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## FISCAL IMPACT REPORT

SPONSOR Ruiloba ORIGINAL DATE 1/29/17  
 LAST UPDATED 2/24/17 HB 236/aHBIC

SHORT TITLE First Responder Death Benefits SB \_\_\_\_\_

ANALYST Kludt

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>				See Fiscal Impact		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)

New Mexico Municipal League (NMML)

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of House Business and Industry Committee Amendment

The amendment removes "volunteer members" from the definition of firefighter and removes language at page 6, lines 7-8 and page 10, lines 16-17 that would have provided benefits to widows of first responders who died while "providing services as a volunteer."

#### Synopsis of Original Bill

House Bill 236 provides that workers' compensation death benefits be paid to the widow or widower of a first responder for the maximum benefit period of 700 weeks, regardless of remarriage. This amends current law that provides widows receive benefits until remarriage, at which time a lump sum payment of two years is paid to the widow. The bill would also provide workers' compensation benefits to the dependents of "volunteer" first responders - under current law, volunteers are not considered employees required to be covered.

## FISCAL IMPLICATIONS

The Workers' Compensation Administration (WCA) reported the fiscal impact of HB 236 to the workers' compensation system has not been studied, but there could be an increase in the cost of individual claims. The cost in rate premiums may also increase for state, county and municipal entities that would now be required to pay the maximum period of benefits (700 weeks) to widows of first responders.

## SIGNIFICANT ISSUES

WCA reported the following:

The bill may not be consistent with the underlying purposes of the Act, including delivering benefits at a reasonable cost to employers and balancing of workers' and employers' interests. The proposed amendment converts workers' compensation indemnity benefits, which are designed to be limited wage replacement benefits, into a life insurance policy for widow(er)s of first responders. Benefits payable to the widow(er) of first responders currently and under the proposed legislation would be in addition to pension benefits or other life insurance benefits provided by the employer.

Under current law, NMSA 1978, § 52-1-46, workers' compensation death benefits are divided among a workers' eligible dependents. Death benefits are based on financial dependency, not legal relationships or beneficiary status. Under current law, if a worker leaves behind a widow(er), the widow(er) receives benefits until remarriage, at which time the widow(er) receives a lump sum of two years' worth of benefits. Upon remarriage, the widow(er) is no longer considered financially dependent on the deceased worker's wages, so the benefits stop after the lump sum payment. The same rationale applies to the benefits received by the worker's dependent children. Upon reaching the age of majority or graduating from full time enrollment in college (up to the age of 23), the dependent child is no longer considered financially dependent on the deceased workers' benefits, so the benefits may stop before the 700 week maximum benefit period is reached.

In addition to the continuing benefits to widow(er)s after remarriage up to the maximum of 700 weeks, the bill will affect distributions to child dependents, both living with and not living with the widow(er). If a deceased worker leaves a widow(er) and children and the children live with the widow(er), the widow(er) receives 45% of benefits and the children equally split the remaining 55% of benefits. If the children do not live with the widow(er), the widow(er) receives 40% of the benefits and the children equally split the remaining 60% of benefits. When the widow remarries, the widow's 45% (or 40%) is redistributed equally among the deceased worker's children, increasing benefits paid the children to 100% of the workers' compensation rate. Under this bill, benefits for widow(er)s of first responders will no longer be distributed 100% to the children upon the widow(er)'s remarriage. Rather distributions will remain the same as prior to the marriage, which may result in an unfair outcome for dependent children who do not live with the widow(er). Additionally, the remarried widow(er) may then continue to receive 45% of benefits for 700 weeks, and past the time when those benefits would have expired if they had been given 100% to the children. An argument can also be made that, once the children are no longer entitled to benefits, the payment to the remarried widow(er) would increase to 100% for the remainder of the 700 week period. Either scenario has the

potential to increase the overall costs for each claim involving the death of a first responder.

The terms “member of search and rescue” and “emergency response provider,” even though defined in the bill, are still somewhat vague and may still include volunteers. Traditionally and under current law, volunteers are not considered workers required to be covered. “Emergency response provider” seems to be a catch-all term that will capture anyone not covered under the other defined categories and could inadvertently include many employees of the NM Dept. of Transportation (snowplow drivers following a blizzard, for example) and the Department of Public Safety, and the Department of Homeland Security. The question of volunteer status may have been fixed by the amendment striking language at page 6, lines 7-8 and page 10, lines 16-17 and leaving the requirement that the death of the first responder be “in the course and scope of employment.” Despite the amendment, the definition of “first responder” is still broad and vague and may still include volunteers (“members of search and rescue,” for example). Clarifying the definition of first responders to add language that the first responder must be a “full or part-time employee” may help address the vagueness.

The constitutionality of increasing workers’ compensation benefits for one very small class of claimants should also be seriously considered, as such legislation may raise equal protection challenges. A recent example of an equal protection challenge occurred in the case of *Rodriguez v. Brand West Dairy, Inc.*, 2016-NMSC-029. In *Rodriguez*, the New Mexico Supreme Court determined that there was no rational basis to distinguish between farm and ranch workers and other workers in deciding who to cover under workers’ compensation. The exemption of farm and ranch workers from receiving workers’ compensation benefits was, therefore, found unconstitutional. If this legislation is challenged on equal protection grounds, the state would have to demonstrate the legislature had a rational basis for providing additional workers’ compensation death benefits to widow(er)s of first responders while denying the same additional benefits to widow(er)s of other workers killed while on the job. The current law treats widow(er)s and dependents of all deceased workers equally, regardless of the worker’s occupation. The bill allows a benefit for a remarried widow(er) of a deceased first responder that does not exist for the remarried widow(er) of other deceased workers, and, thus, raises equal protection issues. Additionally, the bill eliminates rights of child dependents in favor of remarried widow(er) in first responder deaths. This may be even more difficult to defend under rational basis equal protection analysis.

#### **TECHNICAL ISSUES:**

The definitions of first responder set forth in Section 1, Subsection I at page 3 do not limit the covered persons to employees as opposed to volunteers. As noted above, later provisions of the bill may fix this by requiring the death to be “in the course and scope of employment.” Any vagueness could be corrected by inserting an additional definition of first responders to “a full or part-time employee.”

#### **OTHER SUBSTANTIVE ISSUES**

The Administrative Office of the Courts (AOC) reported the following:

“HB 236 proposes three distinct changes to workers’ compensation law:

1. Allow the continuation of benefits rather than a lump sum payout in the event of remarriage (Section 52-1-46(C)(4) amendment);
2. Extend the application of the “arising out of and in the course of employment” test to volunteers (Section 52-1-46(H) amendment); and
3. Extend the application of a recognized distinction for off-duty police officers to all first responders (Section 52-1-46(H) amendment).

In *Schultz v. Pojoaque Tribal Police Dept.*, 2014-NMCA-019, 317 P.3d 866, the New Mexico Court of Appeals, in reversing the Workers’ Compensation Judge’s (WCJ) judgment and remanding the matter, held that the widow of a Pojoaque Tribal Police Officer was entitled to workers’ compensation death benefits, even though her husband, Officer Schultz, was off-duty at the time of his death. Officer Schultz was on the Rio Grande voluntarily chaperoning a church youth group. The child who he rescued from the river before his death was under his and other adult supervision. The Court of Appeals concluded that there was a sufficient nexus between Officer Schultz’s actions in rescuing a drowning child and the duties of his employment as a police officer. The Court further concluded that because of the unique nature of law enforcement duties, law enforcement officers may recover workers’ compensation benefits in some instances for off-duty injuries occurring in response to circumstances reasonably calling for police officer assistance. The Court formulated a two-prong inquiry: (1) the “arising out of” prong, focusing on the expectations for an on-duty officer to respond to the same or similar circumstances; and (2) the “in the course of employment” prong, focusing on the circumstances giving rise to the accident, and specifically, “the nature of the officer’s actions and the manner of their performance in relation to a similarly situated on-duty officer.” *Id.* at paragraph 18.

The *Schultz* Court noted that a distinctive body of workers’ compensation law has arisen surrounding injuries to off-duty police officers, because of their unique role in society and increased responsibilities and a greater sense of duty to their employment than the average citizen. *Id.* at paragraph 10. Officers’ status creates difficulties in applying the “arising in and out of employment” analysis to off-duty activities resulting in injury. *Id.* at paragraph 11. The Court, in examining multiple cases testing the extent of exceptions to the in and arising out of employment analysis, noted that “the ultimate determination in most cases is typically rooted in statutes or police department regulations compelling or authorizing the off-duty action, or, at the least, an implicit expectation that police officers will take some action not required of the general public when emergencies arise.” [citations omitted] *Id.* at paragraph 12. The Court noted further that, “Courts construing these statutory and regulatory provisions to encompass a police officer’s conduct at the time of the injury have concluded either that there was a benefit flowing to the employer from the officer’s actions or that the officer’s conduct furthered the interests of the employer so as to justify the award of compensation.” [citation omitted] *Id.* While noting these circumstances, the Court rejected reliance upon them, writing that interpretations of the traditional analysis are inadequate benchmarks and that

Given the unique nature of law enforcement duties and the various circumstances calling for the exercise of those duties, strict application of the “time, place, and circumstances” factors or attempts to delineate what risks off-duty police officers are likely to face

incidental to their employment strains the function these factors have served in our workers' compensation law in other contexts. Therefore, we think it is necessary to reexamine our application of the "arising out of and in the course of employment" standard in the context of off-duty law enforcement officers injured while responding to circumstances that reasonably call for immediate police assistance.

*Id.* at paragraph 15.

The Court, in discussing the formulation of a proper inquiry, wrote that, in analyzing the "arising out of" prong of the inquiry, the focus should be "the nature of the incident in relation to risks generally faced by on-duty officers in which they would be expected to respond," which would include "a determination of the reasonable expectations of an on-duty officer confronted by the same or similar circumstances". *Id.* at paragraph 16.

With regard to the "in the course of employment" prong, the Court noted that, as with the first prong, traditional interpretations are difficult to apply to employment recognizing little distinction between responsibilities of on-duty and off-duty workers. *Id.* at paragraph 17. In dismissing the sufficient formulation of adequate parameters of time, place and circumstances factors, the Court wrote

We believe that when determining a police officer's eligibility for injuries sustained in circumstances not traditionally arising from or in the course of predictable employment activities, the proper focus should be on the *circumstances* giving rise to the accident, specifically the nature of the officer's actions and the manner of their performance in relation to a similarly situated on-duty officer. That is not to say that some inquiry into the time and place of the accident is irrelevant. But given that the issue before us concerns an *off-duty* police officer, the "time" factor is of little analytic value insofar as this factor relates to injuries occurring on duty, where we have already concluded that police officers are entitled to recovery for off-duty injuries in some circumstances. [citations omitted] We note, however, that the more attenuated the officer's law enforcement relationship to the jurisdiction in which the accident arises, the more relevant the place of the accident should become to the workers' compensation judge's conclusion. Nevertheless, the relationship between the circumstances of the incident and the off-duty officer's response in relation to a similarly situated on-duty officer should remain paramount.

*Id.* at paragraph 18.

We caution, however, that our conclusion should not be construed as holding that all off-duty police officer injuries are compensable. We agree with the Court in *Jordan*, which stated, "In a sense, a police officer is never off-duty. . . . That does not mean, however, that a police officer is covered by the [w]orker[s] c]ompensation [l]aw at all times regardless of the circumstances of the injury. There must be a correlation between the injury sustained and the employment." 699 S.W.2d at 126 (citations omitted).

*Id.* at paragraph 29.

Given the discussion in *Schultz*, it appears that a necessary first step in a proceeding challenging the HB 236 amendments would be to decide whether the Court's two-prong analysis would be applicable to any other profession than police officers. The Court gave no indication that the analysis it applied to an off-duty police officer's benefits would be

extended to all first responders. It is possible that Courts will apply an analogous two-prong analysis for all first responders which may result in the satisfaction of the first prong of the analysis and the potential extension of benefits for injuries sustained off-duty. To include a blanket extension, however, for first responders while providing services as a volunteer, absent a case-by-case examination under the second prong of the analysis, does not appear to be in line with the Court's discussion and holding in *Schultz*.

The *Schultz* court did not address a possible continuation of benefits rather than a lump sum payout in the event of remarriage (Section 52-1-46(C)(4) amendment).”

KK/sb/jle