

REVISED
SESSION OF 2021

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE SUBSTITUTE FOR SUBSTITUTE FOR SENATE
BILL NO. 273**

As Agreed to May 7, 2021

Brief*

House Sub. for Sub. for SB 273 would create the COVID-19 Small Business Relief Act (Act).

Definitions and Expiration (Section 1)

The bill would define terms including “business,” which would mean a sole proprietorship, partnership, limited partnership, limited liability partnership, limited liability company, or corporation that:

- Had 50 or fewer full-time equivalent employees during the period beginning March 12, 2021, and ending on the date such business files a claim pursuant to the bill;
- Was organized under Kansas law or authorized to do business in Kansas on March 12, 2020; and
- Was not a not-for-profit corporation or business entity.

The bill would define “order” to mean any order issued by any Kansas governmental entity related to the COVID-19 pandemic.

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

The bill would define “restriction” to mean any occupancy limitation, limitation on periods of operation, or the exertion by any governmental entity of other significant control on business resources or functionality related to the COVID-19 pandemic. Beginning May 31, 2021, any governmental entity requirement for the use of face masks related to the COVID-19 pandemic that contains enforcement requirements by Kansas businesses would be considered a “restriction” under the Act and subject to a claim for relief.

The bill would provide the Act would expire on January 1, 2025.

COVID-19 Small Business Relief Fund (Section 2)

The bill would establish in the State Treasury the COVID-19 Small Business Relief Fund (Fund) to be administered by the Legislative Coordinating Council (LCC) and would detail how expenditures from the Fund would be made.

The bill would require, prior to February 15, 2023, the Joint Committee on Special Claims Against the State (Joint Committee) to meet and review the claims that have been accepted by a claimant pursuant to the Act and report the Joint Committee’s recommendation to the LCC. On or before February 28, 2023, after receiving the Joint Committee’s recommendations, the LCC could authorize expenditures and approve such requests, including while the Legislature is in session. After LCC approval, the bill would require the LCC chairperson to authorize payment of the amount of relief to be paid to such claimant by the State from the Fund and notify any county or city of the relief to be paid to such claimant by the governmental entity from such entity’s fund established under the Act.

The bill would direct, on or before July 15, 2021, the Director of the Budget to determine the amount of moneys

received by Kansas identified as moneys from the federal government for aid to Kansas for coronavirus relief that:

- Are eligible to be used for the purposes of the Act;
- May be expended at the discretion of the state, in compliance with the Office of Management and Budget's uniform administrative requirements, cost principles, and audit requirements for federal awards; and
- Are unencumbered.

Such moneys would include those from the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act; the federal Coronavirus Preparedness and Response Supplemental Appropriation Act; the federal Families First Coronavirus Response Act; the federal Paycheck Protection Program and Health Care Enhancement Act; the federal Consolidated Appropriations Act, 2021; the American Rescue Plan Act of 2021; and any other federal law that appropriates moneys to the state for aid for coronavirus relief, including any such moneys received by Kansas after July 15, 2021.

Of the identified moneys, following the transfers required by 2021 Senate Sub. for Sub. for HB 2196 and 2021 Senate Sub. for HB 2208, the bill would require an amount not more than 25 percent of the remaining moneys available in special revenue funds to be determined, certified, and transferred to the Fund. To determine this amount to be certified and transferred, the bill would require, on or before September 15, 2021, the Strengthening People and Revitalizing Kansas (SPARK) Executive Committee, established by 2021 SB 159, to meet to determine the amount of moneys necessary to pay for the claims, compensation, expenses, costs, and repayments established in the Act.

Unless prohibited by federal law, moneys in the Fund would be used only for the purpose of paying:

- Claims as provided elsewhere in the Act;
- Compensation and other expenses paid to members of the Board;
- Administrative costs of the COVID-19 Business Relief Claims Board (created in Section 4 of the bill) and the Office of the Attorney General (OAG) related to the Act; and
- Any repayment required by the federal government.

The bill would allow, on and after April 1, 2023, any remaining moneys in the Fund to be used in any manner consistent with state and federal law.

COVID-19 Small Business Relief Claims Board (Section 3)

The bill would establish, under the jurisdiction of the Attorney General, the COVID-19 Small Business Relief Claims Board (Board). The Board would consist of one member appointed by the Governor; one member appointed by the President of the Senate; and one member appointed by the Speaker of the House of Representatives. The bill would require such appointments to be made on or before July 1, 2021. Each member of the Board would be:

- A Kansas resident;
- Selected with special reference to training and experience for duties imposed by the Act; and
- Recognized for outstanding knowledge and leadership in the fields of finance or business.

In addition, the bill would require at least one member of the Board be an attorney regularly admitted to practice law in Kansas.

The bill would require one member to be elected chairperson from among its members, and the Board would meet on call of such chairperson. A quorum would be two members and all actions taken would require a majority of the Board. Compensation and other expenses for members attending meetings of the Board would be provided in the same manner as for members of the Legislature. The Board could hire expert consultants to provide information and assistance and gather information as required to carry out the Board's duties. The bill would require the expert consultants to work in coordination and in compliance with staff at the Kansas Office of Recovery to ensure compliance with federal guidelines and requirements for moneys received related to the COVID-19 pandemic.

The bill would require, on or before September 15, 2021, the Board, in coordination with the Kansas Office of Recovery, to adopt policies and procedures in compliance with federal guidelines and requirements for moneys received related to the COVID-19 pandemic that are necessary to facilitate the settlement of claims through the process provided by the Act, including, but not limited to, the form and manner of submitting claims and the procedure for Board review of claims. The bill would authorize the Board to adopt rules and regulations to implement and administer the Act.

Claims Process (Section 4)

The Act would be administered by the Board, with the assistance and support of the OAG, and claims submitted under the Act would be for businesses impacted by an order making a restriction related to the COVID-19 pandemic.

The bill would require all claims under the Act to be filed in the period beginning October 1, 2021, and ending

December 31, 2021, in a form and manner provided by the Board. The Board would decide each claim based on the information submitted or otherwise obtained and no hearings would be required. The bill would require each claim include:

- Proof that the claimant is a business as defined by Section 1;
- A copy of the claimant's 2019 and 2020 Kansas income tax returns, if applicable;
- Proof of the claimant's business income in 2019, 2020, and 2021, if the claimant's business was in existence in such year; and
- An affidavit by an authorized representative of the business under penalty of perjury stating:
 - Whether the claimant was ordered by a governmental entity to cease all operations or was otherwise restricted in such claimant's operation;
 - The number of days that the claimant was ordered by a governmental entity to cease all operations and the number of days such claimant was restricted in any way in its operations;
 - The governmental entity that issued each applicable order;
 - A description of how the claimant was impacted financially by each order;
 - Whether the claimant's operations were deemed essential or not essential under the Kansas Essential Functions Framework pursuant to an executive order issued by the Governor or an order issued by a local authority;
 - The source and amount of any governmental grants related to the COVID-19 pandemic that

were received by the claimant or governmental loans related to the COVID-19 pandemic made to the claimant that were forgiven by a governmental entity;

- The amount of any unemployment benefits the claimant received from the State;
- Whether the claimant has received any tax refund, rebate, or other tax relief related to the COVID-19 pandemic; and
- The percentage of the relief granted that the claimant projects to use for employee pay, salary, compensation, or benefits.

The claimant also would be required to submit any other information required by the Board to resolve the claim.

Confidentiality; Meetings of the Board

The bill would state any information received pursuant to the process could be disclosed only to the Board or its employees; the OAG or its employees, in support of the Board's duties; or federal or state agencies when necessary in the performance of their duties or functions. Otherwise, information submitted by a business pursuant to the claims process could not be disclosed and would not be subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding. Such information also would not be subject to the Kansas Open Records Act. The bill would state these provisions would not be subject to legislative review and would not expire.

Notwithstanding any other provision or law, meetings of the Board to decide a claim or conduct an informal reconsideration hearing would not be subject to the Kansas Administrative Procedures Act or the Kansas Open Meetings Act.

Evaluation for Relief

The bill would require the Board to consider a list of factors in evaluating whether a claimant is awarded compensation under the Act:

- The duration and nature of the impact of each order making a restriction, including:
 - The imposition of any curfew, occupancy restriction, or other restriction on business operations; and
 - Any added duties prescribed by law on businesses in order to comply with any governmental order that applied to business operations;
- Reasonable costs related to the filing of the claim under the Act;
- Any extraordinary contributions by the business that benefited the general public of Kansas;
- Any relevant factors listed in the Kansas Eminent Domain Procedure Act, the Kansas condemnation law, or the Kansas Private Property Protection Act;
- The moneys available for distribution from the applicable fund or funds and the number of claims against such fund or funds;
- Any governmental grants related to COVID-19 that were received by the claimant or governmental loans related to COVID-19 made to the claimant that were forgiven by a governmental entity;
- The amount of any unemployment benefits the claimant received from the State;

- Whether the claimant has received any tax refund, rebate, or other tax relief related to the COVID-19 pandemic;
- The percentage of the relief granted that the claimant projects to use for employee pay, salary, compensation or benefits; and
- The extent to which non-governmental orders or restrictions and consumer behavior contributed to the monetary loss claimed by the business. The Board would be required to quantify the amount of the claimed loss attributable to non-governmental orders or restrictions and consumer behavior and could not grant relief for such amount.

Awards for Relief; Decisions; Calculations for County and City Payments

The bill would require the Board, on or before September 30, 2022, to decide and issue a written decision that either grants or denies relief for each claim filed under the Act, and would require the issuance of all written decisions on the same date. Also, the bill would require such decisions:

- Specify the amount of relief to be paid to the claimant as calculated under this section and approved by the Board;
- Identify the governmental entity that issued the applicable order making a restriction;
- Assign the amount of relief to be paid to the claimant according to the governmental entity that issued the applicable order making a restriction;
- Notify the claimant that if the claimant does not use at least the percentage of the relief such claimant

projected to use for employee pay, salary, compensation, or benefits for such items, such relief may be subject to repayment; and

- Notify the claimant of the right to an informal reconsideration as provided in the bill.

The bill would provide any relief to be paid would not be assigned to a county if the applicable order issued by the county was less restrictive than an applicable order issued by the State. If the applicable order issued by the county was the same as an applicable order issued by the State, the Board could assign up to 50 percent of the relief to be paid to the county based on availability of moneys in such county's local relief fund.

The bill would provide any relief to be paid would not be assigned to a city if the applicable order issued by the city was the same or less restrictive than an applicable order issued by the State or the county in which such city is located.

Declination of Relief

The claimant would be required to notify the Board in writing whether the claimant declines such relief within 15 days of receipt of the written decision. If the claimant does not make such notification, the claim would be deemed accepted.

Denial

A written decision that denies relief would be required to specify the reasons for such decision and notify the claimant of the right to an informal reconsideration. The bill would require the claimant notify the Board in writing whether the claimant challenges such decision within 15 days of receipt of the written decision.

Request for Reconsideration

The bill would provide a claimant may request reconsideration of the decision of the Board by requesting an informal hearing conducted by the Board. Following such hearing, the Board would be required to issue a written decision either granting or denying relief. A claimant would be required to notify the Board in writing whether the claimant declines such relief within 15 days of receipt of the written decision. If the claimant does not make such notification, the claim would be deemed accepted.

The bill would provide that on or before January 31, 2023, after the Board has issued all written decisions pertaining to reconsideration of claims, the Board would be required to report all accepted claims to the Joint Committee on Special Claims Against the State in an open meeting, and that committee to review and make recommendations on such claims to the LCC.

Limitations

The bill would prohibit any claimant pursuing a claim under the Act from filing any claim in a civil action against the State and all subdivisions of government and each of their officers, employees, agents, and representatives, seeking damages or any other monetary relief based on an order making a restriction related to the COVID-19 pandemic, including, but not limited to, a claim under Kansas Emergency Management Act (KEMA) or the Kansas Private Property Protection Act, or any claim in a civil action related to compensation for a governmental taking.

A claimant would not be prohibited from filing any claim seeking injunctive, declaratory or other nonmonetary relief.

The bill would state nothing in the Act would create any property right or right in action, and the courts would have no jurisdiction to entertain any action against the Board, the

Attorney General, or the State of Kansas, or any officer or agent thereof, based on a claim that the claimant should have received different or better treatment pursuant to the Act, and no determinations made by the Board pursuant to the Act would be subject to appeal or judicial review.

Local Relief Funds (Sections 5-6)

The bill would require any board of county commissioners or governing body of a city that issues, or previously issued, an order making a restriction under the Act to establish a county or city COVID-19 small business relief fund (local relief fund), respectively, to designate an officer of the county or city as the administrator of the local fund.

The administrator would be required to determine the amount of moneys received by the county or city on and after January 1, 2021, identified as moneys from the federal government for coronavirus relief aid to the county or city that may be expended at the discretion of the county or city and are unencumbered. Of such identified moneys, the bill would require 35 percent be determined, certified, and transferred from county or city funds to the local relief fund, with a copy of the certification provided to the Director of Legislative Research and to the Attorney General.

Unless prohibited by federal law, moneys in a local relief fund could be used only to pay relief amounts as authorized by the LCC under the Act. Upon receiving notification from the Attorney General that relief is to be paid to a claimant from the local relief fund, the county or city would be required to pay such relief and notify the Attorney General of payment.

Beginning April 1, 2023, any remaining moneys in a local relief fund could be used in any manner consistent with state and federal law, upon action of the board of county commissioners or the city governing board to abolish the local relief fund on December 31, 2024. The bill would declare all

pending or future claims against such local relief fund to be null and void.

Severability (Section 7)

The bill would provide the provisions of the Act would be severable and, if any portion of the Act or application to any person or circumstance is held unconstitutional or invalid, the invalidity would not affect other portions of the Act that could be given effect without the invalid portion or application, and the applicability of such other portions of the Act to any person or circumstance would remain valid and enforceable.

Study by Legislative Division of Post Audit (Section 8)

The bill would require the Legislative Post Audit Committee to direct the Legislative Division of Post Audit (LPA) to conduct a study of the performance of the Board in carrying out the actions required by the Act, including an analysis of the methods used by the Board in making recommendations to the Joint Committee. The bill would require the study to include a randomized study of at least 10 percent of the total number of claims filed under the Act, and the study could include information related to the process used by the Board to consider reconsideration requests. LPA would be required to report to the Joint Committee and provide a summary of the findings of the study prior to January 31, 2023. The provisions of this section would expire on January 1, 2025.

Amendment to KEMA (Section 9)

The bill would amend a KEMA section regarding compensation to state that nothing in the section authorizes compensation for intangible losses occurring during the COVID-19 state of disaster emergency.

Effective Date (Section 11)

The bill would be in effect upon publication in the *Kansas Register*.

Conference Committee Action

The Conference Committee agreed to replace the contents of the bill, as it entered conference, with the contents of Sub. for SB 286, as amended by Senate Committee of the Whole, with the following modifications:

- Add “small” to the name of the Act, Board, and related funds;
- Administer the moneys for the claims through the new LCC fund, rather than through a new OAG fund;
- Require recommendations by the Joint Committee to the LCC regarding accepted claims;
- Require the SPARK Executive Committee to determine the amount necessary for transfer to the Fund and change the amount to be transferred from 35 percent of remaining available moneys to not more than 25 percent of remaining available moneys;
- Adjust the claims timeline and relevant dates;
- Remove language allowing payment of certain compromises, settlements, and final judgments from the Fund;
- Remove language allowing the Attorney General, with approval of the State Finance Council, to compromise or settle certain claims;

- Add provisions for an informal reconsideration hearing;
- Require additional information from claimants to be provided and such information to be considered by the Board;
- Allow a claimant to decline relief;
- Clarify the timing and contents of the Board's decisions; and
- Require an LPA study of the performance of the Board in carrying out the actions required by the Act.

Background

As the bill entered conference, it contained provisions related to the tobacco Master Settlement Agreement. The Conference Committee agreed to replace these contents with the contents of Sub. for SB 286, as amended by the Senate Committee of the Whole and further modified by the Conference Committee.

Sub. for SB 286

The bill was introduced by the Senate Committee on Assessment and Taxation at the request of an attorney involved in litigation regarding businesses impacted by the State's response to the COVID-19 pandemic. As introduced, the bill contained provisions providing for income tax credits for impacted businesses, providing for the reimbursement to certain business owners of property taxes after December 31, 2019, if the business was shut down or its capacity limited, and creating a business loan forgiveness program.

Senate Committee on Assessment and Taxation

In the March 19, 2021, and March 22, 2021, hearings in the Senate Committee on Assessment and Taxation, an attorney and representatives of the Kansas Chamber and the Wichita Regional Chamber of Commerce provided **proponent** testimony on the bill. Representatives of the Kansas Association of Counties (KAC) and League of Kansas Municipalities (LKM) provided **opponent** testimony on the bill.

Senate Committee on Judiciary

The Senate Committee on Judiciary discussed the contents of the bill and a proposed balloon amendment on March 26, 2021, with an attorney and representatives of the KAC, Kansas Restaurant and Hospitality Association, LKM, the Wichita Regional Chamber of Commerce, and the Sedgwick County Commission providing comments. A representative of the Kansas Chamber provided written-only comments.

On March 29, 2021, the bill was withdrawn from the Senate Committee on Assessment and Taxation and referred to the Senate Committee on Judiciary.

In the Senate Committee hearing on May 3, 2021, an attorney and representatives of the Kansas Chamber and Kansas Restaurant and Hospitality Association testified as **proponents** of proposed substitute language.

Representatives of AFT Kansas, KAC, and LKM provided neutral testimony on the proposed substitute language.

The Senate Committee replaced the contents of the bill with the language described above and recommended a substitute bill based on the proposed language, modified to change the percentage of federal funds that would be transferred to each fund created by the bill from 25 percent to

100 percent. [Note: the Conference Committee did not retain this amendment.]

Senate Committee of the Whole

On May 4, 2021, the Senate Committee of the Whole adopted amendments to:

- Require the Attorney General to publish award recipient information on the OAG website [Note: the Conference Committee did not retain this amendment];
- Change the percentage of federal funds that would be transferred to each fund created by the bill from 100 percent to 35 percent [Note: the Conference Committee further modified these provisions];
- Clarify the effect of filing a claim under the Act on a claimant's ability to file claims under other areas of law [Note: the Conference Committee retained this amendment]; and
- Create the COVID-19 Relief Fund of the LCC and direct any remaining moneys from the COVID-19 Business Relief Fund to this LCC fund [Note: the Conference Committee further modified this amendment].

Fiscal Information

No fiscal note on the language of the substitute bill was available when the Senate Committee of the Whole took action.

COVID-19; COVID-19 Small Business Relief Act; COVID-19 Small Business Relief Fund; COVID-19 Small Business Relief Board

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