

SECOND REGULAR SESSION

SENATE BILL NO. 718

92ND GENERAL ASSEMBLY

INTRODUCED BY SENATORS YECKEL, NODLER AND LOUDON.

Pre-filed December 1, 2003, and ordered printed.

TERRY L. SPIELER, Secretary.

2994S.01I

AN ACT

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

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 536.010 and 536.050, RSMo, are repealed and eight new sections enacted in lieu thereof, to be known as sections 536.010, 536.050, 536.300, 536.305, 536.310, 536.315, 536.320, and 536.325, to read as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

536.010. For the purpose of this chapter:

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

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

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

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

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

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

(a) A statement concerning only the internal management of an agency and which

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;

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

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

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

(e) An opinion of the attorney general;

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

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

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

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

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

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

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

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

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

[(5)] (8) "State agency" means each board, commission, department, officer or other administrative office or unit of the state other than the general assembly, the courts, the

governor, or a political subdivision of the state, existing under the constitution or statute, and authorized by the constitution or statute to make rules or to adjudicate contested cases.

536.050. 1. The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented. The venue of such suits against agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section.

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

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

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

(3) Requiring the person to exhaust any administrative remedy would result in undue prejudice because the person may suffer irreparable harm if unable to secure immediate judicial consideration of the claim. Provided, however, that the provisions of this subsection shall not apply to any matter covered by chapters 288, 302, and 303, RSMo; or

(4) The party bringing the action is a small business claiming a material violation of section 536.300 by the state agency regarding the small business impact statement for the amendment or rule.

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

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

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

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

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

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

8. If a party or the state is dissatisfied with a determination of fees and other expenses made in an action brought pursuant to subsection 1 of this section, that party or the state may, within the time permitted by law, appeal that order or judgment to the appellate court having jurisdiction to review the merits of that order or judgment. The appellate court's determination shall be based solely on the record made before the court below. The court may modify, reverse or reverse and remand the determination of fees and other expenses if the court finds that the award or failure to make an award of fees and other expenses, or the calculation of the amount of the award, was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, or was made contrary to law or in excess of the court's jurisdiction. Awards made pursuant to this section shall be payable from amounts appropriated therefor. The state agency against which the award was made shall request an appropriation to pay for the award.

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

536.300. 1. Prior to submitting or filing with the secretary of state any proposed rules for adoption, amendment, revision, or repeal pursuant to this chapter, the state agency shall determine whether the proposed rules affect small business and, if so, the availability and practicability of less restrictive alternatives that could be implemented to achieve the same results of the proposed rule. This section shall not apply to emergency rulemaking pursuant to section

536.025, RSMo. This section shall be in addition to the fiscal note requirement of sections 536.200 to 536.210, RSMo.

2. If the proposed rules affect small business, the state agency shall consider alternative or flexible methods of compliance for small businesses and prepare a small business impact statement to be submitted with the proposed rules to the board on the date the proposed order of rulemaking is filed with the secretary of state's office. The statement shall provide a reasonable determination of the following:

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

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

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

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

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

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

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

(8) The cost statements referred to in subdivisions (3) and (4) of subsection 2 of this section shall represent the state agency's best reasonable estimates of the cost impact. If the board disagrees with the cost impact statement, the board may provide a statement of the board's opinion as to the cost impact. The board's statement as to the cost impact shall be filed with the small business impact statement in addition to the state agency's statement of cost impact.

3. Sections 536.300 to 536.325 shall not apply to proposed rules adopted by a state agency to implement a statute that does not require a state agency to interpret or describe the requirements of the statute such as federally mandated

regulations which afford the state agency no discretion to consider less restrictive alternatives. Notwithstanding such provision, federally mandated regulations are subject to the federal Regulatory Flexibility Act as amended by the Small Business Regulatory and Enforcement Fairness Act of 1996, P.L. 96-354, as amended by P.L. 104.121. Any federally mandated regulations that do not comply with these acts shall be subject to this section.

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

5. In addition to any other requirements for public hearing, the state agency shall, upon written request by the board, conduct a public hearing on the proposed rule. The board shall not request more than twelve hearings per quarter.

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

536.305. 1. For any proposed rules that affect small business, the state agency shall also submit a small business participation statement to the board within thirty days after a public hearing is held, or if no public hearing is held, then at least thirty days prior to the issuance of any final order of rulemaking. This section shall not apply to emergency rules. The small business participation statement required by this section shall provide the following information:

(1) A description of how the opinions or comments from affected small businesses were solicited;

(2) A summary of the public and small business comments;

(3) A summary of the state agency's response to those comments; and

(4) The number of persons who attended a public hearing, the names of the individuals who testified at a public hearing, the business or organization for which they testified, and whether said individual testified in support, opposition, or neutral position to the proposed rule, and submitted written comments.

2. If the proposed rule was changed in a way that affected small business, a statement of the reasons for adopting the proposed rule without the requested change shall be included in the small business participation statement.

3. A final order of rulemaking shall not be filed with the secretary of state until thirty days after a final order of rulemaking has been received by the board.

4. The board may file with the secretary of state any comments or recommendations that the board has concerning a proposed or final order of

rulemaking. Such comments shall be published in the Missouri Register. A copy of the board's comments or recommendations shall be submitted to the state agency promulgating the rule.

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

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

2. The board may:

(1) Provide state agencies with input regarding proposed rules which adversely affect small business;

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

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

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

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

3. The board shall consist of:

(1) Two members appointed by the governor, with the advice and consent of the senate;

(2) One member appointed by the lieutenant governor;

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

(4) Two members appointed by the chairperson of the committee of the house of representatives having jurisdiction over matters concerning small business;

(5) Two members appointed by the chairperson of the committee of the senate having jurisdiction over matters concerning small business;

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

(7) One member appointed by the speaker of the house of representatives.

4. The appointments to the board shall be representative of a variety of small businesses, both rural and urban, and from a variety of geographical areas

of this state provided that no more than two members shall be representatives from the same type of small business.

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

6. All members of the board, except the chair of the minority business advocacy commission, shall be a current or former owner or officer of a small business. No member may be an elected official, or an officer or an employee of the federal, state, or county government. The governor shall appoint the initial chairperson of the board and a majority of the board shall elect subsequent chairpersons. The chairperson shall serve as chair a term of not more than one year, unless removed by a two-thirds vote of all members of the board.

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

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

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

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

11. The board shall not have the authority to:

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

(2) Intervene in legal actions; or

(3) Subpoena witnesses to testify, or to produce documents, in hearings conducted by the board, but may request witnesses to voluntarily testify or produce documents.

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

536.315. 1. For any rule adopted after August 28, 2004, the board may file a written petition with the state agency that has adopted rules objecting to or requesting the adopting, amendment, or repeal of all or part of any rule affecting

small business on any of the following grounds:

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

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

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

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

(1) The rule creates an undue barrier to the formation, operation, and expansion of small businesses in a manner that significantly outweighs the rule's benefit to the public;

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

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

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

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

4. The state agency shall promptly consider the petition filed pursuant to subsection 1 or 2 of this section and may seek advice and counsel regarding the petition. Within sixty days after the receipt of the petition, the state agency shall determine whether the rule should be adopted, amended, or repealed based on the factors set forth in subsection 1 of this section for rules adopted after August 28, 2004, and subsection 2 of this section for rules adopted prior to August 28, 2004. The state agency shall submit a written response of the agency's determination to the board within sixty days of the receipt of the petition. If the state agency determines that the petition merits adoption, amendment, or repeal of a rule, it may initiate proceedings in accordance with the applicable requirements of this chapter.

5. Any affected small business may seek the filing of a petition by the board

for the adoption, amendment, or repeal of a rule. The board may convene a hearing or by other means solicit testimony that will assist in its determination of whether to file such a petition. For rules adopted after August 28, 2004, the board shall base its decision upon the factors stated in subsection 1 of this section. For rules adopted prior to August 28, 2004, the board shall base its decision on the factors stated in subsection 2 of this section.

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

7. This section shall not be interpreted to restrict any affected party's right to relief otherwise available under the provisions of this chapter.

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

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

536.325. 1. Any state agency authorized to assess administrative penalties or administrative fines upon a small business shall consider waiving or reducing any administrative penalty or administrative fine for a violation of any statute, ordinance, or rule by a small business under the following conditions:

- (1) The small business corrects the violation within thirty days after receipt of a notice of violation or citation;
- (2) The violation was unintentional or the result of excusable neglect;
- (3) The violation was the result of an excusable misunderstanding of a state

agency's interpretation of a rule;

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

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

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

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

(2) A violation involves willful or criminal conduct;

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

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

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

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

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