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FISCAL IMPACT REPORT

ORIGINAL DATE 2/05/09
 SPONSOR Lopez LAST UPDATED 2/25/09 HB _____
 SHORT TITLE Action Against Employee For Discussing Pay SB 305/aSPAC
 ANALYST Peery-Galon

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Corrections Department (NMCD)
 Workforce Solutions Department (WSD)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 State Personnel Office (SPO)

No Response Received From

Association of Counties
 New Mexico Municipal League

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment of Senate Bill 305 strikes “or otherwise take an adverse employment action against” language from the proposed legislation.

Synopsis of Original Bill

Senate Bill 305 amends Section 28-1-7 NMSA 1978 regarding unlawful discriminatory practice. The proposed legislation makes it an unlawful discriminatory practice for any employer to discharge, suspend, demote, discipline or otherwise take an adverse employment action against an employee in the terms or conditions of employment for discussing salary, wages or benefits remitted by an employer to an employee.

FISCAL IMPLICATIONS

NMCD stated that there is no fiscal impact if the court makes no findings of an unlawful discriminatory practice by the department against a department employee who files a compliant. However, if the employee prevails, the department would have to pay the compensatory and other damages or remedies already in place under this law. At this point, it is difficult to accurately estimate or assess the fiscal impact that passage of the proposed legislation would have on the department or state agencies in general.

WSD reported the Human Rights Bureau, which investigates every discrimination claim filed, employs only seven investigators statewide. The department reports there is an eighth position which is under the state's hiring freeze. These investigators are currently assigned 40 new cases per month and are having trouble dealing with current caseloads. The caseloads would go up with new categories of claims being made.

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 the enforcement of this law and commenced prosecutions. 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

SPO noted the Senate Public Affairs Committee amendment to strike the language “or otherwise take an adverse employment action against” appears to remove a double-negative statement since discharging, suspending, demoting or disciplining an employee should capture the intent of this language. On the other hand, by removing this language it would still allow an employer to discuss with the employee their own concerns or reasons why they do not want employees discussing salary or other pay.

NMCD stated that it is not clear exactly what the proposed legislations intent is. If the employee loudly discusses his or her pay, disrupts the operation of the agency, and cusses at or engages in other unprofessional or illegal behavior, such as assault or battery, when discussing his or her pay the proposed legislation could be construed to prevent the department and other state agencies from taking disciplinary action to stop or correct this unprofessional or illegal behavior. If the employee professionally discusses his or her pay, even if the employee is highly critical of or unhappy about his or her pay or benefits, then it seems reasonable that the employee should not be disciplined or sanctioned for this discussion. NMCD reported for this reason, the proposed legislation seems to be too broad in scope.

WSD noted this cause of action for those adversely affected appears to be better suited to enforcement under Chapter 50 wage laws.

AOC reported though the proposed legislation will create significant additional protection to most workers in New Mexico, federal law will limit the proposed legislation's applicability in some narrow circumstances. Employees already under a collective bargaining agreement, with is just over 12 percent of the national workforce, must redress such grievances through the processes stated in the agreement. In this context, federal law would pre-empt the effect of the proposed legislation's provisions. Similarly, to the extent that worker discussions about wages

and benefits might be construed as labor organizing or collective bargaining, federal labor law, and the New Mexico Public Employee Bargaining Act, will often define appropriate conduct between employer and employee.

AGO reported the proposed amendment reflects the Lilly Ledbetter Fair Pay Act of 2009, passed by both the House and the Senate and signed by President Obama on January 29, 2009. The Act amends Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e) § 706(e), the Age Discrimination in Employment Act of 1967, 29 U.S.C. 629(d) § 7(d), and the Fair Labor Standards Act of 1938, (29 U.S.C. 206(d)(1) § 6(d)(1), increasing penalties for equal pay violations, prohibiting employers from retaliating against employees who share salary information and extending the time frame for filing wage discrimination charges. AGO noted it may be prudent to review the entire Lilly Ledbetter Fair Pay Act of 2009 to encompass all of its provisions. Namely, the Act's amendment to current law, extending unlawful employment practices to include the following: "...an unlawful employment practice occurs, with respect to discrimination in violation of [the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

SPO reported Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. The New Mexico Human Rights Act complements the Title VII and covers age, ancestry, physical or mental handicap or serious medical condition. If the employer has more than 50 or more employees, state law covers spousal affiliation or if the employer has fifteen or more employees the state law covers sexual orientation or gender identity. The amendment to statute significantly deviates from the traditional concept of human rights protections based on naturally occurring human conditions. SPO noted state employee salary and wages are considered public information and may be obtained through a formal request for public information.

PERFORMANCE IMPLICATIONS

WSD reported it could better protect employees from violations if the department were able to assess fines or penalties against employers who retaliate against employees for filing a claim pursuant to Chapter 50.

AOC noted the proposed legislation may have an impact on the following district court measures: cases disposed of as a percent of cases filed and percent change in case filings by case type.

DUPLICATION

Senate Bill 305 is a duplication of House Bill 494, and has a relationship to House Bill 493 and House Bill 489.

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