 to emergency rulemaking pursuant to section 536.025. This
5 section shall be in addition to the fiscal note requirement of
6 sections 536.200 to 536.210.

7 2. If the proposed rules affect small business, the state
8 agency shall consider alternative or flexible methods of
9 compliance for small businesses and prepare a small business
10 impact statement to be submitted with the proposed rules to the
11 office of the secretary of state and the office of the joint
12 committee on administrative rules. The statement shall provide a
13 reasonable determination of the following:

14 (1) The type of businesses that will be directly affected
15 by, bear the cost of, or directly benefit from the proposed
16 rules;

17 (2) A description of the small businesses that will be
18 required to comply with the proposed rules and how they may be
19 adversely affected;

20 (3) In dollar amounts, the increase in the level of direct
21 costs, such as fees or administrative penalties, and indirect
22 costs, such as reporting, record keeping, equipment,
23 construction, labor, professional services, revenue loss, or
24 other costs associated with compliance;

1 (4) The probable monetary costs and benefits to the
2 implementing state agency and other state agencies directly
3 affected, including the estimated total amount the state agency
4 expects to collect from any additionally imposed fees and the
5 manner in which the moneys will be used;

6 (5) The methods the state agency considered or used to
7 reduce the impact on small business such as consolidation,
8 simplification, differing compliance or reporting requirements,
9 less stringent deadlines, performance rather than design
10 standards, exemption, or any other mitigating techniques;

11 (6) How the state agency involved small business in the
12 development of the proposed rules;

13 (7) A comparison of the proposed rule to comparable or
14 related federal or state standards, with an explanation of the
15 reason for imposing a different standard; and

16 (8) The cost statements referred to in subdivisions (3) and
17 (4) of subsection 2 of this section shall represent the state
18 agency's best reasonable estimates of the cost impact. If the
19 board disagrees with the cost impact statement, the board may
20 provide a statement of the board's opinion as to the cost impact.
21 The board's statement as to the cost impact shall be filed with
22 the agency that has prepared the rule and the office of the
23 secretary of state and shall be published by the secretary of
24 state as part of the order of rulemaking.

1 3. Sections 536.300 to 536.325 shall not apply to proposed
2 rules adopted by a state agency to implement a statute that does
3 not require a state agency to interpret or describe the
4 requirements of the statute such as federally mandated
5 regulations which afford the state agency no discretion to
6 consider less restrictive alternatives. Notwithstanding such
7 provision, federally mandated regulations are subject to the
8 federal Regulatory Flexibility Act as amended by the Small
9 Business Regulatory and Enforcement Fairness Act of 1996, P.L.
10 96-354, as amended by P.L. 104.121. Any federally mandated
11 regulations that do not comply with these acts shall be subject
12 to this section.

13 4. The board shall be given such notice as is practicable
14 by the state agency of the filing of any emergency rule affecting
15 small business, pursuant to section 536.025. The provisions of
16 this section shall not otherwise apply to emergency rules.

17 5. The board may, within ten days of publication of the
18 proposed rule, request that an agency conduct hearings on the
19 proposed rule. Such a request shall not mandate a public
20 hearing. The agency shall, within ten days of receipt of the
21 request, provide a written response to such a request, which
22 shall include the basis for their decision. The board may
23 delegate power to its chair to make a request for the public
24 hearing.

1 6. Any proposed rule that is required to have a small
2 business impact statement but does not include such a statement
3 shall be invalid and the secretary of state shall not publish the
4 rule.

5 536.305. 1. The final order of rulemaking shall be filed
6 with the board at the same time it is filed with the joint
7 committee on administrative rules pursuant to section 536.024.

8 2. The board may, within thirty days of the receipt of the
9 order of rulemaking, file with the secretary of state any
10 comments or recommendations that the board has concerning a
11 proposed rule. Such comments shall be published with the final
12 order of rulemaking in the Missouri Register. A copy of the
13 board's comments or recommendations shall be submitted to the
14 state agency promulgating the rule.

15 3. The board may refer comments or recommendations
16 concerning such rule to the appropriations and budget committees
17 of the house of representatives and the appropriations committee
18 of the senate for further action.

19 4. This section shall not apply to emergency rules.

20 536.310. 1. There is hereby established the "Small
21 Business Regulatory Fairness Board". The joint committee on
22 administrative rules shall provide staff support for the board.

23 2. The board may:

24 (1) Provide state agencies with input regarding proposed

1 rules which adversely affect small business;

2 (2) Consider any request from small business owners for
3 review of any rule adopted by a state agency;

4 (3) Review any rule promulgated by a state agency, which
5 affects small business and consider making recommendations to the
6 state agency and the general assembly regarding the need for a
7 rule or legislation;

8 (4) Conduct hearings and solicit input from small
9 businesses regarding enforcement of regulations by state
10 agencies. The identity of small businesses providing any such
11 input shall be kept confidential at such small business' request;

12 (5) Annually provide an evaluation report to the governor
13 and the general assembly including any recommendations and
14 evaluations of state agencies regarding regulatory fairness for
15 Missouri's small businesses.

16 3. The board shall consist of:

17 (1) Two members appointed by the governor;

18 (2) One member appointed by the lieutenant governor;

19 (3) One member who is the chair of the minority business
20 advocacy commission;

21 (4) One member appointed by the chairperson of the
22 committee of the house of representatives having jurisdiction
23 over matters concerning small business;

24 (5) One member appointed by the chairperson of the

1 committee of the senate having jurisdiction over matters
2 concerning small business;

3 (6) One member appointed by the president pro tempore of
4 the senate;

5 (7) One member appointed by the speaker of the house of
6 representatives;

7 (8) One member appointed by the minority leader of the
8 senate; and

9 (9) One member appointed by the minority leader of the
10 house of representatives.

11 4. The appointments to the board shall be representative of
12 a variety of small businesses, both rural and urban, and from a
13 variety of geographical areas of this state provided that no more
14 than two members shall be representatives from the same type of
15 small business.

16 5. Members of the board shall serve a term of three years,
17 except that members first appointed to the board shall serve
18 staggered terms of one, two, and three years randomly chosen at
19 the initial meeting and shall serve until their successor is duly
20 appointed and qualified. No member shall serve more than three
21 consecutive terms.

22 6. All members of the board, except the chair of the
23 minority business advocacy commission, shall be a current or
24 former owner or officer of a small business. No member may be an

1 elected official, or an officer or an employee of the federal,
2 state, or county government. The governor shall appoint the
3 initial chairperson of the board and a majority of the board
4 shall elect subsequent chairpersons. The chairperson shall serve
5 as chair a term of not more than one year, unless removed by a
6 two-thirds vote of all members of the board.

7 7. A majority of all the members of the board shall
8 constitute a quorum to do business and the concurrence of a
9 majority of all the members of the board present and voting shall
10 be necessary to make any action of the board valid.

11 8. Members shall not receive any compensation but shall be
12 eligible for reimbursement for necessary expenses.

13 9. The board shall meet at least quarterly or more often if
14 necessary, as determined by the chairperson of the board.

15 10. In addition to any other powers provided by sections
16 536.300 to 536.325, the board may adopt any board procedures
17 necessary to implement sections 536.300 to 536.325 and take any
18 board action necessary to effectuate the purposes of sections
19 536.300 to 536.325.

20 11. The board shall not have the authority to:

21 (1) Interfere with, modify, prevent, or delay an agency or
22 administrative action;

23 (2) Intervene in legal actions; or

24 (3) Subpoena witnesses to testify, or to produce documents,

1 in hearings conducted by the board, but may request witnesses to
2 voluntarily testify or produce documents.

3 12. The board shall have the power to authenticate any copy
4 of any recommendation made by the board, and the authenticated
5 copy shall be considered a government document for hearsay
6 purposes.

7 536.315. 1. For any rule adopted after August 28, 2004,
8 the board may file a written petition with the state agency that
9 has adopted rules objecting to or requesting the adopting,
10 amendment or repeal of all or part of any rule affecting small
11 business on any of the following grounds:

12 (1) The actual effect on small business was not reflected
13 in or significantly exceeded the small business impact statement
14 submitted prior to the adoption of the rules;

15 (2) New or significant economic information has created an
16 undue impact on small business; or

17 (3) The impacts were not previously considered in the
18 adoption of the rules.

19 2. For any rule adopted prior to August 28, 2004, the board
20 may file a written petition with the state agency that adopted
21 the rule objecting to or requesting the adoption, amendment or
22 repeal of all or part of any rule affecting small business on any
23 of the following grounds:

24 (1) The rule creates an undue barrier to the formation,

1 operation, and expansion of small businesses in a manner that
2 significantly outweighs the rule's benefit to the public;

3 (2) The rule duplicates, overlaps, or conflicts with rules
4 adopted by the state agency or any other state agency or violates
5 the substantive authority under which the rule was adopted;

6 (3) The technology, economic conditions, or other relevant
7 factors justifying the purpose for the rule has changed or no
8 longer exist; or

9 (4) New or significant economic information has created an
10 undue impact on small business.

11 3. Any state agency receiving such a petition or other
12 request in writing to adopt, amend or repeal any rule shall
13 forthwith furnish a copy thereof to the joint committee on
14 administrative rules and to the commissioner of administration,
15 together with the action, if any, taken or contemplated by the
16 state agency as a result of such petition or request, and the
17 state agency's reasons therefore.

18 4. The state agency shall promptly consider the petition
19 filed pursuant to subsection 1 or 2 of this section and may seek
20 advice and counsel regarding the petition. Within sixty days
21 after the receipt of the petition, the state agency shall
22 determine whether the rule should be adopted, amended, or
23 repealed based on the factors set forth in subsection 1 of this
24 section for rules adopted after August 28, 2004, and subsection 2

1 of this section for rules adopted prior to August 28, 2004. The
2 state agency shall submit a written response of the agency's
3 determination to the board within sixty days of the receipt of
4 the petition. If the state agency determines that the petition
5 merits adoption, amendment, or repeal of a rule, it may initiate
6 proceedings in accordance with the applicable requirements of
7 this chapter.

8 5. Any affected small business may seek the filing of a
9 petition by the board for the adoption, amendment, or repeal of a
10 rule. The board may convene a hearing or by other means solicit
11 testimony that will assist in its determination of whether to
12 file such a petition. For rules adopted after August 28, 2004,
13 the board shall base its decision upon the factors stated in
14 subsection 1 of this section. For rules adopted prior to August
15 28, 2004, the board shall base its decision on the factors stated
16 in subsection 2 of this section.

17 6. The board may make an evaluation report to the governor
18 and the general assembly on rulemaking proceedings, comments from
19 small business, and state agency response as provided in this
20 section. The governor or general assembly may subsequently take
21 such action in response to the evaluation report and state agency
22 response as they find appropriate.

23 7. This section shall not be interpreted to restrict any
24 affected party's right to relief otherwise available under the

1 provisions of this chapter.

2 536.320. 1. The board shall provide to the head of each
3 state agency a list of any rules adopted by the state agency that
4 affect small business and have generated complaints or concerns,
5 including any rules that the board determines may duplicate,
6 overlap, or conflict with other rules or exceed statutory
7 authority. Within forty-five days after being notified by the
8 board of the list, the state agency shall submit a written report
9 to the board in response to the complaints or concerns. The
10 state agency shall also state whether the state agency has
11 considered the continued need for the rules and the degree to
12 which technology, economic conditions, and other relevant factors
13 may have diminished or eliminated the need for maintaining the
14 rules, including a statement describing the specific public
15 purpose or interest for maintaining the respective rules.

16 2. The board may solicit testimony from the public at a
17 public meeting regarding any report submitted by the state agency
18 under this section. The board shall submit an evaluation report
19 to the governor and the general assembly regarding small business
20 comments, state agency response, and public testimony on rules in
21 this section. The governor and the general assembly may take
22 such action in response to the report as they find appropriate.

23 536.325. 1. Any state agency authorized to assess
24 administrative penalties or administrative fines upon a small

1 business shall consider waiving or reducing any administrative
2 penalty or administrative fine for a violation of any statute,
3 ordinance, or rules by a small business under the following
4 conditions:

5 (1) The small business corrects the violation within thirty
6 days after receipt of a notice of violation or citation;

7 (2) The violation was unintentional or the result of
8 excusable neglect;

9 (3) The violation was the result of an excusable
10 misunderstanding of a state agency's interpretation of a rule;

11 (4) The small business self-identifies the violation; or

12 (5) The state agency takes into account the size of the
13 small business.

14 2. Subsection 1 of this section shall not apply when:

15 (1) A small business fails to exercise good faith in
16 complying with the statute, ordinance, or rule;

17 (2) A violation involves willful or criminal conduct;

18 (3) The violation is deemed by the state agency to be
19 egregious;

20 (4) A violation results in serious health, safety, or
21 environmental impact;

22 (5) The penalty or fine is assessed pursuant to a federal
23 law or regulation for which no waiver or reduction is authorized
24 by the federal law or regulation; or

1 (6) There is a continuing pattern of similar violations by
2 the small business.