

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 and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 1/29/17

SPONSOR Candelaria LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Workers' Compensation Subrogation Rights SB 156

ANALYST Klundt

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal	Minimal		Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)  
Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 156 amends Section 52-5-17 of the Workers' Compensation Administration Act, which governs, in pertinent part, an employer's reimbursement rights when a worker's work place injury or death is caused by a third party. In such cases, the bill would assign the worker's claim to the employer when (1) the worker does not pursue a claim against the third party within one year from the worker's injury or death or (2) the worker fails to fully prosecute the claim and the action results in dismissal. Under the assignment provision of the bill, the action must be brought within a one year statute of limitations and the employer may settle the assigned claim against the third party then may reassign the claim in its entirety to the injured worker or deceased worker's beneficiaries. The bill attempts to set forth a method for calculating the value of the employer's lien in those instances when the worker brings a claim against the third party. Additionally, the bill separately provides that the employer shall have the right to intervene in the third party claim at any time to protect the employer's interests and further that the worker must give the employer written notice of worker's intent to bring a third party claim.

## FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) reported there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to increased subrogation claims by employers or claims reassigned by employers back to the worker. In addition, disputes may arise between the worker and the employer as to when, how or whether to file a claim against a third party, notice obligations, etc., as well as employer enforcement of liens against collected amounts. These disputes may result in increased filings. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. AOC is currently working on possible parameters to measure resulting case increase.

## SIGNIFICANT ISSUES

An effective workers' compensation subrogation statute should balance and accomplish three objectives: (1) hold third party tortfeasors accountable by facilitating, not chilling, claims by injured workers against third parties, (2) avoid a windfall or double recovery to the injured worker so that the worker's tort recovery does not duplicate elements of damages paid under the workers' compensation system, and (3) ensure that employers and the workers' compensation system do not bear the burden of a third party's conduct by providing for a system of reimbursement that is fair and equitable for employers.

WCA reported SB 156 addresses two court decisions: *Gutierrez v. City of Albuquerque*, 1995-NMSC-027, and *Liberty Mutual Insurance v. Salgado*, 2005-NMCA-144. *Gutierrez* set forth the method for how an employer's reimbursement recovery is calculated. *Liberty Mutual* restricted employers' option to recover by ruling that employers and their insurers do not have a right to bring a separate subrogation claim and are limited only to reimbursement from the worker's third party recovery.

In *Gutierrez*, the New Mexico Supreme Court held that employers are entitled to reimbursement only from the portion of the third party claim recovery that duplicates compensation and medical benefits under the Workers' Compensation Act. The damages awarded in tort and workers' compensation are not interchangeable, although they overlap to some extent with regard to lost wages and medical benefits. The extent of the duplicate payments is determined by identifying the type and purpose of payments made by the employer and comparing those payments to the type and amount of tort elements recovered that are duplicative.

Under *Gutierrez*, this calculation involves a complex pro-rata distribution method to arrive at the value of employer's reimbursement, which is often significantly lower than the value of compensation and medical benefits employer paid to the worker under the Act. That value is then further reduced by attorney fees and costs incurred by the worker's attorney in the third party claim. Because employers are not parties to the third party claim, they can be disadvantaged in determining what portion of the third party recovery is duplicative of workers' compensation benefits paid. The bill attempts to bring employers' reimbursement/subrogation recovery more in line with an equitable dollar for dollar recovery.

In *Liberty Mutual*, the employer and insurer attempted to bring a direct cause of action against a third party that allegedly caused two workers' injuries. The New Mexico Court of Appeals

ruled that *Gutierrez* did not expand Section 52-5-17 to recognize a separate, independent right in employer to bring a suit against a third party tortfeasor. The Court also ruled that Section 52-5-17 only allows the employer to seek reimbursement from the worker for workers' compensation benefits when the worker also recovers from a third party claim. The bill addresses this court decision by outlining circumstances of when a worker's action against a third party is assigned to the employer, in addition to permitting the employer to intervene in the third party claim at any time.

### **PERFORMANCE IMPLICATIONS**

WCA reported SB 156 may raise more additional questions, and may be difficult to apply accurately and consistently. WCA stated for example, the following sentence is multifaceted, incoherent, and does not provide clear guidance on how to calculate the employer's lien in claims involving pre-existing injuries:

“[i]n any action arising out of an aggravation of a previously compensable injury, [the employer's lien on the amount actually collectable from the third party] shall contribute only to the deficiency between the amount actually collected and the compensation and medical [sic] benefits provided or estimated by the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law for the case.”

Further, under Section B, the worker's claim is “deemed assigned” to the employer when the worker does not pursue the third party claim within one year from the date of worker's injury or death or fails to fully prosecute and the claim is dismissed. Section D then concurrently and contradictorily provides that the employer shall have the right to intervene at any time to protect their own interests. A party cannot intervene unless a direct cause of action exists, which under the assignment provision does not exist unless worker's conduct triggers the assignment to employer.

Paragraph D discusses worker's obligation to put the employer on notice of the third party claim, and to keep the employer apprised of developments in the third party tort claim. The paragraph includes the following language: “[i]n any action instituted pursuant to this section, the employer shall have a right to intervene....” This language is confusing because tort actions are not brought pursuant to the Workers' Compensation Act or Occupational Disease and Disablement Law. This raises the issue of which forum is best suited to resolve disputes over employer's reimbursement from a worker's third party claims – district courts or the Workers' Compensation Administration?

### **ADMINISTRATIVE IMPLICATIONS**

AOC reported disputes may arise and be further litigated in the courts between the worker and the employer as to when, how, or whether to file a claim against a third party, notice obligations, and employer enforcement of liens against collected amounts. Unrepresented workers may not be able to clearly communicate or to represent their positions on these issues in court proceedings.

## TECHNICAL ISSUES

WCA reported in the following technical issues:

Section E repeatedly refers to “medical, surgical and hospital benefits.” Surgical and hospital benefits are subsumed within medical benefits provided under the Act such that listing “surgical and hospital” benefits is unnecessary and could cause confusion.

References to a one-year statute of limitations in Section B are also unclear. The statute of limitations for personal injury in New Mexico is three years, and the statute of limitations under the Workers’ Compensation Act is one year from the employer’s failure or refusal to pay any installment of compensation benefits (after adding the benefit waiting period, the statute of limitations is one year and twenty-one days). The statute of limitations under the Act does not apply to medical benefits. The bill is also unclear when the one-year statute of limitations begins to run – does it run from the date of worker’s injury or death or does it run from the date the claim is assigned to the employer?

Section D requires the worker to give written notice to the employer of worker’s intent to bring a third party claim, but the bill does not specify when that notice must be given. This section also requires the worker to give employer “timely and periodic notice of all pleadings and rulings,” but the bill does not define “timely” or “periodic”.

In determining the value of the employer’s lien and recovery, who determines the reasonable and necessary expenses under Section E? If this language is intended to apply to the injured worker’s attorney who represents the worker in the third party claim, it may create a conflict of interest for the attorney and divided duties of loyalty between the worker and employer who holds the lien.

Section E provides that a worker’s settlement of the third party claim for an amount less than the compensation and medical benefits employer is entitled to recovery requires the employer’s written approval. The bill is silent about how this process would work. For example, does the worker have a duty of good faith or loyalty to the employer when negotiating the third party claim? Conversely, does the employer have a duty of good faith or loyalty to the worker when reviewing the third party settlement for approval? Finally, the bill is silent about how this prior written approval process would work when the worker and the employer do not agree on the reasonableness of the third party settlement.

AOC reported in the following technical issues:

Current Subsection 52-5-17(A) prohibits double compensation to a claimant “[except as provided in Subsection C of this section].” Current Subsection C deals with compensation due under uninsured motorist coverage. SB 156 changes the latter subsection to F, but neglects to make the same re-designation in Subsection A.

## OTHER SUBSTANTIVE ISSUES

Preliminary nationwide research indicates the vast majority of states either permit or require the employer/insurer to intervene in the third party action to protect its right of recovery from the worker's third party claim. New Mexico appears unique in that it restricts the employer's recovery to reimbursement directly from the injured worker's third party recovery and does not provide for an assignment of worker's rights or permit the employer to intervene in the third party action.

The Advisory Council on Workers' Compensation and Disease and Disablement Law has unanimously endorsed (5-0) the objectives underlying the bill – i.e. to make reimbursement more equitable for employers and to create a direct cause of action for employers to protect their own interests. The Council has not yet discussed or voted on SB 156 in its current form.

KK/jle