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FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 3/16/17
LAST UPDATED _____ HB 335/HJCS
SHORT TITLE Resolution of Prevailing Wage Complaints SB _____
ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$181.4	\$176.4	\$176.4	\$534.2	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 213 and House Bill 20

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workforce Solutions Department (WSD)
Administrative Office of the Courts (AOC)
Public School Facilities Authority (PSFA)

SUMMARY

Synopsis of Bill

House Judiciary Committee substitute for House Bill 335 (HB335) amends NMSA 1978, Section 13-4-11 to add a new mandate applicable to state contracting agencies to withhold from contractors, subcontractors, or employers portions of accrued payments equal to the difference between the appropriate wage rate and fringe benefit rates and actual payment to the employees, where underpayment of wage rates or fringe benefits has occurred. The substitute for HB335 changed what was before a discretionary obligation to a mandatory obligation.

FISCAL IMPLICATIONS

On public-works jobs, the LRD investigates wage and fringe benefit complaints filed with the Division. WSD reported HB 335 will require three additional labor law administrators (one per office) to meet the investigative time frame required by HB 335 and promulgate new regulations.

The LRD would also need to update its website and any publications dealing with the PWMWA in order to reflect the changes called for by the bill.

The AOC reported 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 actions to enforce IPRA, employee actions for damages, and appeals from actions to enforce and private actions seeking damages. 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.

The NMDOT reported this bill will not fiscally impact the agency since NMDOT already does this under obligations imposed on federally funding projects through the Davis-Bacon Act. NMDOT would also begin this withholding obligation for 100 percent state funded projects under the Public Works Minimum Wage Act.

SIGNIFICANT ISSUES

WSD believes HB 335's new provision making both the contracting agencies and noncompliant contractors liable to pay affected employees three times the amount of their unpaid wages or fringe benefits is a significant change to NMSA 1978, § 13-4-14. Currently, the statute only makes both the contracting agencies and noncompliant contractors liable to pay affected employees any wages or fringe benefits found due to the workers. Generally, statutes permitting an award of treble damages do so only in certain egregious situations where the defendant or wrongdoer has acted deliberately. WSD believes there is a significant issue in that HB 335 fails to differentiate between wage and fringe benefit violations that are the result inadvertence or negligence and those that are willful and deliberate.

WSD also highlighted concerns that by making contracting agencies and noncompliant contractors both liable for treble damages, HB 335 can be read as potentially allowing affected workers to receive *six* times the amount they are owed, plus \$100 per day in liquidated damages payable by contractors. WSD stated this exceeds the deterrent purpose for which treble damages have traditionally been allowed.

WSD stated awarding treble damages could also prove problematic if the Director learns of violations only after the public-works project has been completed. Section 13-4-14 requires the Director to certify to the contracting agency the names of noncompliant contractors, which then triggers the contracting agency's nondiscretionary obligation to pay the affected workers from accrued payments withheld under the terms of the contract or designated for the project. But if the project is completed and all monies have been paid out, the Director's certification would be meaningless as an enforcement tool. Although Section 13-4-18(A) (2) provides for the delivery of a "payment bond" to the state agency or local public body "for the protection of persons supplying labor and material to the contractor," recovery in a suit on such a payment bond is limited to the "amount of the balance unpaid at the time of institution of the suit." NMSA 1978, 13-4-19(B). There is no provision for payment of treble damages, as called for by HB 335. In order to give Section 13-4-14 the effect intended by HB 335 with respect to treble damages, it would also be necessary to amend Section 13-4-18 so that violations discovered after completion of the project are covered.

PERFORMANCE IMPLICATIONS

WSD stated HB 335's requires the LRD Director investigate and determine whether a wage violation has occurred within 30 days may not be feasible. Effective compliance investigations can take considerable time and involve requesting oftentimes voluminous payroll and other records, conducting employee and witness interviews and carefully examining all evidence collected. Regulations governing investigations under the federal Davis-Bacon Act do not impose a strict deadline for completion, making the necessity of such a deadline by HB 335 unclear. *See generally* 29 CFR § 5.6.

Labor Law Administrators also perform public works inspections at the job sites, handle a case load of wage and hour investigations, conduct hearings and appear in court on behalf of claimants. Three additional personnel (one per office) would be required to attempt to keep service levels the same to the constituents of New Mexico and implement HB 335.

RELATIONSHIP

House Bill 213 proposes to repeal the PWMWA, Sections 13-4-10 through 13-4-17, NMSA 1978. HB 213 would not impact existing contracts or those contracts that have already been bid that are outstanding pursuant to the PWMWA at the time of enactment of this act.

House Bill 20 proposes to make three changes to the PWMWA. First, HB 20 exempts projects and contracts for public roads and public highways as defined in Section 67-2-1 NMSA 1978 and educational institutions identified in Article 12, Section 11 of the Constitution of New Mexico from the Public Works Minimum Wage Act. Second, HB 20 calls for the Director of the Labor Relations Division of the Workforce Solutions Department to conduct a continuing field survey and to accept voluntary submissions of information from interested parties. Based on the field survey, the Director would set the wage and fringe benefit rate for a particular classification as the weighted average of the hours reported for that classification. Finally, HB 20 caps prevailing wage and fringe benefit rates at the rates applicable to projects covered by the Federal Davis-Bacon Act.

OTHER SUBSTANTIVE ISSUES

HB 335 proposes to amend § 13-4-11 by requiring a contracting agency involved in public-works projects to disclose copies of certified weekly payrolls within 15 days of a request made by any person pursuant to the New Mexico Inspection of Public Records Act. WSD believes this language may create confusion since there is currently no statutory requirement for contractors to send certified weekly payroll records to the contracting agency, and a contracting agency would not have such payroll records in its possession unless they were sent to the contracting agency by the contractor. Certified payroll records maintained by a private contractor performing work on a public works project are not public records subject to IPRA. *See generally Toomey v. City of Truth or Consequences*, 2012-NMCA-104 ¶ 14.

The AOC also noted with the requirement for a contracting agency, upon request by a person, to provide copies of certified weekly payroll records to the requesting party within 15 days of the request subject to the Inspection of Public Records Act. Section 14-2-11 NMSA 1978 in IPRA sets out the procedure for denied requests, providing for an action to enforce IPRA provisions. Section 14-2-12 governs enforcement, permitting an action to enforce IPRA by the Attorney

General (AG) or the District Attorney (DA) with jurisdiction, or a person whose written request has been denied. (Subsection A) Section 14-2-12 further provides:

- A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of IPRA (Subsection B);
- The exhaustion of administrative remedies is not required prior to bring an action to enforce the provisions of IPRA (Subsection C); and
- The court is required to award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of IPRA. (Subsection D)

KK/al/sb