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FISCAL IMPACT REPORT

SPONSOR Maestas ORIGINAL DATE 2/24/07
LAST UPDATED _____ HB 1295
SHORT TITLE Retaliation for Ethics Violation Reporting SB _____
ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1	\$0.1	\$0.1	Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB1043

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Corrections Department (CD)
Department of Transportation (DOT)
Public Defender Department (PDD)
Secretary of State (SOS)

SUMMARY

Synopsis of Bill

House Bill 1295 enacts a new section of the Governmental Conduct Act to prohibit a public employer from taking retaliatory action against a public employee who discloses violations of the Act, or who objects to or refuses to participate in unlawful acts. The bill provides that a public employer who takes retaliatory action shall be liable for all relief necessary to make the employee whole, including actual, special and, if appropriate, punitive damages. If the public employee prevails, the court may allow costs and attorney fees and the State is liable the same as a private person.

HB 1295 provides that a public employee may bring an action in any court of competent jurisdiction. The bill requires a public employer to conspicuously post notices prepared by the employer that set forth excerpts of the Act and the provisions of HB 1295.

The effective date of the Act is July 1, 2007.

FISCAL IMPLICATIONS

At some point the Risk Management Division (RMD) and other public agencies providing insurance coverage will have an increase in the number of retaliation lawsuits filed by state employees. There will be increased litigation costs as well as additional compensatory and even punitive damages. RMD will then raise the insurance premiums for any added cases--win or lose--that they must handle as a result of this bill.

The DOT notes punitive damages, which are not generally available against the State, are provided for under this bill proposed legislation, and this is a significant concern with this bill. There is no legal standard set forth to provide guidance as to when punitive damages will be awarded, nor is there any cap to the potential punitive damages awards. The State could incur some financial liabilities, possibly significant, under this bill as it is currently proposed.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced civil actions. 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.

SIGNIFICANT ISSUES

This bill tackles the public policy issue of whistleblower protection. The bill will afford “anti-retaliation protections” to certain public employees who are “whistleblowers” or who otherwise participate in proceedings and investigations into unlawful acts.

The proposed Act will allow a court to award punitive damages, and specifically states that the State will be liable the same as a private person.

CD has provided the following:

A public employer’s liability is generally limited and controlled by the New Mexico Tort Claims Act. That Act does not allow punitive damages. This bill will reduce the scope of the Act and will further expand the state agencies exposure to liability.

Many employment and human rights related laws already have provisions that prohibit and remedy retaliation. Providing additional retaliation remedies or an additional anti-retaliation law may not be necessary.

There is always a tension between protecting an employee’s rights and protecting an employer’s rights. This bill, while it seeks to protect public employees from retaliation, may also give certain employees a “shield” to use to justify their poor work performance or their own misconduct.

Some employees tend to believe that every less than excellent performance appraisal or every piece of criticism even when constructive must be “retaliatory” in nature and some employees will try to use this law every time they are disciplined by their public employer. The bill is therefore likely to increase the Department’s and the State’s litigation costs in defending suits brought by state employees who often truly believe

(rightly or wrongly) that they must be the victims of retaliation.

The bill allows employees to be awarded reasonable attorney's fees if they prevail, but it does not allow public employers to be awarded their attorney's fees if the employer prevails at the hearing. Fairness will seem to require that prevailing public employers be eligible to be awarded their attorney's fees as well.

The AODA believes this bill will foster ethical work places. This bill will put pressure on a public employer to not only handle his or her affairs in an ethical manner but will also keep a public employer from retaliating against a public employee. It will provide public employees the security to disclose an unlawful act...

ADMINISTRATIVE IMPLICATIONS

RMD and attorney for state agencies can handle the provisions of this bill as part of their ongoing responsibilities.

RELATIONSHIP

HB 1295 relates to SB1043, Whistleblower Protection Act, which prohibiting retaliatory action by a public employer against a public employee who discloses improper acts of the public employer, or who objects to or refuses to participate in improper acts. SB 1043 requires the whistleblower to seek administrative relief before proceeding to the district court. SB 1043 also provides for actual and punitive damages and attorney fees for a prevailing public employee but also provides for the awarding of attorney fees to a public employer when the court finds that a complaint is frivolous.

POSSIBLE QUESTIONS

Will there be any consequences to the employees who are guilty of retaliation?

DW/mt