F I S C A L I M P A C T R E P O R T

SPONSOR Ezzell **ORIGINAL DATE** 02/06/13 **LAST UPDATED** **HB** 302

SHORT TITLE Unemployment Benefits & Drug Use **SB**

ANALYST Trowbridge

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$0.0	$17.7	$0.0	$17.7	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
New Mexico Department of Workforce Solutions (WSD)
Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

HB 302 would require unemployed individuals who file a claim for unemployment benefits to certify each week on their claim for benefits that they did not become unemployed or failed to secure employment because they tested positive for illegal drug use in a test administered or required by the individual's last employer or by a prospective employer. HB 302 requires the WSD Secretary to adopt rules addressing this eligibility change. The bill also includes language to have drug test results classified as confidential and not subject to disclosure to the public. HB 302 would take effect July 1, 2013.

FISCAL IMPLICATIONS

The fiscal impact to WSD includes the costs for expenses associated with IT-related and adjudication changes. This project will require programming changes for the automated Unemployment Insurance (UI) claims system, as well as application programming changes through code and in the database. WSD IT staff will also need to include the capability of incident reporting statistics for this category of suspension of benefits. WSD estimates the cost for this will be approximately $17,697.00.

SIGNIFICANT ISSUES

The AGO indicates the proposed disqualification of persons from receiving unemployment benefits raises due process considerations given that the disqualification is based solely on a positive drug screening conducted by an employer. Such persons may or may not have been adjudicated guilty of using illegal substances, and denying them unemployment benefits could be problematic.

WSD indicates that pursuant to the Middle Class Tax Relief and Job Creation Act of 2012, states are allowed to deny unemployment compensation benefits to an applicant who tests positive in two limited circumstances that are directly related to the "fact or cause" of the individual's unemployment. First, states are allowed to deny unemployment compensation if the individual was terminated from employment with his or her most recent employer for the unlawful use of drugs. Second, states may deny unemployment compensation to an applicant who tests positive for unlawful use of controlled substances if the only work suitable for that individual is in an occupation that regularly conducts drug testing.

WSD states that as drafted, HB 302 requires an applicant for unemployment compensation to certify that the individual did not become unemployed because the individual tested positive for illegal drug use in a test administered or required by the individual's employer. Additionally, HB 302 requires the applicant to certify on a weekly basis that the individual did not fail to secure employment because they tested positive for illegal drug use in a test administered or required by a prospective employer. Because the requirements are directly related to the "fact or cause" of the individual's unemployment and do not require any additional drug testing of the applicant before the applicant is allowed benefits, this amendment seems to be allowable pursuant to the Middle Class Tax Relief and Job Creation Act of 2012. Further, the requirement is in conformity with federal law regarding unemployment compensation, according to an informal opinion from the United States Department of Labor.

Nevertheless, WSD expresses some concerns with implementing the bill as drafted. From a process standpoint, the online and telephone processes for filing a claim will have to be amended to include a specific question for the claimant to certify regarding whether the separation from employment occurred due to a failure to pass a drug test administered or required by the employer. The questionnaires provided to the employer must also be amended to include questions to confirm the statement from the claimant regarding allegations of a failed drug test. Similarly, the online and telephone processes for certifying a claimant's work search will have to be amended to include a specific question for the claimant to certify regarding whether he or she failed to secure employment due to a failed drug test.

Additionally, WSD states that benefits may not be denied solely on the claimant's certification that he or she was terminated based on a positive test for illegal drug use at the initial claim or certification. Instead, the issue would have to be adjudicated; this means that an adjudicator from WSD will have to contact the employer for verification that the discharge was due to the positive test for illegal drug use or that the individual was not hired because he or she failed or refused a drug test. The process will likely be that during an applicant's initial application, he or she will be asked if either he was terminated from employment because of a positive test for illegal drug use. Thereafter, during the weekly certification process, the applicant will be asked if s/he was not hired because s/he failed a drug test. Regardless of the applicant's response, an adjudicator from the WSD will investigate further to determine whether the employer will verify

the reason for the termination or for the failure to hire. WSD states that typically, these types of investigations into the reason for the employment separation are already conducted by the WSD.

As a result, the WSD anticipates an estimated increase of 500-1000 issues created, resulting in an additional number of determinations adjudicated and appeals decided. Additional questions would need to be added to the Interactive Voice Response System and on-line certification; new fact-finding questionnaires would need to be created and appeal forms and decisions would need to be updated.

The revised 51-1-5(B) requires the Secretary to prescribe rules requiring the certification. An additional consideration for the adjudication of these issues is that the prescribed rules must be consistent with the requirements of Section 303(1)(1) of the Social Security Act. Essentially, the rules and procedures for adjudication must be established to ensure that there are no delays in the determinations of eligibility for unemployment compensation. Because similar investigations and adjudications are already being conducted by WSD, it would not be difficult for the Secretary to prescribe rules to ensure that there are no delays in the determinations of eligibility for unemployment compensation.

OTHER SUBSTANTIVE ISSUES

WSD states that from a practical standpoint, if a claimant is terminated due to a positive test for illegal drug use, the claimant may already be disqualified from receiving benefits because the claimant was terminated for misconduct under the current unemployment compensation law. Whether the claimant is denied benefits under the current or amended law, if the termination or failure to hire for the reason of a failed drug test is disputed, there are additional considerations regarding evidentiary requirements.

Specifically, WSD notes that an agency decision must be based on substantial evidence (Rule 1-077). In practice, although the agency need not strictly adhere to the Rules of Evidence, any critical piece of evidence that forms the basis of a decision should pass formal evidentiary standards. Under these principles, if drug test results are to form the basis for a decision to deny UI benefits, the party trying to prove a failed drug test must do so with admissible evidence. Documentation of drug test results are hearsay, but are generally admissible under the business records exception to the hearsay rule. The business records exception requires a qualified witness to lay the foundation for such documentation. That witness must be able to testify, based on personal knowledge, that the documents proffered were kept in the regular course of business, and that it was the regular practice of the sponsoring party to make the memorandum, report, record, or data compilation, (NMRA 11-803). Thus, if a failed drug test is to provide the basis for a denial of UI benefits, then documentary evidence will not, on its own be sufficient. Rather, such evidence must be proffered through a qualified foundation witness. Generally, when it comes to lab test results, the foundational witness should be from the lab that created the record. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 388, 210 P.3d 804, 814, rehearing denied (June 17, 2009). NMRA Rule 11-803. Notably, except for certain self-authenticating records, the elements needed to meet this hearsay exception must be shown "by the testimony of the custodian or other qualified witness…."

[1] New Mexico's business records exception reads as follows:

> **F. Records of Regularly Conducted Activity.** A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses,

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Paragraph K of Rule 11-902 NMRA or Paragraph L of Rule 11-902 NMRA, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

TT/bm