

FISCAL IMPACT OF PROPOSED LEGISLATION

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

Measure: HB 2323 - A

*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, A-engrossed, 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 within 60 calendar days before a general election, including by electronic or telephonic means. The Secretary of State (SOS) may institute civil proceedings in a state circuit court to enjoin any such violation, unless SOS or a candidate for SOS commits the violation, in which case the Attorney General may institute civil proceedings to enjoin the violation. In any such civil action, the circuit court may at any time enter such injunctions, prohibitions or restraining orders, or take any other actions as the court deems proper. A restraining order, prohibition or injunction may be issued without proof of injury or damage to any person. The circuit court shall give priority to any such hearing and determination and shall award the prevailing party reasonable attorney fees at trial and on appeal. Upon proof of a violation, the court shall impose a civil penalty of not more than \$10,000, which is the exclusive remedy for any such violation. All penalties recovered shall be paid into the State Treasury and credited to the General Fund.

The measure clarifies that ORS 260.532, which prohibits any person from knowingly or with reckless disregard communicating a false statement of material fact about a candidate, political committee or measure, applies to electronic or telephonic communications, including advertisements circulated by electronic or telephonic means.

The measure requires any imitation voters' pamphlet that is printed or circulated, including by electronic means, to be clearly marked as not official. The SOS or Attorney General may impose a civil penalty of \$10,000 for failing to clearly mark an imitation voters' pamphlet as unofficial. All penalties recovered shall be paid into the State Treasury and credited to the General Fund. The measure also 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. It takes effect on January 1, 2022.

Secretary of State

The measure would have an indeterminate fiscal impact on SOS. It authorizes SOS to institute a civil proceeding against anyone who knowingly or with reckless disregard communicates a statement of material fact that is intended to mislead voters about an election or voting. The measure also authorizes SOS to impose a \$10,000 civil penalty against anyone who fails to clearly mark an imitation voters' pamphlet as unofficial. The measure does not, however, require SOS to institute such civil proceedings or impose such civil penalties. If SOS were to never do so, the measure would have no fiscal impact on SOS. This fiscal impact statement assumes that SOS would institute such proceedings and impose civil penalties.

Currently, when the SOS Elections Division receives a complaint, the division investigates the complaint pursuant to ORS 260.345. The measure would not change that process. However, if the Elections Division were to determine that someone knowingly or with reckless disregard communicates a statement of material fact that is intended to mislead voters about an election or voting, the division would file a civil proceeding in a state circuit court, which the Department of Justice would litigate and/or settle on behalf of the Elections Division. With respect to such civil proceedings, 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.

The measure also authorizes both SOS and the Attorney General to impose a civil penalty against anyone who fails to clearly mark an imitation voters' pamphlet as unofficial. The fiscal impact to SOS would depend on which agency takes the primary enforcement role of enforcing such 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 impose civil penalties for improperly marked 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. With respect to imitation voters' pamphlets, the fiscal impact to SOS thus 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.

Department of Justice

The measure would have an indeterminate fiscal impact on DOJ. The measure authorizes SOS to institute a civil proceeding against anyone who knowingly or with reckless disregard communicates a statement of material fact that is intended to mislead voters about an election or voting, and DOJ would represent SOS in these proceedings. The measure 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 communicating a materially false statement intended to mislead electors about an election or voting, the DOJ Civil Enforcement Division would represent SOS in these civil proceedings, for which SOS would be charged for legal services under the department's standard billable hours charge. Since SOS would have the primary enforcement role, the Civil Enforcement Division would not conduct the initial review and investigation for each case, which would lessen the impact to DOJ. It should also be noted that these cases would only occur within a discrete timeframe, i.e., during the November or May election cycles, and cases are more likely to be filed for violations relating to statewide or federal elections.

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 improperly marked 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.

Overall, DOJ estimates that it 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.

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 civil proceedings alleging the communication of a materially false statement intended to mislead voters about elections and voting, including its hearing and final determination. By giving priority to these cases, other circuit court cases would be decided or adjudicated 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 SOS or the Attorney General/DOJ.