

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0363-01
Bill No.: SB 6
Subject: Administrative Rules; Courts; Crimes and Punishment; Drugs and Controlled Substances; Health and Senior Services Department; Law Enforcement Officers and Agencies
Type: Original
Date: January 22, 2019

Bill Summary: This proposal modifies provisions relating to controlled substances, including the Schedules and criminal provisions involving controlled substances.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND				
FUND AFFECTED	FY 2020	FY 2021	FY 2022	Fully Implemented (FY 2029)
General Revenue	(Could exceed \$105,239)	(Could exceed \$112,825)	(Could exceed \$152,328)	(Could exceed \$280,325)
Total Estimated Net Effect on General Revenue	(Could exceed \$105,239)	(Could exceed \$112,825)	(Could exceed \$152,328)	(Could exceed \$280,325)

ESTIMATED NET EFFECT ON OTHER STATE FUNDS				
FUND AFFECTED	FY 2020	FY 2021	FY 2022	Fully Implemented (FY 2029)
Total Estimated Net Effect on <u>Other</u> State Funds	\$0	\$0	\$0	\$0

Numbers within parentheses: () indicate costs or losses. This fiscal note contains 9 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS				
FUND AFFECTED	FY 2020	FY 2021	FY 2022	Fully Implemented (FY 2029)
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0	\$0	\$0	\$0

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)				
FUND AFFECTED	FY 2020	FY 2021	FY 2022	Fully Implemented (FY 2029)
Total Estimated Net Effect on FTE	0	0	0	0

☒ Estimated Net Effect (expenditures or reduced revenues) expected to exceed \$100,000 in any of the three fiscal years after implementation of the act.

ESTIMATED NET EFFECT ON LOCAL FUNDS				
FUND AFFECTED	FY 2020	FY 2021	FY 2022	Fully Implemented (FY 2029)
Local Government	\$0	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

§§195.015 and 195.017 - Controlled substances

Officials from the **Department of Health and Senior Services (DHSS)** state 195.015.4 of the proposed legislation requires the Division of Regulation and Licensure, Section for Health Standards and Licensure, Bureau of Narcotics and Dangerous Drugs (BNDD) to promulgate emergency rules within 30 days of publication in the federal register each time the Drug Enforcement Administration (DEA) designates a substance as a controlled substance or reschedules or deletes a substance. The DEA makes such changes an average of 20 times annually.

It is assumed it will take a Health and Senior Services Manager approximately 16 hours to promulgate each emergency rule change. Based on 2,080 working hours per year, this would require 0.15 FTE to assume the duties set forth in the proposed section (16 hours X 20 rule changes ÷ 2,080 hours per year = 0.15) for a total personal service annual cost of \$9,915 (\$66,098 X 0.15).

The DHSS anticipates being able to absorb these costs. However, until the FY20 budget is final, the department cannot identify specific funding sources.

Oversight obtained information from the DHSS regarding the U.S. Department of Justice, Drug Enforcement Administration (DEA) Diversion Control Division. Oversight determined that in the past 5 years (2014 - 2018), the DEA has taken scheduling actions on substances/controlled substances 99 times (average 19.8 actions per year). Based on this information the DHSS would need 0.15 FTE to manage the DEA's average annual change in substance/controlled substance schedules. Oversight assumes the additional duties can be performed within current funding/staffing levels.

§§565.021, 579.015, 579.065, 579.068 - Increase in criminal penalties

Officials from the **Department of Corrections (DOC)** state the bill makes changes to the schedule of controlled substances and adds drug offenses to four criminal statutes.

§565.021 - 2nd Degree Murder

This section adds the offense of manufacturing, delivering or distributing a schedule I or II controlled substance that caused or was a contributing factor in the death of a person. The

ASSUMPTION (continued)

number of deaths from drug overdoses is a national concern and Missouri reported 1,367 deaths from drug overdoses during 2017 (**Oversight** determined this is the most recent data available from the Centers for Disease Control and Prevention (CDC)). At present it is unknown the number of convictions of the providers of the controlled substance, but the DOC is estimating one per year will receive a prison sentence. It is also likely that the offender would be sentenced to a drug offense but the conviction will be concurrent with the murder conviction.

In FY18 the average sentence for 2nd degree murder was 21.0 years and offenders will serve 85% of their time before parole. The expected time served is 17.9 years which is beyond the 10 year budget horizon. In FY2029 the population increase is estimated to be 10.

§579.015 - Possession of a controlled substance

This section increases the felony class from D to C if the offender is employed as an emergency care provider or other care assistant. The US Bureau of Labor Statistics reported in 2017 personal care assistants comprised 1.42% of the occupational workforce so the DOC is estimating that 1.42% of offenders convicted of drug possession will be sentenced for the class C offense. The offense is estimated to increase the average sentence from 4.3 years to 7 years (the average sentence for drug distribution). There were 1,176 prison admissions (FY 18) for drug possession of which 17 will be sentenced for a class C felony. Time served for the class D offense in FY18 is 28.9% and 33.5% for the class C. The change will add 2 offenders to the population in FY22.

Oversight obtained information from the Bureau of Labor Statistics (May 2017 National Occupational Employment and Wage Estimates (most recent available)). The Personal Care Aids employment category (Occupation code 39-9021) employs 2,035,610 persons nationwide and the total employment for all occupational categories is 142,549,250. Therefore, personal care aids comprise 1.428% of the occupational workforce.

§579.065 - 1st Degree Drug Trafficking

This section adds Fentanyl to the list of controlled substances. If the amount is from 10 to 60 grams, it is a class B felony, and becomes a class A felony offense if the amount is greater. The legislation will result in some drug distribution offenses being sentenced as 1st degree drug trafficking. In FY18, 20% of drug distribution new admissions were estimated to be for Fentanyl and there were 9 new prison admissions for 1st degree drug trafficking. Applying the 20% expansion factor results in an expected increase of 2 additional new admissions who would have been sentenced to drug distribution. The average sentence will increase from 7.0 years to 9.4 years and the percent of time served from 33.5% to 42%. The prison population is expected to

ASSUMPTION (continued)

increase by 2 in FY24 and stabilize at 4 in FY25.

§579.068 - 2nd Degree Trafficking

This section adds Fentanyl to the list of controlled substances if the amount is greater than 10 grams. In FY18, 23% of drug possession new admissions are estimated to have been for fentanyl, and there were 34 new admissions for 2nd degree drug trafficking. The impact is expected to be 5 offenders charged with 2nd degree drug trafficking instead of drug possession. The average sentence will increase from 4.3 years to 7 years and the average time served will increase from 28.9% to 33.5%. The population will increase by 4 in FY22 and stabilize at 9 in FY23.

There is no impact on probation sentencing from these statute changes because the probation term will be unchanged.

The **total** impact of the legislation is an increase in the prison population by 24 in FY29 and an increase of 5 in the field (probation) population.

	# to prison	Cost per year	Total Costs for prison	# to probation & parole	Cost per year	Total cost for probation and parole	Grand Total - Prison and Probation (includes and 2% inflation)
Year 1	1.0	(\$6,287)	(\$5,239)	0	absorbed	\$0	(\$5,239)
Year 2	2.0	(\$6,287)	(\$12,825)	0	absorbed	\$0	(\$12,825)
Year 3	8.0	(\$6,287)	(\$52,328)	0	absorbed	\$0	(\$52,328)
Year 4	14.0	(\$6,287)	(\$93,405)	0	absorbed	\$0	(\$93,405)
Year 5	17.0	(\$6,287)	(\$115,689)	0	absorbed	\$0	(\$115,689)
Year 6	20.0	(\$6,287)	(\$138,827)	0	absorbed	\$0	(\$138,827)
Year 7	21.0	(\$6,287)	(\$148,684)	0	absorbed	\$0	(\$148,684)
Year 8	22.0	(\$6,287)	(\$158,879)	0	absorbed	\$0	(\$158,879)
Year 9	23.0	(\$6,287)	(\$169,423)	0	absorbed	\$0	(\$169,423)
Year 10	24.0	(\$6,287)	(\$180,325)	0	absorbed	\$0	(\$180,325)

Oversight does not have any information to the contrary. Therefore, Oversight will reflect the impact provided by DOC in the fiscal note.

ASSUMPTION (continued)

For the purpose of this proposed legislation, officials from the **Office of State Public Defender (SPD)** state they cannot assume that existing staff will provide effective representation for any new cases arising where indigent persons are charged with possession of a newly added substance to the controlled substance list. The Missouri State Public Defender System is currently providing legal representation in caseloads in excess of recognized standards.

While the number of new cases (or cases with increased penalties) may be too few or uncertain to request additional funding for this specific bill, the SPD will continue to request sufficient appropriations to provide effective representation in all cases where the right to counsel attaches.

In Fiscal Year 2018, SPD's Trial Division opened 2,431 "drug" related cases (Chapter 195). These drug cases represent almost 4% of the total Trial Division caseload of 63,395.

Oversight notes over the last three fiscal years, the SPD has lapsed a total of \$152 of General Revenue appropriations (\$0 out of \$36.4 million in FY 2016; \$2 out of \$28.0 million in FY 2017; and \$150 out of \$42.5 million in FY 2018). Therefore, Oversight assumes the SPD is at maximum capacity and the increase in workload resulting from this bill cannot be absorbed within SPD's current resources.

Adding one additional Assistant Public Defender 1 (APD) with a starting salary of \$47,000, will cost approximately \$74,500 per year in personal service and fringe benefit costs. One additional APD II (\$52,000 per year; eligible for consideration after 1 year of successful performance at APD I) will cost the state approximately \$81,000 per year in personal service and fringe benefit costs. When expense and equipment costs such as travel, training, furniture, equipment and supplies are included, **Oversight** assumes the cost for a new APD could approach \$100,000 per year.

Oversight assumes the SPD cannot absorb the additional caseload that may result from this proposal within their existing appropriation. With drug-related cases a large portion of SPD's workload, Oversight will assume the changes in this proposal could result in costs exceeding \$100,000 per year to the Office of the State Public Defender.

Officials from the **Office of the Secretary of State (SOS)** state many bills considered by the General Assembly include provisions allowing or requiring agencies to submit rules and regulations to implement the act. The SOS is provided with core funding to handle a certain amount of normal activity resulting from each year's legislative session. The fiscal impact for this fiscal note to the SOS for Administrative Rules is less than \$5,000. The SOS recognizes that this is a small amount and does not expect that additional funding would be required to meet

ASSUMPTION (continued)

these costs. However, the SOS also recognizes that many such bills may be passed by the General Assembly in a given year and that collectively the costs may be in excess of what the office can sustain with the core budget. Therefore, the SOS reserves the right to request funding for the cost of supporting administrative rules requirements should the need arise based on a review of the finally approved bills signed by the governor.

Oversight assumes the SOS could absorb the costs of printing and distributing regulations related to this proposal. If multiple bills pass which require the printing and distribution of regulations at substantial costs, the SOS could require additional resources.

Oversight notes that the **Joint Committee on Administrative Rules**, the **Department of Public Safety**, **Missouri State Highway Patrol**, the **Missouri Office of Prosecution Services** and the **Office of State Courts Administrator** have stated the proposal would not have a direct 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 organizations.

<u>FISCAL IMPACT -</u> <u>State Government</u>	FY 2020 (10 Mo.)	FY 2021	FY 2022	Fully Implemented (FY 2029)
GENERAL REVENUE FUND				
<u>Costs - DOC</u> (§§565.021, 579.015, 579.065, 579.068) Increase in incarceration expenditures	(\$5,239)	(\$12,825)	(\$52,328)	(\$180,325)
<u>Costs - SPD</u> (§§195.015 and 195.017) Personal service, fringe benefits and equipment and expense for additional APD(s)	<u>(Less than \$100,000)</u>	<u>(Less than \$100,000)</u>	<u>(Less than \$100,000)</u>	<u>(Less than \$100,000)</u>
ESTIMATED NET EFFECT ON THE GENERAL REVENUE FUND	<u>(Less than \$105,239)</u>	<u>(Less than \$112,825)</u>	<u>(Less than \$152,328)</u>	<u>(Less than \$280,325)</u>

FISCAL IMPACT -
Local Government

FY 2020
(10 Mo.)

FY 2021

FY 2022

Fully
Implemented
(FY 2029)

\$0

\$0

\$0

\$0

FISCAL IMPACT - Small Business

No direct fiscal impact to small businesses would be expected as a result of this proposal.

FISCAL DESCRIPTION

Under this act, if a substance is designated, rescheduled, or deleted as a controlled substance under federal law, the Department of Health and Senior Services shall promulgate emergency rules to implement such change within 30 days of publication of the change in the Federal Register, unless the Department objects to such change. If the Department promulgates emergency rules under this act, the rules may remain in effect until the legislature concludes its next regular session following the imposition of the rules.

Additionally, this act updates the schedules of controlled substances in Missouri to mirror the most recent update to the schedules in 19 CFR 30-1.002.

This act modifies the crime of murder in the second degree by adding language making a person who knowingly and unlawfully manufactures, delivers, or distributes a Schedule I or II controlled substance, excluding marijuana for medical use, and thereafter the controlled substance is the proximate cause of the death of another person who uses or consumes it. It shall not be a defense that the defendant did not directly deliver or distribute the controlled substance to the decedent.

Currently, unlawful possession of a controlled substance, except 35 grams or less of marijuana or any synthetic cannabinoid, is a Class D felony. This act adds an enhanced penalty if the defendant is an emergency care provider, a home health care employee, a hospice employee, an in-home care employee, a personal care assistant, or any other individual providing home health or personal care assistance services to patients. If such defendant knowingly and unlawfully possesses a controlled substance belonging to the patient or another member of the patient's household, the offense shall be a Class C felony.

Finally, this acts adds to the offense of trafficking drugs in the first degree knowingly distributing, delivering, manufacturing, producing, or attempting to do so more than 10 grams but less than 60 grams of fentanyl, or any derivative thereof or any mixture containing fentanyl, as a Class B felony and a Class A felony when the amount is 60 grams or more.

FISCAL DESCRIPTION (continued)

Additionally, this act adds to the offense of trafficking drugs in the second degree knowingly possessing, purchasing, or attempting to do so more than 10 grams but less than 60 grams of fentanyl, or any derivative thereof or any mixture containing fentanyl, as a Class C felony and a Class B felony when the amount is 60 grams or more.

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 Health and Senior Services
Department of Corrections
Department of Public Safety -
 Missouri State Highway Patrol
Joint Committee on Administrative Rules
Missouri Office of Prosecution Services
Office of State Courts Administrator
Office of Secretary of State
Office of State Public Defender



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January 22, 2019

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