

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 02/09/13

SPONSOR Moores LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Unemployment Benefits and Drug Use SB 465

ANALYST Aledo-Sandoval

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicate to HB 139, with the exception of the addition of the word “work” in front of the word “injury” on page 3, lines 6 and 14.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)

Attorney General’s Office (AGO)

Administrative Office of the Courts (AOC)

General Services Department (GSD)

Workers’ Compensation Administration (WCA)

### SUMMARY

#### Synopsis of Bill

Senate Bill 465 (SB 465) amends existing drug and alcohol provisions contained in the Workers’ Compensation Act. The proposed amendment separates the intoxication and willfulness provisions and combines intoxication and drug abuse language into Section 52-1-12.1. The current law states that a worker was noncompensable only if they were intoxicated while intentionally or willfully causing injuries.

SB 465 allows for the reduction of indemnity benefits proportionate to the contribution of drugs and alcohol or misuse of prescription drugs to a worker’s injury or death. The percentage of reduction shall be determined by a Workers’ Compensation Judge.

The bill would add the misuse of prescription drugs as a basis for reduction of benefits, and would eliminate the exception in the current Act for drugs otherwise lawfully dispensed to the worker based on a properly issued prescription.

SB 465 would also expand permissible drug and alcohol testing procedures by allowing testing other than that conforming to United States Department of Transportation procedures so long as such tests meet standards generally accepted in the medical community.

Employers of ten or more that do not implement a post-accident drug testing policy are prohibited from claiming a reduction in compensation benefits. A worker's refusal to submit to pre or post-accident drug or alcohol testing would constitute an admission of intoxication. SB 465 also repeals Section 52-1-12 NMSA 1978.

### **FISCAL IMPLICATIONS**

The Workers' Compensation Administration (WCA) states that SB 465 will not have a fiscal impact on the agency. However, the WCA does state that large employers or their insurers will face costs for the bill's required implementation of post-accident testing.

### **SIGNIFICANT ISSUES**

According to the Attorney General's Office (AGO), SB 465 appears to address and resolve ambiguities and possible conflicts between NMSA 1978, Sections 52-1-11, 52-1-12 and 52-1-12.1 on the issue of causation, as identified and discussed at length by the New Mexico Court of Appeals in *Villa v. City of Las Cruces*, 2010 NMCA-099, 148 N.M. 668.

The AGO also notes that SB 465 adds the misuse of prescription drugs by a worker as a possible basis for a reduction in compensation under the Act, but fails to define or provide guidance on what would constitute such misuse.

The AGO highlights that the post-accident alcohol and drug testing provision may give rise to constitutional issues including the following:

1. To the extent that the bill can be construed to compel employers to mandate post-accident alcohol or drug testing for injured employees, the conduct and results of such testing could become subject to 4<sup>th</sup> Amendment reasonable search challenges.
2. The bill's provision that a worker's refusal to submit to or release results from a post-accident alcohol or drug test would result in a deemed admission of intoxication could be challenged as a denial of due process rights. Similarly, but less likely, is the possibility of due process challenge by an employer who fails to mandate a post-accident testing regime as required by the bill and is subsequently barred from claiming a reduction in compensation based on the worker's alcohol or drug use.

The Department of Health (DOH) stated that SB 465 is unclear on the issue of reduction of benefits for innocent coworkers who were injured by intoxicated workers. The agency also added that there is a potential policy conflict between drug or alcohol screening procedures and rights with existing State Personnel Rules (1.7.8.1 NMAC) regarding drug and alcohol abuse. Currently, the State Personnel Board's existing policies prescribe drug-screening for only employees in safety-sensitive positions. SB 465 creates what arguably is a new requirement for drug screening procedures for which all state employees may now become subject.

The Advisory Council on Workers' Compensation and Occupational Disease has approved this bill.

## **PERFORMANCE IMPLICATIONS**

According to the WCA, the bill's requirement for a judicial assignment of a percentage that drugs and alcohol contributed proportionately to the on the job injury, may increase litigation, costs and extend the length of time to resolution of a workers' compensation case. However, this requirement will also allow for fairer outcomes. Currently, the only choices are a 10 percent reduction or no benefits. There is also a likelihood that by clarifying the causation element of the defense litigation costs and time may be reduced.

## **ADMINISTRATIVE IMPLICATIONS**

The DOH states that state agencies may need to develop and promulgate new policies and procedures that allow for drug or alcohol screening for employees who previously were not subject to any drug or alcohol screening.

## **DUPLICATION**

SB 465 and HB 139 are duplicate bills, with the exception of the addition of the word "work" in front of the word "injury" on page 3, lines 6 and 14. This addition further clarifies that the injury occurred while the person was at work.

## **TECHNICAL ISSUES**

The short title assigned to this bill does not match the bill's topic. This bill does not have to do with unemployment benefits. The short title for the bill should be changes to match the short title for HB 139 - "Reduce Workers' Comp Payment for Drug Use".

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The WCA states that a consequence of not enacting this bill would be that recent appellate court rulings would remain in effect allowing for an unclear and difficult legal standard to meet.

MAS/svb