

FIRST REGULAR SESSION

SENATE BILL NO. 456

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR NODLER.

Read 1st time February 28, 2005, and ordered printed.

TERRY L. SPIELER, Secretary.

1727S.011

AN ACT

To repeal sections 536.010, 536.050, 536.300, 536.305, and 536.310, RSMo, and to enact in lieu thereof nine new sections relating to small business.

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

Section A. Sections 536.010, 536.050, 536.300, 536.305, and 536.310, RSMo, are repealed and nine new sections enacted in lieu thereof, to be known as sections 536.010, 536.050, 536.300, 536.303, 536.305, 536.310, 536.323, 536.325, and 536.328, to read as follows:

536.010. For the purpose of this chapter:

(1) **"Affected small business" or "Affects small business", means any potential or actual requirement imposed upon a small business or minority small business through a state agency's proposed or adopted rule that will cause direct and significant economic burden upon a small business or minority small business, or that 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, **except those in the legislative or judicial branches;**

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

(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;

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

(6) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or

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

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 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", **means** a for-profit enterprise consisting of fewer than

[fifty] **one hundred** full- or part-time employees;

(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 requiring 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 proposed rules for adoption, amendment, revision, or repeal, **under this chapter** the state agency shall determine whether the proposed rulemaking affects small businesses and, if so, the availability and practicability of

less-restrictive alternatives that could be implemented to achieve the same results of the proposed rulemaking. This requirement shall not apply to emergency rulemaking pursuant to section 536.025 or to constitutionally authorized rulemaking pursuant to article IV, section 45 of the Missouri Constitution. This requirement shall be in addition to the fiscal note requirement of sections 536.200 to 536.210.

2. If the proposed rules affect small businesses, the state agency shall **consider creative, innovative, or flexible methods of compliance for small business and** prepare a small business impact statement to be submitted to the secretary of state and the joint committee on administrative rules with the proposed rules. A copy of the proposed rules and the small business impact statement shall also be filed with the board on the same date as they are filed with the secretary of state. **Such business impact statement and proposed rules shall be submitted to the board prior to providing notice for a public hearing.** The statement shall provide a reasonable determination of the following:

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

(2) How the agency involved small businesses in the development of the proposed rules;

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

(4) A description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected, except in cases where the state agency has filed a fiscal note that complies with all of the provisions of section 536.205; [and]

(5) 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 if such costs are capable of determination, except in cases where the state agency has filed a fiscal note that complies with all of the provisions of section 536.205;

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

(7) Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more stringent standard.

3. 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 should not publish the rule until such time as the statement is provided. If the state agency determines that its proposed rule does not affect small business, the state agency shall so certify this finding in the transmittal letter to the secretary of state, stating that it has determined that such proposed rule will not have an economic impact on small businesses and the secretary of state shall publish the rule.

4. Sections 536.300 to 536.310 shall not apply where the proposed rule is being promulgated on an emergency basis, where the rule is federally mandated, or where the rule substantially codifies existing federal or state law. Notwithstanding the provisions of this section, 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.

536.303. 1. For any proposed rules that affect small business, the agency shall also submit a small business statement to the board after a public hearing is held. This section shall not apply to emergency rules. The small business 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 agency's response to those comments; and**
- (4) The number of persons who attended the public hearing, testified at the hearing, and submitted written comments.**

2. If a request to change the proposed rule was made at the hearing 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 statement.

536.305. 1. There is hereby established the "Small Business Regulatory Fairness Board". The department of economic development shall provide staff support for the board.

2. The board shall be composed of nine members appointed in the following manner:

- (1) One member who is the chair of the minority business advocacy commission;
- (2) One member appointed by the president pro tempore of the senate;
- (3) One member appointed by the minority leader of the senate;
- (4) One member appointed by the speaker of the house of representatives;
- (5) One member appointed by the minority leader of the house of representatives; and
- (6) Four members appointed by the governor.

3. Each member of the board, except for the public members and the chair of the minority business advocacy commission, shall be a current or former owner or officer of a

small business. All members of the board shall represent a variety of small businesses, both rural and urban, and be from a variety of geographical areas of this state, provided that no more than two members shall represent the same type of small business.

4. Members of the board shall serve a term of three years and may be reappointed at the conclusion of the term. No member shall serve more than three consecutive terms. Appointments shall be made so that one-third of the membership of the board shall terminate each year. 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 for a term of not more than two years.

5. Members of the board shall serve without compensation, but may be reimbursed for reasonable and necessary expenses relating to their performance of duties, according to the rules and regulations of travel issued by the office of administration. Members will be required to submit an expense account form in order to obtain reimbursement for expenses incurred.

6. The board shall meet as often as necessary, as determined by the chairperson of the board. All meetings of the board will be conducted in accordance with the governmental bodies and records act, chapter 610, RSMo, including closed sessions. Notice will be posted and will be provided to the joint committee on administrative rules. Minutes of the meetings shall be provided to all members, the office of the governor, and the joint committee on administrative rules.

7. In addition to any other powers provided by sections 536.300 to 536.328, the board may adopt any rules necessary to implement sections 536.300 to 536.328 and take any action necessary to effectuate the purposes of sections 536.300 to 536.328. Any rule or portion of a rule, as that term is defined in section 536.010, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of this chapter and, if applicable, section 536.028. This section and this chapter are nonseverable and if any of the powers vested with the general assembly pursuant to this chapter to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

536.310. 1. The board [may] shall:

(1) Provide state agencies with input regarding rules that adversely affect small businesses;

(2) Solicit input and conduct hearings from small business owners and state agencies regarding any rules proposed by a state agency; and

(3) 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. The report shall include comments from small businesses, state agency responses, and a summary of any public testimony on rules brought before the board for consideration.

2. In any inquiry conducted by the board because of a request from a small business owner, the board may make recommendations to the state agency. If the board makes recommendations, such recommendations shall be based 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 benefits to the public; or

(2) New or significant economic information indicates the proposed rule would create an undue impact on small businesses; or

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

(4) If the rule was adopted after August 28, 2004, whether the actual effect on small businesses was not reflected in or significantly exceeded the small business impact statement submitted prior to the adoption of the rules.

536.323. 1. In addition to the basis for filing a petition provided in section 536.041, any affected small business may file a written petition with the agency that has adopted rules objecting to 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) The small business impact statement did not consider new or significant economic information that reveals an undue impact on small business; or

(3) The impacts were not previously considered at the public hearing on the rules.

2. For any rule adopted prior to August 28, 2005, an affected small business may file a written petition with the agency that adopted the rule objecting to 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 agency or any other agency or violates the substantive authority under which the rule was adopted; or

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

3. Upon submission of the petition, the agency shall forward a copy of the petition to the board and the joint committee on administrative rules, as required by section 536.041, as notification of a petition filed under sections 536.300 to 536.328. The agency shall promptly consider the petition and may seek advice and counsel regarding the petition. Within sixty days after the receipt of the petition, the agency shall determine whether the impact statement or public hearing addressed the actual and significant impact on small business. The 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 agency determines that the petition merits the adoption, amendment, or repeal of a rule, it may initiate proceedings in accordance with the applicable requirements of this chapter.

4. If the agency determines that the petition does not merit the adoption, amendment, or repeal of a rule, any affected small business may seek a review of the decision by the board. The board may convene a hearing or by other means solicit testimony that will assist in its determination of whether to recommend that the agency initiate proceedings in accordance with this chapter. For rules adopted after August 28, 2005, the board shall base its recommendations on any of the following reasons:

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

(2) The impact statement did not consider new or significant economic information that reveals an undue impact on small business;

(3) Such impacts were not previously considered by the agency; or

(4) Such impacts were not previously considered at the public hearing on the rules.

5. For rules adopted prior to August 28, 2005, the board shall base its recommendations on any of the following reasons:

(1) The rules created an undue barrier to the formation, operation, and expansion of small businesses in a manner that significantly outweighs its benefit to the public;

(2) The rules duplicate, overlap, or conflict with rules adopted by the agency or any other agency or violate the substantive authority under which the rules were adopted; or

(3) The technology, economic conditions, or other relevant factors justifying the purpose for the rules have changed or no longer exist.

6. The board shall make an evaluation report to the governor and the general assembly on rulemaking proceedings, comments from small business, and agency response as provided in this section. The governor or general assembly

may subsequently take such action in response to the evaluation report and agency response as they find appropriate.

536.325. 1. Each agency with rules that affect small business shall submit by June 13 of each odd-numbered year a list of such rules to the general assembly and the board. The agency shall also submit a report describing the specific public purpose or interest for adopting the respective rules and any other reasons to justify its continued existence. The general assembly may subsequently take such action in response to the report as it finds appropriate.

2. The board shall provide to the head of each agency a list of any rules adopted by the 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 the list of rules adopted, the agency shall submit a written report to the board in response to the complaints or concerns. The agency shall also state whether the 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.

3. The board may solicit testimony from the public at a public meeting regarding any report submitted by the agency under this section. The board shall submit an evaluation report to the governor and the general assembly regarding small business comments, 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.

536.328. For any regulation subject to sections 536.300 to 536.328, a small business that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 536.300 to 536.328. Judicial review shall be commenced in the circuit court of the county in which the small business has its primary place of business, or in Cole County. If the small business does not have a primary place of business in the state, proper venue shall be in Cole County. Notwithstanding any provisions of this chapter to the contrary, an affected small business may seek such judicial review during the period beginning on the date the proposed rule becomes final and ending one year later.