

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 3549S.01I
Bill No.: SB 909
Subject: Health Care; Professional Registration and Licensing
Type: Original
Date: April 26, 2022

Bill Summary: This proposal creates provisions regarding the use of online platforms by health care contractors.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2023	FY 2024	FY 2025
Total Estimated Net Effect on General Revenue	\$0	\$0	\$0

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2023	FY 2024	FY 2025
Total Estimated Net Effect on <u>Other</u> State Funds	\$0	\$0	\$0

Numbers within parentheses: () indicate costs or losses.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2023	FY 2024	FY 2025
Federal Funds*	\$0 or (\$71,500,000)	\$0 or (\$71,500,000)	\$0 or (\$71,500,000)
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0 or (\$71,500,000)	\$0 or (\$71,500,000)	\$0 or (\$71,500,000)

*Officials from the **Department of Labor and Industrial Relations (DOLIR)** state their review of this bill has identified an issue that may affect certification of Missouri's unemployment insurance (UI) program. DOLIR has ranged the fiscal impact from \$0 (no non-conformity with federal regulations) to a potential loss of federal funding.

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2023	FY 2024	FY 2025
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 2023	FY 2024	FY 2025
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

Section 324.049 – Health Care Contractors Online Platforms

Officials from the **Department of Labor and Industrial Relations (DOLIR)** state this legislation adds a new section 324.049, which indicates that health care contractors shall be independent contractors and not employees if certain conditions are met.

DOLIR's review of this bill has identified an issue that may affect certification of Missouri's unemployment insurance (UI) program. Depending on court interpretation, there could be conflicts between the independent contractor test in Section 288.034.5 and Regulation 8 CSR 10-4.150 and the test set forth in Section 324.049.2. Further, Subsection 324.049.2 begins as follows: Notwithstanding any other provision of law, a health care contractor shall be treated as an independent contractor and not as an employee of the platform for all purposes under state and local laws, regulations, ordinances, and resolutions if the following conditions are met.

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 could jeopardize the certification of Missouri's UI program. If the program fails to be certified, Missouri could lose approximately \$60.1 million in federal funds the state receives each year to administer the UI program. Additionally, Missouri could lose the approximately \$11.4 million in federal funds each year the Department of Higher Education and Workforce Development uses for Wagner-Peyser reemployment 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 \$ 989 million per year.

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.

Section 3306(i), FUTA, references the definition of an employee in Section 3121(d) of the Internal Revenue Code (IRC) of 1986. Section 3121(d)(2), IRC, specifies that employee means “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” 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.

The provisions in the bill that an independent contractor relationship exists will 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 would result in the exclusion of coverage under the Missouri UI law. Certain individuals would 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 health care contractor that is a state and local governmental entity, certain nonprofit organizations, or Indian tribes, the services must be covered under UI law, or a conformity issue is raised.

If these individuals were performing services for an employer that is liable for the FUTA tax and such services were excluded from coverage under state UC law, no conformity issue would exist. However, if the IRS determines that an employer-employee relationship exists using the common law test, the employer would be required to pay the full FUTA tax (currently 6.0 percent) on these wages as no state contributions would have been made on the remuneration paid to the individuals providing these services.

Oversight does not have any information to the contrary. Therefore, Oversight will range the fiscal impact as \$0 (this legislation complies with federal law) OR a loss of \$60.1 million (this legislation does not comply with federal law) to Missouri’s UI Federal Program. Oversight will also reflect a fiscal impact range of \$0 (this legislation complies with federal law) OR a loss of \$11.4 million (this legislation does not comply with federal law) to the Wagner-Peyser Federal Fund.

Officials from the **Department of Commerce and Insurance** and the **Department of Higher Education and Workforce Development** each assume the proposal will have no fiscal impact on their organizations. **Oversight** does not have any information to the contrary. Therefore, Oversight will reflect a zero impact in the fiscal note for these agencies.

<u>FISCAL IMPACT – State Government</u>	FY 2023 (10 Mo.)	FY 2024	FY 2025
FEDERAL FUNDS			
<u>Loss – DOLIR</u> UI Administration – potential nonconformity of federal laws	\$0 or (\$60,100,000)	\$0 or (\$60,100,000)	\$0 or (\$60,100,000)
<u>Loss – DOLIR</u> Wagner-Peyser – potential nonconformity of federal laws	\$0 or (\$11,400,000)	\$0 or (\$11,400,000)	\$0 or (\$11,400,000)
ESTIMATED NET EFFECT TO FEDERAL FUNDS	<u>\$0 or</u> <u>(\$71,500,000)</u>	<u>\$0 or</u> <u>(\$71,500,000)</u>	<u>\$0 or</u> <u>(\$71,500,000)</u>

<u>FISCAL IMPACT – Local Government</u>	FY 2023 (10 Mo.)	FY 2024	FY 2025
	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

FISCAL IMPACT – Small Business

There are over 165,000 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

Under this act, a health care contractor taking requests to provided health care services from a platform, as such terms are defined in the act, shall be treated as an independent contractor and not as an employee for purposes of state and local law if certain conditions are met. The contractor must be an independent contractor pursuant to a written agreement; the platform must not set certain restrictions, requirements, or penalties, as described in the act, related to the services performed; the contractor must be responsible for taxes on earnings derived from services performed; and substantially all of the contractor's payments must be based on performance of the services provided.

This section shall not authorize the performance of any health care service without a license, registration, or certificate required by law for the performance of such service.

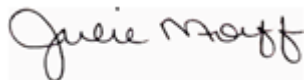
This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

SOURCES OF INFORMATION

Department of Commerce and Insurance

Department of Labor and Industrial Relations

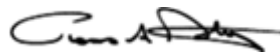
Department of Higher Education and Workforce Development



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