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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/06/09  
**LAST UPDATED** 02/26/09    **HB** CS/493/aHJC

**SPONSOR** HLC

**SHORT TITLE** Minimum Wage Inclusion & Procedures    **SB** \_\_\_\_\_

**ANALYST** Peery-Galon

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Indeterminate but Substantial	Indeterminate but Substantial	Recurring	Wage and Hour Enforcement Fund

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate (See Below)	Indeterminate (See Below)	Indeterminate (See Below)	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workforce Solutions Department (WSD)  
 State Personnel Office (SPO)  
 Attorney General's Office (AGO)  
 New Mexico Municipal League

#### No Response Received From

Association of Counties

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment of Committee Substitute 493 deletes, in regards to employer who fails to respond, the language “adequately and in good faith” and “or who fails to cooperate adequately and in good faith during the course of the investigation”. Adds “notice of claim, subpoena or a hearing notice” to receipt of notice of an investigation. Deletes Section 50-

4-9(G) “The statute of limitation for civil actions brought pursuant to Chapter 50, Article 4 NMSA 1978 shall be tolled during a labor relations division investigation of an employer, but such an investigation shall not be a prerequisite to a person bringing a civil action nor shall it operate to bar a civil action pursuant to Chapter 50, Article 4 NMSA 1978.” Adds language “after exhausting all reasonable efforts to locate the employee or employees” in regards to any proceeds remaining from a judgment entered for a class of employees recovered on behalf of the Workforce Solutions Department.

### Synopsis of Substitute

The House Labor and Human Resources Committee Substitute for House Bill 493 amends Section 50-4-8 NMSA 1978 to provide a penalty of \$100 per day for a wage violation after a 30 day period provided for information gathering. The penalty is per employee per day that the employer does not act in good faith after the notice of an investigation has been given. An employee, a person acting on behalf of an employee or any other interested person may file a complaint with the director of the Labor Relations Division of the Workforce Solutions Department alleging a violation of the Act. The employer is required to provide its name, address and telephone number in writing to the employee, and increases the requirement for employers to maintain employment records from one to four years. The substitute allows for the filing of class action lawsuits against the employer.

The substitute amends the Minimum Wage Act to expand the definition of an “Employer” to include the State and its political subdivisions. New language is added that in the event a class action lawsuit is filed and damages are recovered, but no available class action employee or employees exist, then the proceeds will be distributed to the Workforce Solution Department for future enforcement activities.

The substitute creates the Wage and Hour Enforcement Fund in the State Treasury to be administered by the Workforce Solutions Department. The interest earned on the fund balance is to be credited to the fund and the balance is not to revert to the general fund at the end of a fiscal year. Disbursement from the fund is to be made by warrants drawn by the secretary of Finance and Administration upon vouchers issued and signed by the secretary of Workforce Solutions Department or secretary’s designee.

### **FISCAL IMPLICATIONS**

This substitute creates a new fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

WSD reported its Labor Relations Division has experienced an increasing number of employers who, when properly served with wage complaints, fail to respond to the allegations or to appear for hearings. This requires the labor law administrators to pursue administrative default orders in magistrate or metropolitan court. WSD noted that having claims pursued via default orders because an employer ignores the administrative process, bogs down the court system and potentially delays payment of wages owed to employee, sometimes for years. WSD estimates that employers do not respond to 15-20 percent of claims filed by the Division. As the economy worsens these numbers are expected to increase. WSD stated the proposed legislation would likely help the department save money spent on mailings, subpoena services and other attempts

to bring the employer into the administrative process. WSD noted that collecting fines where appropriate would allow the department to recoup some monies and pursue the claim in court.

New Mexico Municipal League stated that passage of the substitute could save the state and political subdivisions of the state substantial sums of money in paying overtime costs by allowing the state and political subdivisions to give compensating time in lieu of overtime.

### **SIGNIFICANT ISSUES**

SPO noted the House Judiciary Committee amendment strikes language in Section 2 (G) that was added to the original bill related to bringing civil suit under Chapter 50, Article 4 NMSA 1978.

AGO stated the House Judiciary Committee amendment to Section 50-4-8(B) removes subjective language that could have made the proposed legislation vulnerable to legal challenge. Also, the amendment to delete Section 50-4-9(G) still does not resolve the proposed legislation's lack of statute of limitations.

SPO stated it is unclear if the change to the definition of employer to include the state and its political subdivisions will have a negative impact on the ability of these entities to provide compensatory time in lieu of cash payment for overtime worked. In 2007, a change was made to the Minimum Wage Act that required legislative action in 2008 to correct the conflict that disallowed these entities from providing compensatory time. The substitute attempts to address this issue; however, the addition of coverage to include the state and its political subdivisions in the definition should be evaluated.

AGO noted the substitute would subject an employer to a fine of \$100.00 per day per employee for each day the employer fails to “respond adequately and in good faith” within thirty days of receiving notice of an investigation from the director of the Labor Relations Division, or who “fails to cooperate adequately and in good faith” during the course of an investigation. There is a legal argument that this sets up a subjective criteria for imposing those fines, which will presumably be levied by the director, and thus might violate the “fair notice” requirement imposed by the Due Process Clause of the Fifth Amendment to the United States Constitution, and therefore deemed “void for vagueness”. A penal statute offends due process and is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is being prohibited so that he or she may act accordingly. *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct..App.1986)

AGO reported Chapter 50, Article 4 NMSA does not contain a statute of limitations applicable to all claims made under that chapter and article. Other statutes of limitation would apply depending upon the cause asserted. See Section 37-1-3 NMSA 1978 (six years for claims based on written contract); Section 37-1-4 NMSA 1978 (four years for claims based on unwritten contract); Section 37-1-5 NMSA 1978 (one year for claims for recovery of unpaid overtime). The proposed legislation does not provide a clear reference to the statute of limitations it is referring to.

AGO reported by deleting the state and its political subdivisions from the definition of “employer” in Section 50-4-21 NMSA 1978, those entities will be subject to all of the provisions of the Minimum Wage Act. Currently they are only subject to Section 50-4-22(A) NMSA 1978

which sets a minimum wage of \$7.50 per hour. For example, the state and its political subdivisions will be subject to the overtime provisions set forth in Section 50-4-22(D) NMSA 1978, if this proposed legislation is enacted. It is unclear whether Section 50-4-22(E) is meant to trump Section 50-4-22(D). It is also unclear as to the effect that will have on collective bargaining agreements and other state laws.

AGO noted Section 50-4-22(E) appears to adopt and incorporate the provisions and exemptions in the federal Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq) and regulations issued pursuant to that act and apply them to the state and any political subdivision of the state. Examples would include the allowance of compensatory time off in lieu of overtime compensation for employees of public agencies (29 U.S.C. 207(o)); the general exemptions from the minimum wage provisions of that act for executive, administrative, and professional employees (29 U.S.C. 213(a)(1); and the overtime exemption for small police and fire departments (29 U.S.C. 213(b)(20).

New Mexico Municipal League noted that prior to the increase in the state minimum wage authorized in 2007, the state and political subdivisions were allowed to grant compensating time in lieu of payment of overtime in accordance with the Fair Labor Standards Act. The 2007 amendments removed that authority. The proposed legislation would return the state and political subdivisions to the status they had prior to January 1, 2008.

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

House Labor and Human Resources Committee Substitute for House Bill 493 is similar to House Bill 489 which also seeks to amend the Minimum Wage Act by adding protection against retaliation for filing claims. The substitute also has a relationship with House Bill 196, House Bill 493, House Bill 494, Senate Bill 33 and Senate Bill 305.

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