

SESSION OF 2021

**SUPPLEMENTAL NOTE ON SUBSTITUTE FOR SENATE
BILL NO. 286**

As Recommended by Senate Committee on
Judiciary

Brief*

Sub. for SB 286 would create the COVID-19 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.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

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 Business Relief Fund (Section 2)

The bill would establish in the State Treasury the COVID-19 Business Relief Fund (Fund) to be administered by the Attorney General, and would detail how expenditures from the Fund would be made.

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 transfers required by 2021 Senate Sub. for Sub. for HB 2196 and 2021 Senate Sub. for HB 2208, the bill would require 100% of the remaining moneys available in special revenue funds be determined, certified, and transferred to the Fund.

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;
- Compromises, settlements, and final judgments arising from claims related to an order making a restriction that are brought against the State, including claims under the Kansas Emergency Management Act (KEMA) or Kansas eminent domain laws;
- Administrative costs of the COVID-19 Business Relief Claims Board (created in Section 4 of the bill) and the Office of the Attorney General related to the Act; and
- Any repayment required by the federal government.

The bill would allow the Attorney General to compromise or settle related claims on behalf of the State, with the approval of the State Finance Council, which would have 60 days to approve or deny the settlement after receiving the proposed settlement from the Attorney General. Approval could also be given by the Legislature when in session. The bill would require payment of a final judgment be made from

the Fund if there has been a determination of any appeal taken from the judgment or if the time for appeal has expired.

The bill would permit, beginning January 1, 2023, any remaining moneys in the Fund to be used in any manner consistent with state and federal law. On December 31, 2024, the Fund would be abolished and all pending or future claims against the Fund would be declared null and void.

COVID-19 Business Relief Claims Board (Section 3)

The bill would establish, under the jurisdiction of the Attorney General, the COVID-19 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 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, on or before November 1, 2021, the Board to adopt policies and procedures 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 Office of the Attorney General (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 January 1, 2022, and ending March 31, 2022, 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, 2020, and 2021 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; and
- 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 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 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 consider a list of seven 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; 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 December 30, 2022, to decide and issue a written decision that either grants or denies relief for each claim filed under the Act. The bill would require the Board report each decision to the Attorney General and claimant. If the decision grants relief, within 30 days of receipt of such decision, the Attorney General would be required to authorize payment from the Fund and notify any county or city of the relief to be paid to such claimant by such governmental entity from such entity's COVID-19 Business Relief Fund (local relief fund), established by Section 5 or 6. Also, the bill would require such decisions to:

- 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; and

- Assign the amount of relief to be paid to the claimant according to the governmental entity that issued the applicable order making a restriction.

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.

Exhaustion of Funds

The bill would require, if the Attorney General determines all moneys in the Fund or local relief funds are exhausted, the Attorney General to certify such determination and publish notice in the *Kansas Register*. On and after the date of publication of such notice, pending or future claims against such fund would be declared to be null and void.

Limitations

The bill would prohibit any claimant pursuing a claim under the Act from filing any claim against the State and all subdivisions of government and each of their officers, employees, agents, and representatives alleging damages or any other monetary claim based on an order making a restriction related to the COVID-19 pandemic, including, but not limited to, a claim under KEMA or the Kansas Private Property Protection Act, or any claim 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 and 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 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 100% 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 calculated by the Board 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 January 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.

Amendment to KEMA (Section 8)

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 10)

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

Background

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 COVID-19. 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.

Fiscal Information

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

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