

FISCAL IMPACT OF PROPOSED LEGISLATION

81st Oregon Legislative Assembly – 2021 Regular Session
Legislative Fiscal Office

Measure: HB 2323 - 5

*Only Impacts on Original or Engrossed
Versions are Considered Official*

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Measure Description:

Prohibits any person from knowingly or with reckless disregard communicating materially false statement with intent to mislead electors about the date of an election, the deadline for delivering a ballot, the voter registration deadline, the method of registering to vote, locations at which an elector may deposit a ballot, qualifications of electors, or voter registration status, within 30 days of a primary election or special election or within 60 days of a general election.

Government Unit(s) Affected:

Department of Justice (DOJ), Secretary of State (SOS), Oregon Judicial Department (OJD), Oregon Government Ethics Commission (OGEC), District Attorneys and their Deputies (DAs)

Summary of Fiscal Impact:

Costs related to the measure are indeterminate at this time - See explanatory analysis.

Analysis:

House Bill 2323, as amended by the -5 amendments, prohibits any person from knowingly or with reckless disregard communicating or causing to communicate a false statement of material fact that is intended to mislead electors about the date of an election, the deadline for submitting a ballot, the deadline for registering to vote, the method of registering to vote, locations to submit a ballot, voter registration qualifications, or voter registration status. This prohibition applies to any such communication within 30 calendar days before a primary election or special election, or any such communication within 60 calendar days before a general election. The measure authorizes the Attorney General to institute a civil proceeding to enjoin any such violation. The circuit court shall give priority to the hearing and determination. Pending final determination, the court may at any time enter an injunction, prohibition or restraining order, or take any other action as the court deems proper. Upon proof of any violation, the court shall impose a civil penalty of not more than \$10,000, which is the exclusive remedy for communicating a materially false statement intended to mislead electors.

The measure requires any imitation voters' pamphlet that is printed or circulated, including by electronic means, to be clearly marked as not official. The Secretary of State (SOS) or Attorney General may impose a civil penalty of \$10,000 for failing to clearly mark an imitation voters' pamphlet as unofficial. The measure prohibits any person from registering as a paid petition circulator if the person has had a civil penalty imposed for failing to clearly mark an imitation voters' pamphlet as unofficial. The measure takes effect on January 1, 2022.

Department of Justice

The fiscal impact to the Department of Justice (DOJ) is indeterminate. The measure authorizes the Attorney General to institute a civil proceeding and impose a \$10,000 civil penalty against anyone who communicates a materially false statement intended to mislead electors. The measure also authorizes the Attorney General to impose a \$10,000 civil penalty against anyone who fails to clearly mark an imitation voters' pamphlet as unofficial. While the measure does not require the Attorney General to institute such a civil proceeding or impose such civil penalties, this fiscal impact statement assumes that the Attorney General/DOJ would do so.

With respect to failing to clearly mark an imitation voters' pamphlet as unofficial, both the Attorney General and the Secretary of State are authorized to impose a civil penalty against anyone who fails to do so. The fiscal impact would depend on which agency takes the primary enforcement role for these violations. If SOS were to take the primary enforcement role, the SOS Elections Division would institute a civil proceeding and the DOJ Civil Enforcement Division would represent and bill SOS for legal services under DOJ's standard billable hours charge. However, if the DOJ Civil Enforcement Division were to take the primary enforcement role, then DOJ would be unable to bill SOS for reviewing, investigating and potentially litigating these complaints. Consequently, any costs the Civil Enforcement Division would incur to enforce these violations would become a General Fund obligation. Since SOS and DOJ are both authorized to enforce imitation voters' pamphlets, it is unclear whether the Civil Enforcement Division or the SOS Elections Division would conduct the initial review and investigation for each violation. If SOS were to conduct the initial review and investigation, the fiscal impact to DOJ would be lessened. If the DOJ Civil Enforcement Division were to take the primary enforcement role, the fiscal impact to DOJ would depend on how many violations occur, how many complaints the Civil Enforcement Division receives and investigates, how many lawsuits the division files in the circuit courts, and how long it would take to adjudicate and/or settle these cases, all of which is presently unknown. It should also be noted that these cases would only occur within a discrete timeframe, i.e., in the months prior to the May or November election cycles.

With respect to communicating a materially false statement intended to mislead electors, the DOJ Civil Enforcement Division would take the primary enforcement role for these violations. Consequently, DOJ staff time would be needed to review, investigate, and potentially litigate these complaints. This prohibition uses similar language to ORS 260.532, which prohibits any person from communicating a false statement of material fact relating to any candidate, political committee, or measure. Due to its similarities to ORS 260.532, DOJ anticipates that the Civil Enforcement Division would receive anywhere from 50-100 complaints each election cycle and need to litigate 3-5 cases each election cycle. It should also be noted that these cases would only occur within a discrete timeframe, i.e., during the May or November election cycles, and cases would be more likely to be filed for violations relating to statewide or federal elections. DOJ estimates that the Civil Enforcement Division would be able to absorb as many as 10 cases per election cycle into the division's existing workload without adding additional staff. If, for some reason, the caseload was to exceed 10 cases per election cycle, DOJ might need to request additional position authority at that time. The fiscal impact to DOJ would depend on how many violations occur, how many complaints the Civil Enforcement Division receives and investigates, how many lawsuits the division files in the circuit courts, and how long it would take to adjudicate and/or settle these cases, all of which is presently unknown. Additionally, DOJ would be unable to bill another state agency for investigating and litigating cases related to communicating a materially false statement, as the measure directs the Attorney General to enforce these violations. Consequently, any costs the Civil Enforcement Division would incur to enforce these violations would become a General Fund obligation.

It should also be noted that the measure does not specify where the civil penalties imposed for communicating a materially false statement intended to mislead electors would be deposited. The general rule, codified in ORS 260.995(8), is that that civil penalties related to election law violations are deposited into the General Fund.

Secretary of State

The fiscal impact to SOS is indeterminate. The measure authorizes SOS to impose a \$10,000 civil penalty against anyone who fails to clearly mark an imitation voters' pamphlet as unofficial. While the measure does not require SOS to impose such a civil penalty, this fiscal impact statement assumes that SOS would impose such a penalty.

The measure authorizes both the Attorney General and the Secretary of State to impose a civil penalty against anyone who fails to clearly mark an imitation voters' pamphlet as unofficial. The fiscal impact would depend on which agency takes the primary enforcement role of policing these violations. If SOS were to take the primary enforcement role, the Elections Division would institute a civil proceeding and the DOJ Civil Enforcement Division would represent and bill SOS for legal services under DOJ's standard billable hours charge. However, if the DOJ Civil Enforcement Division were to take the primary enforcement role, then SOS would incur no costs. Since SOS

and DOJ are both authorized to police imitation voters' pamphlets, it is unclear whether the Civil Enforcement Division or the SOS Elections Division would conduct the initial review and investigation for each violation.

If the Elections Division were to take the primary enforcement role, the division would conduct the initial review and investigation. If the Elections Division were to determine that someone failed to clearly mark an imitation voters' pamphlet as unofficial, the division would then initiate a civil proceeding against that person in a state circuit court, which DOJ would litigate and/or settle on the division's behalf. The fiscal impact to SOS would depend on how many violations occur, how many complaints the Elections Division receives and investigates, how many lawsuits the division files in the circuit courts, and how long it would take to adjudicate and/or settle these cases, all of which is presently unknown.

Oregon Judicial Department

The measure would have a minimal fiscal impact on the Oregon Judicial Department (OJD). OJD anticipates that the measure would result in a small number of additional case filings in the circuit courts, some of which might be appealed to the Court of Appeals. The measure would also require circuit courts to give priority to any actions involving communicating a materially false statement, including its hearing and final determination, which would result in other cases being decided later than they otherwise would be.

Oregon Government Ethics Commission

The measure would have no fiscal impact on the Oregon Government Ethics Commission (OGEC). OGEC's jurisdiction does not extend to election-related matters, unless they involve a public official covered by the parameters of ORS Chapter 244. Even if a civil proceeding authorized by this measure were to fall within of ORS Chapter 244, such investigations are part of the commission's regular business.

District Attorneys and their Deputies

The measure would have no fiscal impact on District Attorneys and their Deputies. While the measure does authorize another prosecutor to investigate and litigate a matter when the Attorney General is unable to do so, most, if not all, of the enforcement actions would be conducted by the Attorney General/DOJ or SOS.