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FISCAL IMPACT REPORT

SPONSOR Ezzell/Wooley/
Townsend ORIGINAL DATE 02/20/17 LAST UPDATED 02/22/17 HB 434/aHAWC

SHORT TITLE Agritourism Limited Liability SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

NM Department of Agriculture (NMDA)
 Administrative Office of the Courts (AOC)
 Office of the Attorney General (OAG)
 Office of the Superintendent of Insurance (OSI)
 Tourism Department (TD)

SUMMARY

Synopsis of HAWC Amendment

The House Agriculture and Water Resources Committee amendment to HB 434 clarifies the definition of “agritourism professional” in the bill by adding corporations and partnerships, consistent with the even broader definition of “person” in the Uniform Statute and Rule Construction Act that applies to New Mexico statutes generally. See Section 12-2A-3(E) NMSA 1978.

Synopsis of Original Bill

House Bill 434 enacts the “Agritourism Limited Liability Act” (“ALLA”), providing immunity from liability for agritourism professionals, providing exceptions from immunity, and requiring the posting of warnings about agritourism activities. The Act defines the following terms:

- “Agritourism activity”: any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities regardless of whether the participant paid to participate in the activity;
- “Agritourism professional”: any person who is engaged in the business of providing one or more agritourism activities, whether or not for compensation;
- “Farm or ranch”: one or more areas of land used for the production, cultivation, growing, harvesting or processing of agricultural products;
- “Inherent risks of agritourism activity”: those dangers or conditions that are an integral part of an agritourism activity, including the potential that a participant will act in a negligent manner that may contribute to the participant’s or another’s injury; and
- “Participant”: any person, other than an agritourism professional, who engages in an agritourism activity.

HB 434 provides that an agritourism professional is not liable for injury to or the death of a participant resulting from the inherent risks of agritourism activities so long as the warning notice specified in Section 4(C) is posted as required. That warning must be posted at the entrance to a farm or ranch where the agritourism activity is to take place and at the site of the agritourism activity. It also must be contained in every written contract entered into by an agritourism professional for the providing of professional services, instruction or the rental of equipment to a participant.

No participant or participant’s representative is authorized to maintain an action against or to recover from an agritourism professional for injury, loss, damage or death of the participant resulting exclusively from any of the inherent risks of agritourism activities. An agritourism professional must plead the affirmative defense of assumption of the inherent risks of agritourism activity by the participant, in any action for damages against an agritourism professional for agritourism activity.

An agritourism professional may be found liable when that professional: (1) commits an act or omission constituting negligence or willful or wanton disregard for the safety of the participant, which act or omission proximately causes injury, damage or death to the participant; (2) has actual knowledge or reasonably should have known of a dangerous condition or the dangerous propensity of a particular animal, does not make the dangerous condition or propensity known to the participant, and the dangerous condition or propensity proximately causes injury, damage or death to the participant; or (3) intentionally injures the participant. Additionally, failure to comply with the warning sign and notices requirements prevents an agritourism professional from invoking the privileges of immunity provided by ALLA.

HB 434 contains a severability clause. The effective date of the bill is July 1, 2017.

FISCAL IMPLICATIONS

This bill has no fiscal impact on state agencies.

SIGNIFICANT ISSUES

Agritourism is an emerging industry in New Mexico. According to NMDA:

The main purpose of an agritourism operation is to provide entertainment and education to visitors, while providing a connection to production agriculture. The agritourism industry is growing in New Mexico. There are at least 80 agritourism businesses in the state. With a growing wine industry and a desire for families to form a connection to agriculture, the demand for these types of operations continues to grow. Some agritourism operations have incorporated a school curriculum as a part of their educational component, which makes these destinations appealing to teachers as a learning tool. These operations attract many local visitors and tourists, contributing to their local economies. Incorporating agritourism programs into traditional farms and ranches allows operators the opportunity to generate alternative sources of income which helps to cover the operating expenses. By diversifying through agritourism, farm and ranch families are able to keep multi-generations involved in their family operations.

Similarly, TD comments:

House Bill 434 could remove perceived barriers for potential businesses entering or expanding into the agritourism industry in New Mexico, creating a greater investment in agritourism as a whole. HB 434 could encourage growth throughout the industry by providing protection to agritourism professionals from unreasonable claims, such as those that result from visitors engaging in activities with known inherent risks. Examples of these unreasonable claims may be a visitor making a claim after tripping over a pumpkin in a pumpkin patch with adequate signage or getting stung by a bee during a ranch tour.

As NMDA notes, currently there are no laws in New Mexico to protect agritourism professionals from inherent risks of an agritourism activity. HB 434 addresses this by providing limited immunity to agritourism professionals.

AOC analysis points out that HB 434 may conflict with the Equine Liability Act, which provides liability limits for equine activities. Although this bill does not specifically address equine activities, the broad liability covered under the Equine Liability Act and the expansive definition of agritourism activity in ALLA could create a conflict over the applicable standard or liability. In the event of such a conflict:

...a court may be tasked with choosing between a waiver of limited liability under the Equine Liability Act for an operator, owner, trainer or promoter of an equine activity who has “committed an act or omission that constitutes conscious or reckless disregard for the safety of a rider and an injury was the proximate result of that act or omission...” (Section 42-13-4(C)(4) NMSA 1978) or a waiver of liability under ALLA for an agritourism professional who “commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage or death to the participant.” (Section 3(B))

Likewise, the State of New Mexico has a number of laws involving serving and selling alcohol, see Liquor Control Act (Sections 60-3A-1 to 12, NMSA 1978) and tort liability for alcohol vendors (see Section 41-11-1 NMSA 1978), which may be implicated by winemaking, a specified agritourism activity under the Act. Section 57-6-1 NMSA 1978 provides liability for hotelkeepers which may conflict with liability limitations provided in HB 434 regarding bed-and-breakfast operations. To avoid any potential conflict, the language “subject to the provisions of” or “notwithstanding the provisions of” the title of the conflicting act could be inserted.

AOC also points to ALLA’s broad definition of inherent risk, defined in Section 1(E) to include “dangers or conditions that are an integral part of an agritourism activity...” and suggests it may be problematic:

While the bill goes to some length in expanding on what might be inherent dangers or conditions, the courts may come to divergent conclusions about what is included in the language. This uncertainty may affect the value of a case for settlement or alternative dispute resolution purposes.

OAG calls attention to Section 4(B)’s required language in professional agritourism contracts:

HB 434 conditions liability limitations on inclusion of a specific warning within “every” written contract for providing services, instruction or rental equipment to participants in an agritourism activity. The requirement for including the warning in all contracts may be overbroad, unintentionally exposing the agritourism professional to more liability rather than limiting the liability. As an example, the warning requirement could affect an agritourism professional who uses an instructor under an existing contract that does not contain the warning. Also, the warning required under HB 434 also applies to off-premises activities and activities that do not involve agritourism. Requiring a warning in an agribusiness professional’s contract that does not involve a participant may have unintended consequences for the agritourism professional.

OTHER SUBSTANTIVE ISSUES

Section 3(A)(2) requires an agritourism professional, in an action for damages against that professional, to plead the affirmative defense of assumption of the inherent risks of agritourism activity by the participant. AOC analysis advises “This sort of procedural prescription is generally left to the authority of the Supreme Court in establishing pleading procedures.”

MD/al/jle