

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 1384-05
Bill No.: SCS for HCS for HB 611
Subject: Unemployment Compensation; Employees - Employers
Type: Original
Date: May 8, 2013

Bill Summary: This proposal changes the laws regarding unemployment compensation.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2014	FY 2015	FY 2016
Total Estimated Net Effect on General Revenue Fund	\$0	\$0	\$0

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2014	FY 2015	FY 2016
Special Employment Security Fund	(\$631,000)	(\$631,000)	(\$631,000)
Unemployment Compensation Trust Fund	\$631,000	\$631,000	\$631,000
UC Administration	\$0 or (\$46,000,000)	\$0 or (\$46,000,000)	\$0 or (\$46,000,000)
Wagner-Peyser	\$0 or (\$13,000,000)	\$0 or (\$13,000,000)	\$0 or (\$13,000,000)
Total Estimated Net Effect on Other State Funds	\$0 or (\$59,000,000)	\$0 or (\$59,000,000)	\$0 or (\$59,000,000)

Numbers within parentheses: () indicate costs or losses. This fiscal note contains 10 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2014	FY 2015	FY 2016
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0	\$0	\$0

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2014	FY 2015	FY 2016
Total Estimated Net Effect on FTE	0	0	0

- Estimated Total Net Effect on All funds expected to exceed \$100,000 savings or (cost).
- Estimated Net Effect on General Revenue Fund expected to exceed \$100,000 (cost).

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2014	FY 2015	FY 2016
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

§ 285.300

Officials at the **Department of Labor and Industrial Relations (DOL)** assume this proposal is a federally-mandated change that defines a "newly hired employee" for purposes of the state and national directories of new hires. Missouri employers are required to ensure that all newly hired employees fill out a federal W-4 withholding form, which is sent to the Missouri Department of Revenue. New Hire data are retained in the state directory of new hire database, which is maintained by the Missouri Department of Social Services and transferred to the federal national directory of new hires database. The Division of Employment Security (DES) is required to cross-check unemployment compensation recipients against the New Hire databases.

Public Law (Pub.L.) 112-40 added section 453A(a)(2)(C), Social Security Act (SSA), in which a "newly hired employee" is specifically defined. This bill establishes the same definition in Missouri law.

DOL expects this proposal to protect the integrity of the unemployment insurance (UI) system by detecting and preventing improper payments. Thus, this bill should have a positive effect on the unemployment compensation (UC) trust fund. However, the DES cannot estimate the amount.

§ 285.515

DOL states this language adds a provision that when the Department of Labor and Industrial Relations determines a business has misclassified a worker who should be classified as an employee, the fine (penalty) and interest shall be tolled while the employer's appeal to the determination is pending.

Currently, by law a determination is considered legally binding until such time that it is amended or reversed. As such, employers continue to be billed in accordance with the determination that is in place, and those employers are expected to report in accordance with the determination under appeal.

If it is the intent of this bill that the only interest that will be due is that which accrued subsequent the final appeal decision, then this change would pose significant administrative and computer programming challenges to DOL.

§ 288.030

DOL states individuals that are determined to have been separated from employment due to misconduct are not eligible to receive unemployment insurance (UI) benefits. This bill amends the definition of misconduct.

ASSUMPTION (continued)

§ 288.050.2

DOL states under 288.050.2 an employee discharged for misconduct is not qualified to receive unemployment compensation. The bill expands the definition of 'misconduct'. The bill also removes language from 288.050.3, providing that absenteeism or tardiness may constitute a rebuttable presumption of misconduct and adds absenteeism and tardiness into the new definition of misconduct as conduct that constitutes misconduct -not just a presumption.

Federal law prohibits a state from imposing a total reduction of benefit rights, or the cancellation of wage credits, unless the individual is discharged for misconduct connected with work.

The United States Department of Labor (USDOL) has reviewed this bill for conformity issues and has informed the Division of Employment Security (DES) that any interpretation of the language that would allow Missouri to impose a total reduction of benefit rights, or the cancellation of wage credits for misconduct not connected to the work would cause a conformity issue with federal law. The USDOL expressed concerns about the language in this bill and if enacted, the USDOL will require the DES to assure it that the Division will not interpret the bill in a way that would cause a conformity problem.

The bill defines misconduct employee conduct or an employee's failure to act demonstrating a knowing disregard of the employer's interest or a knowing violation of the standards which the employer expects of his or her employees. The current statutory definition of misconduct requires "an act of wanton or willful disregard of the employer's interest." The bill would appear to lower substantially the level of intent on the part of the employee from "wanton and willful" merely a "knowing" violation of the employer's interest. The current statutory definition of misconduct defines misconduct as an employee's "disregard of standards of behavior which the employer has a right to expect of his or her employee." The bill's definition of misconduct requires merely a knowing violation of the standards which the employer expects of his or her employee." Under the bill's definition of misconduct an employer can set any type of workplace expectation, reasonable or unreasonable, for its employees. Under the bill's definition of misconduct an employee's knowing violation of an unreasonable workplace expectation would appear to be misconduct.

The bills definition of misconduct includes employee carelessness as misconduct. The current definition of misconduct requires negligence on the part of the employee to "such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer." The bill's definition of misconduct would require only employee carelessness in such degree or recurrence demonstrating "a knowing disregard of the employer's interest or of the employee' duties and obligations to the employer." Under the bill's definition of misconduct, it

ASSUMPTION (continued)

would appear that one act of carelessness on the part of an employee could be sufficient to find misconduct disqualifying the employee from receiving unemployment benefits.

Under the current statutory definition of misconduct, in order to find misconduct, only "deliberate violations of the employer's rules" are misconduct. Therefore, an employee must willfully or deliberately violate the employer's attendance policy in order to be found to have committed disqualifying misconduct. Absences such as illness or family emergency are outside of the employee's control and are not deliberate or willful on the part of the employee. Therefore, an employee's violation of the employer's attendance policy due to employee illness or family emergency are not misconduct that would disqualify the employee from receiving unemployment benefits. However, under the bill's definition of misconduct, an employee's violation of the employer's no-call, no-show attendance policy, no matter the reason for the violation, would be disqualifying misconduct. Further, chronic absenteeism or tardiness in violation of a known policy of the employer, even if the employee had no control over the situation such as a serious health condition, would appear to be disqualifying misconduct under the bill's definition of misconduct. Lastly, under the bill's definition of misconduct, "one or more unapproved absences following a written reprimand or warning relating to an unapproved absence" is disqualifying misconduct irrespective of the reason for the unapproved absence or whether the absence was within the reasonable control of the employee.

Under the bill's definition of misconduct, a knowing violation of a state standard or regulation by an employee of an employer licensed or certified by the state can be disqualifying misconduct. Under the current statutory definition of misconduct the employee must willfully or intentionally violate the state standard in order to have committed misconduct which would disqualify the employee from receiving unemployment benefits.

Finally, under the current statutory definition of misconduct, a deliberate violation of a reasonable employer work rule is misconduct that disqualifies the employee from receiving unemployment benefits. The employee must willfully or intentionally violate the rule in order to be guilty of misconduct. Further, under current law, the employer bears the burden of proving misconduct on the part of the employee. Under the bill's definition of misconduct, any employee violation of an employer rule is disqualifying misconduct unless the employee proves that he or she did not know and could not reasonably know about the rule or the rule is unlawful. The bill's definition of misconduct does not require any intent to violate the rule on the part of the employee. Even unintended violations of an employee rule could be misconduct that would disqualify the employee from receiving unemployment benefits. Further, the bill places on the employee the burden of proving that he or she did not know of the rule and could not have reasonably known of the rule or prove that the rule is unlawful. Therefore, under the bill's definition of misconduct, any violation of a work rule is per se misconduct even if the rule is

ASSUMPTION (continued)

unreasonable and the violation unintended. Furthermore, the bill places upon the employee the burden of proving the absence of misconduct.

These changes would have no fiscal impact as long as Missouri interprets this bill in a manner that does not raise conformity issues with federal law.

§ 288.100

DOL states that the changes in section 288.100, would bring Missouri law into compliance with federal law. Pub. L. 112-40 requires that states not relieve an employer of charges or of benefit payments (non-charging) when the employer or an agent of the employer fails to respond timely or adequately to requests for information from the state workforce agency and the information pertained to a claim for unemployment benefits that was subsequently overpaid.

Current Missouri law allows for non-charging under certain conditions. When unemployment benefits are non-charged, they are charged to a pool. In general, these pool charges cause tax rates for all employers to remain higher than if these charges were attributable to the employer responsible for the benefit charges because secondary tax rate adjustments that are not based on experience are either activated or remain active.

Under this bill, non-charging could not occur if the employer or an agent of the employer fails to respond timely or adequately to requests for information from the Division and has a pattern of failing to do so and the information pertained to a claim for unemployment benefits that was subsequently overpaid. This proposal may result in fewer pool charges and may incentivize employers to provide the Division with more timely and complete information, which may result in fewer erroneous benefit payments.

This bill requires a pattern of two or more failures or failures of greater than two percent of all requests as a condition for the prohibition of non-charging. This change would pose significant administrative and computer programming challenges to the Division. To determine whether the employer or agent of the employer has a pattern of non-compliance, the Division will first need to develop programming that will track all requests for information and whether or not the employer or agent of the employer failed to respond timely or adequately. Programming will be required to link these requests to a claim for unemployment benefits and any subsequent overpayments. The Division must also develop programming that will determine whether a pattern exists by looking at all of the requests for information over the prior year. If a pattern exists, the Division must also develop programming that will determine for which charges the employer may not be relieved and generate a determination to be sent to that employer.

ASSUMPTION (continued)

Requiring a pattern will increase the time required to issue determinations regarding eligibility for unemployment benefits because staff will be required to track all requests for information. This change will also potentially increase the number of appeals regarding non-charging.

§ 288.380

DOL states section 288.380, would bring Missouri law into compliance with federal law. Pub. L. 112-40 requires states to impose a monetary penalty of no less than 15% for fraud overpayments. Current Missouri law mandates a 25% penalty for fraud overpayments for the first offense and a 100% penalty for subsequent offenses. Thus, Missouri law is already compliant with this requirement.

However, this public law also requires states to deposit this 15% penalty into the unemployment compensation trust fund immediately. The unemployment compensation trust fund is used to pay unemployment benefits. Current Missouri law requires that these penalties be deposited in the special employment security (ES) fund, which is used for administrative expenses by the Division of Employment Security (DES). This proposal deposits the 15% penalty into the trust fund, as required by federal law, and the remaining amount of the penalty continues to be deposited into the special ES fund.

Pub. L. 112-40 also requires that states assess this penalty on fraud overpayments on all federal unemployment programs, such as unemployment benefits for federal civilian and military employees. The DES currently assesses penalties on fraud overpayments on these claims. The change made to subdivision (1) of subsection 9 of section 288.380 clarifies that the DES must assess fraud penalties on all state and federal unemployment claims. This change must be applied to overpayments established after October 21, 2013.

These changes impose no additional penalties, but rather they change the funds into which those penalty amounts are deposited. As a result, this bill would increase monies in the unemployment compensation trust fund, which is used to pay unemployment benefits, and will decrease monies deposited in the special employment security (ES) trust fund, which is used for administrative expenditures by the Division of Employment Security (DES). In state fiscal year 2012, the DES deposited approximately \$1.3 million into the special ES fund from fraud penalties. Assuming that 75% of this amount recovered was for 25% penalty balances and 25% was for 100% penalty balances, an estimated \$631,000 would have been deposited into the trust fund and an estimated \$664,000 would have been deposited into the special ES fund under this proposal.

Failure to make the above changes to Section 285.300 may cause a conformity issue if the Secretary of Health and Human Services (HHS) determines these changes are required for the state to report these new hires. Failure to make the above changes to Sections 288.100 and

ASSUMPTION (continued)

288.380 within the allotted timeframe (applicable to overpayments established after October 21, 2013) will cause Missouri's unemployment compensation (UC) system to be out of compliance with federal law.

Non-conformity with federal law could jeopardize the certification of Missouri's UI program. If the program fails to be certified, Missouri would lose approximately \$46 million in federal funds the state receives each year to administer the UI program. Additionally, Missouri would lose the approximately \$13 million in federal funds each year the Department of Economic Development-Division of Workforce Development uses for Wagner-Peyser re-employment services.

The 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 would pay the full 6.0%, or approximately an additional \$859 million per year.

In response to a previous version of this proposal, officials at the **Department of Social Services** assumed there is no fiscal impact to the Department if this proposal passes. However, if this proposal does not pass during the 2013 legislative session, Missouri's Title IV-D State Plan will be out of compliance with federal requirements. Failure to have an approved Title IV-D State Plan results in the loss of all federal funding for the Title IV-D program, and a loss of federal funding for the Temporary Assistance for Needy Families program.

In response to a previous version of this proposal, officials at the **Department of Conservation**, **Department of Revenue** and the **Office of State Treasurer** each assumed there is no fiscal impact to their organization from this proposal.

In response to a previous version of this proposal, officials at the **Office of Administration** assumed there is no fiscal impact from this proposal.

<u>FISCAL IMPACT - State Government</u>	FY 2014 (10 Mo.)	FY 2015	FY 2016
SPECIAL EMPLOYMENT SECURITY FUND			
<u>Loss</u> - law requires penalty money be deposited into UC fund	<u>(\$631,000)</u>	<u>(\$631,000)</u>	<u>(\$631,000)</u>
ESTIMATED NET EFFECT ON SPECIAL EMPLOYMENT SECURITY FUND	<u>(\$631,000)</u>	<u>(\$631,000)</u>	<u>(\$631,000)</u>
UNEMPLOYMENT COMPENSATION TRUST FUND			
<u>Revenue</u> - penalty money	<u>\$631,000</u>	<u>\$631,000</u>	<u>\$631,000</u>
ESTIMATED NET EFFECT ON UNEMPLOYMENT COMPENSATION TRUST FUND	<u>\$631,000</u>	<u>\$631,000</u>	<u>\$631,000</u>
UC ADMINISTRATION FUND			
<u>Loss</u> - UC Administration Fund Loss of federal funds	\$0 or <u>(\$46,000,000)</u>	\$0 or <u>(\$46,000,000)</u>	\$0 or <u>(\$46,000,000)</u>
ESTIMATED NET EFFECT ON UC ADMINISTRATION FUND	<u>\$0 or (\$46,000,000)</u>	<u>\$0 or (\$46,000,000)</u>	<u>\$0 or (\$46,000,000)</u>
WAGNER-PEYSER ADMINISTRATION FUND			
<u>Loss</u> - Wagner-Peyser Admin Fund Loss of federal funds	\$0 or <u>(\$13,000,000)</u>	\$0 or <u>(\$13,000,000)</u>	\$0 or <u>(\$13,000,000)</u>
ESTIMATED NET EFFECT ON WAGNER-PEYSER ADMINISTRATION FUND	<u>\$0 or (\$13,000,000)</u>	<u>\$0 or (\$13,000,000)</u>	<u>\$0 or (\$13,000,000)</u>

<u>FISCAL IMPACT - Local Government</u>	FY 2014 (10 Mo.)	FY 2015	FY 2016
	<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 proposal changes the laws regarding unemployment compensation.

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

SOURCES OF INFORMATION

Department of Conservation
Department of Labor and Industrial Relations
Department of Revenue
Department of Social Services
Missouri Department of Transportation
Office of Administration
Office of State Treasurer



Ross Strope
Acting Director
May 8, 2013