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FISCAL IMPACT REPORT

SPONSOR Wirth ORIGINAL DATE 03/09/15
LAST UPDATED 03/18/15 HB _____
SHORT TITLE Protect Worker Rights To Wage & Leave SB 646/aSPAC
ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Narrative	See Narrative		Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 498 State Preemption of Wage & Leave Laws

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Workforce Solutions Department (WSD)

State Personnel Office (SPO)

Department of Health (DOH)

Office of the Attorney General (AGO)

SUMMARY

Synopsis of SPAC Amendment

Senate Public Affairs Committee amendment to SB 646 would make a simple language change with significant ramifications to the bill: it would eliminate “sick and other” leave from the definition of wages owed to an employee upon separation but retain “vacation and holiday” leave in the definition.

This means that employees in public and private employment would be paid, whether they quit or are discharged from employment, for accrued vacation and holiday leave, but would not be compensated for any accrued sick leave.

The SPAC amendment is therefore not consistent with 1.7.7.8 NMAC, which allows a classified state employee, upon separation, to cash out up to 240 hours of annual leave. Any hours over 240 at the time of separation are lost.

AGO analysis states:

To the extent that the wage payment on separation language would impair any collective bargaining agreements in place as of the effective date of this amendment, SB 646 may raise concerns under the contract clause of Article II, Section 19 of the New Mexico Constitution.

Section 19 states: “No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.”

The fiscal impact of SB 646 as amended is unknown. By eliminating sick and other leave from the definition of “wages,” the cost to private employers and to the state will be reduced.

Currently, according to the prior SPO analysis, the state liability for state employees only (not employees of schools and universities) for annual and personal leave is \$57.9 million.

With 23,000 employees, averaging \$2.5 thousand each in such leave, and with expected separations of 2850 per year, estimated cost to the state for payment of such leave would be \$7.2 million per year (assuming there would be no limitation on much accrued vacation leave would be paid upon separation.)

DOH reports that the bill as amended alleviates concerns outlined in the original analysis with regard to fiscal implications.

Synopsis of Original Bill

Senate Bill 646 amends Section 50-4-1 NMSA 1978 to clarify who is an employer, and the payment of accrued leave time to an employee leaving their job.

Section 1 (A) requires that when courts and the Workforce Solutions Department is determining who an “employer” is, they should consider all relevant evidence including informal handwritten documentation, audio or video recordings, statements and other evidence of the existence of an employer-employee relationship.

Section 1 (B) adds to the definition of wages, stating that when an employer is calculating wages due to an employee, they must include at final payment of the employee an employee's vacation, holiday, sick and other leave accrued, but unused as of the date that the employee quits or is discharged from employment.

The effective date is July 1, 2015.

FISCAL IMPLICATIONS

SB 646 carries no appropriation. It would have indeterminate but substantial impact on state agencies and all employers in the state not exempted from the bill's requirements.

SPO analysis details below the impact of SB 646 on state agencies for employee separations: There will be a budgetary impact to state agencies as they would be required to pay for unused accrued hours at the time of separation. Since 2011, there has been between 2,100 and 3,100

employee separations per year. The actual fiscal impact is difficult to determine since each employee’s leave balance is unique to them at the time of separation, and is based on their individual hourly rates. Although an employee separation is a unique event, and each individual separation results in a non-recurring cost, the vacant positions will be filled and those employees will eventually separate, which would categorize this into an indeterminate recurring cost to agencies. The table below displays the budgetary impact to state agencies on a macro basis based on **current** leave balances.

The State already makes terminal leave payments on vacation (annual) leave up to 240 hours; however, SB646 would require the state to pay the full amount of all annual leave and all sick leave.

The total amount of leave that is eligible to be paid to state employees as of March 2, 2015, is as follows:

Salary Plan	Sick	Vacation	Personal Day	Grand Total
AOC (Courts)	\$ 2,588.1	\$ 4,795.3	\$ 219.0	\$ 7,383.4
AODA (District Attorneys)	1,239.4	2,442.4	118.3	3,681.8
CLSS (Classified Employees)	24,032.1	42,660.0	2,260.7	66,692.1
EXOT (Executive Other)	252.9	54.8	3.8	307.7
GOVX (Governor’s Exempt)	1,594.9	2,807.8	135.3	4,402.7
LGIS (Legislative Employees)	503.0	64.6	31.5	567.5
STPL (State Police)	1,287.3	2,190.8	82.1	3,478.1
Grand Total	\$31,497.6	\$55,015.7	\$ 2,850.7	\$ 86,513.3

In thousands, rounded.

In FY14, there were 2,858 separations from state service. It would have cost \$13.6 million to pay all of the leave time owed to those employees leaving their state jobs.

DOH analysis looked at the impact on their agency alone:

The Department of Health (DOH) Administrative Services Division estimates an increase in annual expenditures of \$2.5M to enact this requirement within the agency. Currently, DOH is not required to pay unused sick leave; therefore, no request for appropriation was made to enable DOH to pay employees who resign or are discharged, and this expense is not included in the Executive Budget Recommendation.

WSD analysis states that SB 646 will impact their Labor Relations Division (LRD). LRD is authorized by statute to investigate and prosecute actions for the collection of wage claims on behalf of workers. SB 646 would expand the scope of cases that LRD investigates. WSD states:

LRD does not have concrete information regarding the impact of the expanded workload, but estimates that two additional labor law administrators would be required (\$125.0 per year, recurring). The division would also need to update its website information, Wage and Hour employer/employee presentations and all WSD publications that make reference to the WSD’s wage-claim process. Such updates would entail an estimated non-recurring fiscal impact of \$5,000, in addition to the recurring amounts.

AOC analysis states:

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.

There are very few “wage theft” cases currently filed by the state on behalf of unpaid workers. The bill imposes a duty on the courts to consider “all relevant evidence,” and enumerates different kinds of evidence of contracts that may exist. 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. This bill has the potential to significantly increase case filings

SIGNIFICANT ISSUES

SB 646 has two sections. Section 1A adds to the definition of what constitutes an employer-employee relationship. Section 1B redefines “wages” as including not only cash payments, but also all accrued but unused leave.

SPO analysis states:

The law regarding what constitutes an employer-employee relationship is already well-established in New Mexico. See Uniform Jury Instructions 13-401, 13-403, 13-404, and 13-406 through 13-408 NMRA; and see, *Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶19, 147 N.M. 209, 214, 218 P.3d 1257, 1262: “The principal test for determining whether an employer-employee relationship exists ... turns on the right of the employer to control the work of the employee.” Thus, Section 1(A) could cause unnecessary confusion.

Additionally, SPO Board rules already mandate the following:

1.7.7.8 NMAC ANNUAL LEAVE:

G. Employees separating from the classified service, except by a reduction in force, shall be paid for accrued annual leave, as of the date of separation, up to a maximum of 240 hours at their current hourly rate. Employees separating from the classified service as the result of a reduction in force shall be paid for all accrued annual leave, as of the date of separation, at their current hourly rate.

1.7.7.10 NMAC SICK LEAVE:

F. No payment shall be made for accrued sick leave at the time of separation from the classified service except as provided by law.

1.7.7.17 NMAC PERSONAL LEAVE DAY:

D. Employees who do not take the personal leave day shall not be paid for it upon separation from the classified service.

Pursuant to 1.7.7.8 NMAC, when a classified state employee separates they are allowed to cash out up to 240 hours of annual leave. Any hours over 240 at the time of separation are lost. Many employees with high annual leave balances will use this additional leave

to bring their balance down to 240 in order to not lose the excess leave. This type of employee may choose not to use the extra leave in order to receive a higher paycheck upon separation, thereby creating an additional financial liability for the State.

Also, pursuant to Rule 1.7.7.10 NMAC, when a state employee separates they forfeit all accrued sick leave at the time of separation. This bill would require all state agencies to pay the full balance of sick leave which would result in a significant financial burden. Note: A special rule allows those employees who are retiring to cash out up to 400 hours at half their hourly rate of pay at the time of retirement. This rule applies to employees who have over 600 hours of accrued sick leave.

Similarly, pursuant to 1.7.7.17 NMAC, an employee must either use the personal day by the end of the calendar year, or lose it. If employees are paid for this leave at the time of separation, they may not take the leave during the year of separation in anticipation of being paid for the unused leave, which could create a significant financial burden for the State.

This bill may have an unintended negative impact on both employers and workers if private employers who offer paid time off choose to discontinue their paid leave benefit because SB 646 mandated employers to pay for all unused accrued leave at the time of employee separation.

National Conference of State Legislatures (NCSL) defines employee leave as being “types of leave for workers, including family leave, sick leave, parental leave and vacation leave. Other less common types of leave are donor leave, to serve as a blood, organ or tissue donor; disaster leave, to serve as a volunteer for an organization that assists with emergencies or disasters; or jury duty leave. Paid leave is rarely required by law and is more commonly provided by employers as a benefit for their workers. Leave for workers are covered under a variety of state and federal laws. Leave provisions often vary for private and public employees and with limited exceptions there are few leave requirements for private employers.”

AOC analysis states:

The bill appears to expand the scope of “relevant evidence” that might establish an employer-employee relationship to include many informal work arrangements that, prior to the bill, would not currently rise to the level of an employment contract that would confer the rights of payment of wages and leave due upon separation. The factors for consideration that the bill enumerates are considered by contract law scholars to be common indications of an employer/employee relationship. The magistrate judges, whose courts receive many such cases, have been trained that contracts can take all forms, including verbal contracts and contracts that are pieced together through course of dealings, custom and practice, and so on.

This expanded inquiry only explicitly lists what the law already allows judges to consider. Though many more contracts may be found under this bill, those commercial relationships would already be found to exist had the entirety of contract law been applied to them.

That said, the second part of the bill that changes the definition of wages may include some employer/employee relationships that the contract common law would not include. For instance, many employer/employee relationships include sick leave, but the express terms of the contract do not allow for payment of accumulated sick leave upon separation from employment. Many employers allow for holiday leave, but the express terms of the contract do not include payment for holiday leave. Some bonus arrangements require employment through a given date before the duty to pay the bonus becomes legally enforceable. The substantive requirement in the bill that the wages as defined “shall be paid” could result in payment of hourly wages beyond the express terms of the contract.

DOH analysis states that “Sick leave within a State of New Mexico agency such as DOH is currently viewed as safety net should an employee become sick or injured. The current sick leave benefit is not defined as a vested benefit.”

ADMINISTRATIVE IMPLICATIONS

Statutory changes may be required for Section 10-7-10 and 11 NMSA 1978. The State Personnel Office will go through the rule making process to change the three rules listed above to be compliant with state statute.

RELATIONSHIP

Relates to: HB 498 - State Preemption of Wage & Leave Laws

TECHNICAL ISSUES

SPO states: With regard to Section 1(A), mandating the types of evidence that can establish the existence of an employer-employee relationship is not a proper way of defining a term, and could unintentionally limit the scope of what is considered in making such a determination.

OTHER SUBSTANTIVE ISSUES

The NCSL has summarized all bills considered by state legislatures in 2013 related to employee leave. Many of the bills seek to mandate paid sick leave for employees in their state. <http://www.ncsl.org/documents/employ/Employment-Leave-2013.pdf>

ALTERNATIVES

AOC suggests: If, on page 2, line 10, the phrase “contractually promised” were inserted between “employee’s” and “wages,” it would be clear that the employer would be required to pay vacation, sick and holiday pay only if such pay was promised as part of the employment contract.”

POSSIBLE QUESTIONS

What will be the economic impact on the state if all employers are required to pay for all leave accrued? Will employers provide less leave?