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FISCAL IMPACT REPORT

CS/CS/HB20/HLVMC
S/HJCS/aHFI#1/aSHP

SPONSOR HJC ORIGINAL DATE 02/11/21 HB AC/aSTBTC/aSJC
 LAST UPDATED 03/17/21

SHORT TITLE Healthy Workplaces Act SB _____

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Increased agency personnel costs		Uncertain; probably moderate	Uncertain; probably moderate	Uncertain; probably moderate	Recurring	General Fund
WSD Administrative costs		\$859.1	\$884.9	\$1,744.0	Recurring	General Fund
Total		>\$859.1	>\$884.9	>\$1,744.0	Recurring	General fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 37, House Bill 38, Senate Bill 198

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)

Workforce Solutions Department (WSD, based on original HB20)

Human Services Department (HSD)

No Response Received

Department of Health (DOH; declined)

General Services Department (GSD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to House Judiciary Committee substitute for House Labor, Veterans' and Military Affairs Committee substitute for House Bill 20 as amended, makes several distinct changes to the bill:

- 1) It strikes section 2 of the act, which spelled out the purposes of the act.
- 2) It removes the specification that a declared public health emergency can be limited to part

of the state.

- 3) It changes the definition of “employer” used in the act to exclude from its provisions only the federal government. State and local governments would now be bound by the act’s provisions.
- 4) It removes the definition of “public health emergency,” which is no longer needed, as another part of the amendment removes the entirety of Section 5, which refers to public health emergencies and supplemental leave to be given during such an emergency.
- 5) It adds a definition of “independent contractor,” as used in what now is Section 3. In Section 3, employers are forbidden from reclassifying employees as independent contractors in order for them not to be covered by this act. The new definition of “independent contractor” includes a person who does work for another person, who has the contractor accomplish a specified result but where the person contracting for the result cannot specify the means and details of the work.
- 6) When considering reasons for which an employee cannot be retaliated against, it changes the phrasing when an employee... “has in good faith” alleged violations of the act to “has reasonably alleged” such violations.
- 7) It removes the severability provision.

Due to this amendment, the table below reflects changes to indicate the new section numbers after the elimination of the original sections 2 and 5.

Synopsis of STBTC Amendment

The Senate Tax, Business and Transportation Committee amendment to House Judiciary Committee substitute for House Labor, Veterans’ and Military Affairs Committee substitute for House Bill 20 as amended, makes a clarifying change in Section 4 B(1): employees may begin to use paid sick leave sixty days after the beginning of their employment or after the effective date of the act, whichever is later.

In addition, new language has been inserted into Section 4 to allow the employer to define the twelve month period during which paid sick leave may be used. At his/her discretion, the employer may define that as the calendar year, a year measured forward or backward from the date of an employee’s first use of sick leave, or any other fixed twelve month period chosen by the employer. As previously written in the House Judiciary Committee substitute, the leave accrued by an employee is to carry over from year to year, and the term “year to year” is defined in this amendment as referring to the twelve-month period chosen by the employer.

Synopsis of SHPAC Amendment

The Senate Health and Public Affairs Committee amendment to House Judiciary Committee substitute for House Labor, Veterans’ and Military Affairs Committee substitute for House Bill 20 as amended, makes the following changes:

- Removes the words “pursuant to a collective bargaining agreement”
- Clarifies the section on applicability of employers’ previous paid leave policies which include earned sick leave. Those paid leave policies would be compliant with the Healthy Workplaces Act if the sick leave provision allowed for use under the same conditions and purposes as the act. As of the effective date of the act, sick leave under the act would be added to that already provided under a collective bargaining agreement if the conditions and purposes of the leave differed from the act’s conditions and purposes.
- Establishes July 1, 2022 as the effective date of the act.

Synopsis of HFI#1 Amendment

The House Floor #1 amendment to House Judiciary Committee substitute for House Labor, Veterans’ Military Affairs Committee substitute for House Bill 20 makes several change:

- Removes the emergency clause;
- Limits coverage of the bill to paid employees and removes from coverage those who are providing domestic service in homes;
- Earned sick leave would be accrued beginning when the employee starts working or the effective date of the Healthy Workplaces Act (assumed to be ninety days after the bill is signed), whichever is later;
- Earned sick leave could be used sixty days after the date earned sick leave began to be accrued;
- Modifies coverage of Section 5 regarding supplemental leave during a public health emergency to indicate that that section applies only to parts of the state declared to be in such an emergency;
- Notes that paid sick leave under the act would be in addition to any provided by an employer under a collective bargaining agreement; and
- Employers may require documentation of the reason for sick leave taken if more than one day (rather than two) of sick leave is taken.

Synopsis of Original Bill

The House Judiciary Committee substitute for House Labor, Veterans’ and Military Affairs Committee substitute for House Bill 20 creates a right to paid sick leave for New Mexico workers. Its provisions are spelled out in the following sections:

Section	Provisions
1	Establishes the name “Healthy Workplaces Act.”
2 –[stricken with the SJC amendment]	States purposes of the act: <ul style="list-style-type: none"> A. Regulating sick leave benefits; B. Allowing employed New Mexicans to be given a minimum amount of paid sick leave to attend the health and safety needs of themselves and their families; C. Addressing a lack of paid sick leave for many employees; D. Reducing healthcare expenditures by allowing for early and routine medical care; E. Reducing the public’s exposure to contagious diseases neglected because of lack of paid sick leave; F. Providing financial stability for employees’ families; G. Avoiding penalties to employees who use paid sick leave; H. Benefiting businesses by reducing the likelihood of employees coming to work when ill; I. Safeguarding public health and well-being; and J. Accomplishing aims A through J looking at what is feasible for employers.
3 - 2	Definitions used in the act, including <ul style="list-style-type: none"> • Earned sick leave means pay equal to usual pay when used for the listed purposes.

	<ul style="list-style-type: none"> • Family member, broadly defined, includes domestic partners, also defined. • “Employer” includes state and local government entities, but not federal government. • “Employee” includes full- and part-time employees and persons in domestic service but does not include employees subject to the federal Railroad Unemployment Insurance Act or the federal Employers' Liability Act. • “Public health emergency includes the current covid pandemic. • The Labor Relations Division (LRD) of the Workforce Solutions Department is responsible for act enforcement.
<p>4-3</p>	<p>Details of use and accrual for all employees: Each would accrue one hour of paid sick leave for every 30 hours worked. Earned sick leave would carry over from year to year, but the yearly maximum would be no less than 64 hours. Employers could choose to provide more generous benefits. Employees exempt from receiving overtime pay are assumed to work 40 hours a week unless actual work hours are less than that.</p> <p>Employees are to begin earning paid sick leave at the beginning of employment and can use accrued leave beginning 30 days after then. If an employee changes location or job position within a firm, or if the firm changes hands, the sick leave accrued would remain in place. If a person leaves employment, there is no obligation for the employer to pay for unused sick leave.</p> <p>Earned sick leave could be used for any type of personal or family member illness or health condition or medical care, curative or preventive; for school meetings relative to a child’s disability; for inability to work due to a public health emergency (either because the place of work has been closed or because the employee’s condition might represent a threat to the health of others); or for absences due to domestic violence, sexual assault or stalking of the employee or a family member.</p> <p>Employees, or someone acting in their behalf, should make a request for use of sick leave orally or in writing, attempting to estimate how long the absence might be required, but could not be required to use other leave before using sick leave or to find a replacement during their absence.</p> <p>Employers cannot misclassify an employee as an “independent contractor” to escape obligations under the act.</p>
<p>5 [stricken in its entirety]</p>	<p>Establishes supplemental sick leave during a public health emergency – 80 hours or, for part-time employees, twice the weekly number of hours. This would begin upon declaration of a public health emergency and be effective until four weeks after declaration that the emergency is over, and could be used for personal care or a family member’s care, defined broadly. No documentation would be needed to use this supplemental leave.</p>
<p>6 4</p>	<p>Sick leave already granted by an employer would qualify for the Healthy</p>

	Work Places Act as long as it was at least as generous as the Act, but other forms of leave (e.g., annual, family) granted by the employer would not qualify.
7 5	Documentation for sick leave use could not be required if the sick leave lasted for less than three consecutive days. In the case of physical or mental needs, a healthcare professional’s certification would suffice; court or other legal or counseling person’s documentation would be accepted in case of absence due to stalking, sexual assault or domestic abuse. The cost of any such documentation required by an employer would have to be paid by the employer if not covered by insurance, and the documentation must be treated in a confidential manner.
8 6	Employers would be required to post notice of their policies with regard to paid sick leave; the contents of the required postings are specified by LRD.
9 7	Documentation of hours worked and paid sick leave taken must be preserved for at least forty-eight months.
10 8	Retaliation against an employee is prohibited in the case of <ul style="list-style-type: none"> • Use of this benefit, or • Employee allegation of violation of this act. <p>Employers could not discipline or otherwise punish an employee for use of sick leave.</p> <p>Contracts between employer and employee cannot contain provisions that would abrogate the employee’s right to use sick leave.</p>
11 9	LRD would coordinate implementation and enforce provisions of the act, to include receiving complaints in writing or by telephone against employers and assessing penalties against offending employers. LRD would also ensure compliance with the act by audits or investigations. LRD would establish a procedure for reviewing complaints, and would maintain the confidentiality of respondents if not required to release that information for purposes of investigation or otherwise required by law, in which cases the complainant would be notified.
12 10	Allows for court action if filed within three years of alleged violation of the act. Actions could be brought by LRD, by the Attorney General or an aggrieved employee or the employee’s agent. Establishes an employer’s assumption of a burden of proof if on the surface it appears the employer has violated principles of the Healthy Workplaces Act until the employer gives a reason for having acted, at which time the burden of proof passes to the employee to prove the employer wrong. Immigration status cannot be taken into account in such proceedings.
13 11	Establishes employer penalties for violation of the act. Depending on the violation, the penalty varies from one to three times the actual damages or \$500-\$1000.
14 12	The Healthy Workplaces Act would not supplant other laws, regulations, or collective bargaining agreements that provide greater benefits.
15 [stricken by SJC amendment]	Severability provision.
16 13	Declares an emergency, the bill to take effect immediately. [The SHPAC

	removed the emergency clause, replacing it with an effective date of July 1, 2022.
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FISCAL IMPLICATIONS

There is no appropriation in this bill. The Department of Workforce Solutions, which would be charged with record-keeping, reporting, and investigating allegations of employer noncompliance with the bill, estimates its costs as follows:

The fiscal implications of HB20 would require DWS to obtain five (5) additional Investigator FTE, one (1) Administrative Assistant FTE, one (1) Legal Attorney FTE, and one (1) Legal Assistant. A total of ten (10) new FTE positions would need to be approved for DWS to assist in fulfilling the requirements in HB20. This additional staffing would also require increases to the workforce technology division including one (1) FTE for Technical Support and one (1) FTE as a systems analyst...

DWS will have to create informational posters, brochures and other printed materials with information specifically required by the Act. This includes information on the new employee rights and remedies, employer obligations, and complaint process established by the Act. The DWS website will have to reflect these changes. Creating these publications and materials is possible with existing staff, however there will be additional costs related to producing translations of the materials into the various non-English languages required by HB 20.

HSD notes the requirement to allow paid sick leave in keeping with this bill would increase employee cost but does not estimate how much that cost would be. It is likely that other state government agencies would see increased costs in similar fashion.

SIGNIFICANT ISSUES

According to DWS:

HB20 imposes new notice and recordkeeping obligations on employers and subjects them to monetary penalties for violating the proposed law, allowing courts to impose liquidated damages ranging from \$500 to \$1,000 per violation *plus* actual damages, back pay and benefits, reinstatement, rescission of disciplinary action, litigation costs and attorney fees. These penalties/damages considerably outpace those available under existing wage-and-hour statutes. The Act creates six (6) new causes of action for things such as misclassification of employees as independent contractors, retaliation and recordkeeping violations. A cursory review of similar PSL legislation across the United States reveals that no single state law has as aggressive an array of requirements and employer penalties as HB 20... Fourteen states and the District of Columbia have PSL statutes, none of which are as comprehensive and punitive as HB20.

The Act requires the labor relations division (LRD) of the workforce solutions department to investigate complaints alleging violations of the Act, provide progress reports every 90 days, and file civil lawsuits against employers for violations. HB20 does not give the LRD the same discretion that it has in other types of wage claims to select cases that it deems “just and valid” for litigation. Rather, the bill mandates that LRD take all claims alleging PSLA violations to court, regardless of agency resources, evidentiary challenges, dollar amount in controversy, bona fide employer errors, or whether

violations are isolated or repetitive in nature. Significantly, establishing an entire new class of cases that the LRD must investigate and litigate will necessitate considerable additional funding in order to support the personnel and structural enhancements required to execute these mandates.

HSD comments on new requirements on the House Labor, Veterans' and Military Affairs Committee substitute regarding supplemental sick leave during a public health emergency, such as the present pandemic:

Currently, state employees are offered Covid-19-Related Conditions Leave that is administrative leave (rather than sick leave) as directed by the State Personnel Office (SPO). This leave already exceeds the 80 hours of supplemental leave that would be required by HB20/HLVSCS, some of the purposes for which the leave may be used are expanded.

Specifically, the supplemental leave that would be afforded under HB20/HLVSCS allows an employee to take leave to care for a family member when that family member's care provider is unavailable due to the public health emergency. The current Paid Covid-19-Related Conditions leave allow employees to take such leave but only to care for their child(ren).

Additionally, the supplemental leave for a public health emergency in HB20/HLVSCS would not require documentation for its use. The current Paid Covid-19-Related Conditions leave requires specific documentation to support each request.

HB20/HLVSCS would require HSD to reinstate accrued sick leave to employees that separate from employment in state government and are employed with HSD within twelve (12) months of the separation. Currently, employees lose any accrued leave upon separation from state government.

The requirements of HB20/HLVSCS for earned sick leave would generally be met or exceeded by current HSD policies and practices and by State Personnel Board rules. Some of the expanded notice and posting requirements, and the enforcement of civil and financial penalties would be new requirements for HSD. HB20/HLVSCS would require HSD to provide up to 80 supplemental hours of paid sick leave for specified purposes during a declared public health emergency. Currently, state employees are offered paid Covid-19-Related Conditions Leave as administrative leave (rather than sick leave) during the public health emergency as directed by the State Personnel Office. This leave already exceeds the 80 hours of supplemental leave that would be required by HB20/HLVSCS; however, some of the purposes for which the paid Covid-19-Related Conditions Leave may be used are expanded in HB20/HLVSCS.

Specifically, the supplemental leave that would be afforded under HB20/HLVSCS allows an employee to take leave to care for a family member when that family member's care provider is unavailable due to the public health emergency. The current Paid Covid-19-Related Conditions leave allow employees to take such leave but only to care for their child(ren). Additionally, the supplemental leave for a public health emergency in HB20/HLVSCS would not require documentation for its use. The current Paid Covid-19-Related Conditions leave requires specific documentation to support each request.

ADMINISTRATIVE IMPLICATIONS

WSD would be required to implement, administer and enforce the program and respond to employees' complaints against employers relating the act.

WSD indicates, "The bill requires the district attorney to aid and assist WSD with prosecution of such violations but also makes no appropriation to the DA for such activity. This could make it difficult to carry out the purposes of the Act."

RELATIONSHIP

Relates to House Bill 37, which creates a similar requirement that employers provide sick leave but also includes an emergency clause and separate requirements for sick leave during a declared public health emergency (such as the coronavirus pandemic) and differs in penalties for employers not complying with its provisions. The committee substitute bill incorporates many of the provisions of HB37 with respect to the public health emergency. Both bills now have an emergency clause.

Relates to House Bill 38, which creates other requirements for medical and family leave to be provided by employers to employees that overlap with the requirements in House Bills 20 and 37.

TECHNICAL ISSUES

Two points brought by WSD:

HB20 does not require employers with existing earned sick leave policies to provide employees with additional earned sick leave, but this is true only if the policies allow employees to use the leave under the *same conditions* as the Act and at the same accrual requirements. If the policies do not, then the employees are entitled to accrue additional leave.

Section 4B(1) states that earned sick leave "shall begin to accrue upon commencement of the employee's employment." Does this mean that an employee may accrue ESL *before* the effective date of the Act? An employer could probably not be held to this legally but the language is problematic and could lead to disputes over accrual levels. In contrast, HB 37 avoids this problem by specifying that "[p]aid leave shall begin to accrue on the date the employee commences work or the effective date of [HB37], whichever is later."
[*This issue was addressed in the House floor amendment.*]