F I S C A L I M P A C T R E P O R T

SPONSOR SCORC **ORIGINAL DATE** 2/26/07 **LAST UPDATED** 3/15/07 **HB**

SHORT TITLE Film Industry Child Labor Requirements **SB** 225/SCORCS

ANALYST Lucero

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	**FY08**		
NFI	NFI	NFI	NFI

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to: HB 51 "Film Industry Child Labor Provisions" SB 476 "Film Industry Child Labor Requirements" SB 175 "Film Industry Child Labor Requirements"

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the District Attorney (AODA)
New Mexico Department of Labor (DL)
Office of Workforce Training and Development

SUMMARY

Synopsis of Bill

Senate Corporations and Transportation Committee Substitute for Senate Bill 175 amends in part and repeals in part the current law 50-6-1 through 50-6-16 NMSA regarding employment of children under the age of fourteen (14) . It also creates a new section dealing specifically with children working in the performing arts. The bill incorporates all changes under the title the "Child Labor Act". The bill sets out restrictions and exceptions as to the types of employment available and the working hours for children under the age of sixteen (16). It also now provides for a civil penalty to be accessed and the required referral of cases to the District Attorney who is required to prosecute. The bill also provides for additional penalties ranging from a petty misdemeanor for the first offense, a misdemeanor for the second offense, and a fourth degree felony for a third or subsequent conviction. It also provide for a trust account to be created, for contracts equal or greater than one thousand dollars, in the child's state of residence for children in performing arts.

FISCAL IMPLICATIONS

The increased penalties under the Act, the new requirement that the Director report all violations to the local District Attorney and the new requirement making it mandatory for the District Attorney to prosecute violations of the Act will increase the case loads of District Attorneys, Public Defenders, the Courts and Adult Probation Offices as well as increase incarceration costs for the Department of Corrections. An inquiry to all fourteen (14) District Attorneys as to whether they had ever had a case referred to them under the current law returned no positive replies. Depending on the volume of cases referred potentially this could necessitate additional attorneys and staff for all offices mentioned and the associated costs. The exact fiscal impact to the judicial and detention systems is indeterminable due to the uncertainty as to the potential number of cases that may be referred.

The bill does not appropriate any money to the Corrections Department, but it does increase criminal penalties. A third or subsequent conviction for a violation of the Act by a parent, guardian, custodian or an employer is a fourth degree felony. While the bill will probably not result in a large number of convictions, it will cause a minimal increase to the prison population and to probation/parole caseloads due to some new felony convictions.

The contract/private prison annual cost of incarcerating an inmate is $23,867 per year for males. The cost per client to house a female inmate at a privately operated facility is $21,651 per year. Because state owned prisons are essentially at capacity, any net increase in inmate population will be housed at a contract/private facility.

The cost per client in Probation and Parole for a standard supervision program is $1,467 per year. The cost per client in Intensive Supervision programs is $3,383 per year. The cost per client in department-operated Community Corrections programs is $3,503 per year. The cost per client in privately-operated Community Corrections programs is $7,917 per year. The cost per client per year for male and female residential Community Corrections programs is $39,401.

SIGNIFICANT ISSUES

New Mexico Public Regulation Commission (PRC) states:

> New Section 2, Subsection (A) would allow parents to employ children under sixteen in occupations "other than [those] found to be particularly hazardous or detrimental to the health of children under the age of sixteen." I suggest that the Legislature examine carefully what occupations have been found to fall within the quoted exception. See also § 50-6-4(C), the proposed amendment to which would limit the requirement for a consultation on non-listed hazardous occupations to situations involving children between fourteen and sixteen years old. (Those wishing to employ younger children would arguably be exempted.)
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> New Section 2, Subsection (A)(2) and (B), read in conjunction with § 50-6-2, would bypass the need for a work permit for children employed as actors or performers, as long as they are under sixteen. This also presents a possible conflict with § 50-6-9.
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> New Section 3, Subsection (C) would permit a child's "workday" to begin at 5:00 a.m. and end at 10:00 p.m. on school nights (or end at midnight on non-school nights). When read in conjunction with Subsection (D), it is not clear whether this provision would allow

the employer to keep a child-performer on the set for up to 19 hours (17 hours on a school night), as long as the child is not "permitted to labor" for longer than the durations specified in Subsection (D).

New Section 3, Subsection (D) would establish limitations on working hours, "including school time." Subsection (E) would require the employer to provide a teacher. However, it is not clear that any actual instruction time would be required, or if so, how long that instruction time would be. See also, § 50-6-3(B) in this regard, and compare § 50-6-3(B)(4).

Subsection (D)(1) relates to children "under the age of six" and would allow them to be "working" for up to six hours in one day. Subsection D(2) relates to children between six and nine years of age and would allow them to be "working" up to eight hours in one day. The bill would allow even very small children under six years old to be engaged in "labor," with hours that seem excessively long. I suggest that, at a minimum, the Legislature seek information on whether this is good for children.

The proposed amendments to § 50-6-12 would reduce certain criminal penalties for violations. I suggest that the Legislature examine this language carefully. In addition, § 50-6-12(A) could conflict with § 50-6-12(B) in that (A) would reduce a [first] violation from a misdemeanor to a "petty misdemeanor," while (B) would impose a mandatory 30-day jail sentence. Sentences for misdemeanors are established at NMSA 1978, § 31-19-1(A) as a definite jail term of up to one year or a fine of up to $1,000. In contrast, sentences for "petty misdemeanors" are established at NMSA 1978, § 31-19-1(B) as a definite jail term of up to six months or a fine of up to $500. The bill would make a second violation a misdemeanor, and a third violation would be a fourth degree felony. See also New Section 4 ("Civil Penalty").

This bill modifies language in the Child Labor Act to conform to provisions in the Screen Actors Guild guidelines. The bill establishes working conditions and hour limitations for minors performing in film, television and other theatrical endeavors. It adds civil penalties for violations and adds an administrative appeal process. It strengthens the penalty for subsequent violations.

Although the bill toughens up the consequences of violating child labor laws, it expands child labor to any young age in the category of children who work for their parents, work as performers in various electronic media or children who deliver newspapers to customers.

Section 22-12-6(A) of the Compulsory School Attendance Law currently provides that, "Any student . . . attaining the age of fourteen may be excused from full-time school attendance by issuance of a certificate of employment. . ." It is not clear if a school district can and should continue to issue this certificate under the circumstances outlined in this bill.

Because some parents who home school children challenge any restrictions they perceive are not lawfully imposed upon them, it is possible that some of these parents may not feel bound by Section 8 of the bill that prohibits employment of children in the context of a "calendar school year" or "during a school day." As currently written, these restrictive provisions would arguably not apply to such home-schooled children who might be inclined to work outside of the proposed restrictions.

The bill contains both a civil penalty section for which monetary penalties can be assessed by the state Labor Department and a penalty section for when violators can be criminalized including (implicitly) fines and imprisonment. Because the civil penalty uses terms with criminal consequences ("separate offense," criminal prosecution," "refer the case to the district attorney"), it is not clear if a violator can both be fined civilly and prosecuted or the intent is that it should be one or the other. A violator faced with both consequences would likely find creative ways to challenge a duplicate hearing or penalty whether under a theory of res judicata (already adjudicated) or double jeopardy.

ADMINISTRATIVE IMPLICATIONS

Currently three of the four agencies, District Attorneys, Public Defenders and the Department of Corrections that potentially could be impacted by this bill are seeking additional funding for salaries in an effort to reduce employee turnover due to large caseloads and low pay compared to other state agencies. If this bill leads to a high number of cases being prosecuted it could exasperate the problem and impact criminal prosecutions and monitoring and housing convicted defendants in other areas of the law.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 51 "Film Industry Child Labor Provisions", SB 476 "Film Industry Child Labor Requirements", SB 175 "Film Industry Child Labor Requirements"

TECHNICAL ISSUES

The Administrative Office of the District Attorney provided the following:

> This bill provides for both a civil fine and criminal prosecution for violation of the Act. There may be potential problems in imposing both a civil fine and prosecuting a violator criminally based on double jeopardy if the civil fine is deemed to be a "punishment" for the same conduct. Double jeopardy provides that a defendant shall not be punished more than once for the same offense. New Mexico courts have previously found that civil forfeitures are a "punishment" and as such bar a later criminal prosecution based on the same violation of the law. See State v. Nunez, 129 N.M. 63, 2 P.3d 264(1999). The exception spelled out in Nunez is if the actions are filed simultaneously in a single bifurcated proceeding in district court. However New Mexico has also interpreted civil forfeiture to be "remedial" rather than a punishment when it was filed after an individual's driver's license had been revoked for driving under the influence. It was found to not violate double jeopardy in City of Albuquerque v. One (1) White Chevy, 132 N.M. 187, 46 P.3d 94(2002). If the civil penalty were deemed an administrative penalty this would also allow a criminal prosecution subsequent to the penalty being imposed. For example revoking an individual's driver's license for driving while under the influence of alcohol is deemed an administrative penalty and therefore is not a bar to a later criminal prosecution for the same conduct. It is difficult to imagine an argument that the civil fine imposed under this Act is not a "punishment" or is an administrative penalty to avoid a criminal prosecution being barred by double jeopardy.
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> The bill also amends the penalties under 50-6-12 NMSA by providing for graduated

penalties for subsequent violations. In paragraph A. it is a petty misdemeanor for the first conviction, a misdemeanor for a second conviction, and a fourth degree felony for a third and subsequent conviction. Paragraph B. appears to be in conflict with paragraph A. as it provides "Upon conviction, the employer, parent, guardian or custodian may be sentenced to county jail for a period of not less than thirty days and for any succeeding conviction for the like offense, the employer, parent, guardian or custodian is guilty of a fourth degree felony." "Conviction for the like offense" is not defined in the bill; it is unclear as to what is meant by this language. A plain meaning of the wording would be for a person to be subsequently convicted under the Act. However as paragraph A. uses this language and provides for a different increase in penalty, it does not become a fourth degree felony until the third conviction, the author must have intended a different meaning for the phrase "conviction for the like offense". Whether it is intended to cover employment of a child in the same type of job, cover subsequent convictions involving the same child, or a violation of the Act under the same section and paragraph is unclear. Such lack of clarity as to the intent of paragraph B. leaves the Act open for attack in court as being Unconstitutionally Vague. There is also no provision for severability to save the rest of the Act should one portion be found to be Unconstitutional. The language in paragraphs A. and B. should be amended to conform to each other, the language in Paragraph B as to penalties should be deleted, or the term "conviction for the like offense" should be defined to correct this problem. Also a severability clause should be added so that the entire Act is not nullified if one portion is found to be Unconstitutional.

Additionally the language in Paragraph B. also reads "The director of the labor and industrial division of the labor department shall report a violation of the Child Labor Act to the local district attorney, who shall prosecute the alleged violator." The mandatory language "shall prosecute" would require the filing of and prosecution of all cases referred by the director. Such mandatory language infringes upon the prosecutorial discretion of each district attorney to prosecute or not prosecute a case based on evidence or the lack thereof. Prosecutorial discretion has been the most highly protected power possessed by prosecutors in the courts. As district attorneys are part of the judiciary such a directive infringing upon this power is possibly a violation of the separation of powers. Prosecutors are under an ethical obligation to seek justice and to not prosecute a case that they do not reasonably believe they can obtain a conviction on. The standard of proof that must be met in a criminal prosecution is proof beyond a reasonable doubt. As the labor department is not an agency that normally engages in criminal investigations it is questionable if a case referred by the director to the local district attorney would be in a form that would be prosecutable. No other statute comes to mind which contains such mandatory language "shall prosecute the alleged violator". This language needs to be amended or stricken.

PED states that on page 4, Line 3 - 5, "a teacher with credentials appropriate to the level of education" is used to describe child performers who must receive education by their employer. These terms do not comport with the current licensure structure of the PED. While the educational needs of younger children who are in traditional elementary school grades might be met by one teacher, the educational needs of older children who are in middle or high school might require more than one highly qualified teacher who teaches core academic subjects. There are many restrictions and requirements of who can teach what subject depending upon the grade

of the child. For example, a child receiving special education services must be provided services from qualified related service providers if called for in that child's Individualized Educational Plan (IEP).

Perhaps the provision could be changed to: "a teacher or teachers with credentials appropriate to the level of education" to accommodate these licensure requirements.

Page 5, Lines 12 – 16, is unclear and confusing. It is unclear why the appeals board has 10 days to set a hearing within 30 days (thereafter?). It might be clearer to simply give it 40 days to set the hearing.

Under 50-6-12 B, the language states, "…the local district attorney shall prosecute the alleged violator." The language should be, '…the local district attorney may prosecute the alleged violator." The local district attorney in each jurisdiction has the discretion to prosecute an offender or not based on the facts and evidence presented to him/her.

The PRC states: In § 50-6-3(B), PRC suggests placing the phrase "unless otherwise provided for in the Child Labor Act" at the beginning of the sentence.

OTHER SUBSTANTIVE ISSUES

The proposal of the age limit(s) and amendments to work permit application/receipt may have an impact to the federal Workforce Investment Act youth delivery system as well as other state funded youth programs which provide a work experience component in their program designs. In most cases this would increase the number of youth that could participate in work experience.

Administrative Office of the District Courts states: Based on recent local news reports, the film industry has defrauded New Mexico of hundreds of thousands of dollars. If anything, controls need to be tightened on that industry. If a child is to be employed by any industry, it is preferable that a work permit be obtained for any child for record keeping purposes, as well as for safeguarding of the children's interests. No industry should receive any special treatment in light of securing children's rights in the "workplace".

ALTERNATIVES

As mentioned above.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Not enacting this bill will mean less protection for children working in the film industry. A minimal impact may occur to the number of youth that may not be able to be offered a work experience opportunity due to the age limitations and permit limitations outlined in the existing Law.

DL/nt