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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Lopez/Pope/Pinto</u>	<b>LAST UPDATED</b> <u>2/26/2023</u>
<b>SHORT TITLE</b> <u>Diversity Act</u>	<b>ORIGINAL DATE</b> <u>2/11/2023</u>
	<b>BILL NUMBER</b> <u>Senate Bill 226/aSFC</u>
	<b>ANALYST</b> <u>Hanika-Ortiz</u>

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
SPO (CDO, convene council, data sets)	No fiscal impact	\$150.0	\$150.0	\$300.0	Recurring	General Fund
State Agencies (council liaisons, diversity plans)	No fiscal impact	At least \$100.0	At least \$100.0	At least \$200.0	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases  
 \*Amounts reflect most recent analysis of this legislation

### Sources of Information

LFC Files

#### Responses Received From

Higher Education Department (HED)  
 New Mexico Attorney General (NMAG)  
 General Services Department (GSD)  
 State Personnel Office (SPO)  
 Office of African American Affairs (OAAA)  
 Commission for Deaf and Hard-of-Hearing Persons (CDHH)  
 Commission for the Blind (CFB)  
 Indian Affairs Department (IAD)  
 Human Services Department (HSD)

## SUMMARY

### Synopsis of SFC Amendment to Senate Bill 226

The Senate Finance Committee Amendment to SB226 strikes the appropriation.

### Synopsis of Original Bill

Senate Bill 226 (SB226) appropriates \$250 thousand from the general fund to the State Personnel Office (SPO) to enact and carry out the provisions of the proposed “Diversity Act.”

More specifically,

Sections 1 and 2 provide a title and definitions that include, among others, "council" to mean the workforce diversity and inclusion council; "institutional racism" to mean the actions that result in differential access to goods, services and opportunities; "protected class" to mean a group legally protected from discrimination; "state employees" as subject to the Personnel Act; and "workforce diversity" to mean recruiting from a diverse population to secure a high-performing workforce.

Section 3 creates the "chief diversity officer" (CDO) tasked with creating a culture of equity, equality, and inclusion, and collaborating with agencies in assessing barriers and developing strategies to: recruit and retain a diverse workforce; increase awareness of and support for equity, equality and inclusive values; establish and maintain agency-specific strategic plans and best practices for leading diverse groups; create strategies to recruit from underserved communities; and conduct evaluations to track progress against the required provisions in the bill.

On or before December 31 each year, the CDO will develop policies to prevent inequities in hiring, pay, and promotion; develop anti-institutional racism trainings; and track progress toward ending institutional racism. Such trainings will include strategies to eliminate cultural prejudices and discrimination; improve engagement with employees, customers, and contractors from different backgrounds; and counteract unconscious bias to foster a climate of diversity and inclusion.

Section 4 requires the CDO to convene the "workforce diversity and inclusion council" composed of liaisons from agencies. The liaisons will implement recommendations proposed by agencies and CDO. The CDO will ensure job advertisements and personnel reviews reflect commitments to eliminating institutional racism, and ensure employees receive anti-institutional racism training.

Section 5 requires by July 1 each year, agencies to submit a report that includes an assessment of anti-institutional racism in hiring, promoting and pay equity, including for contractors and nongovernmental and other organizations that win bids or obtain contracts; accommodations for employees with disabilities; and data-driven approaches to address solutions for the problems identified, including proactive measures to address equity and inclusion in the workforce.

This section also requires the CDO to submit an annual report each year to the governor and Legislature and for it to be part of the annual budget request and request for proposals submissions for each agency. In addition to posting on the SPO website, copies are to be maintained in the Legislative Council Service library, state library, as well as in the State Records and Archives.

Section 6 requires each agency to maintain a diversity, equity, and inclusion strategic plan.

The effective date of this bill is July 1, 2023.

## **FISCAL IMPLICATIONS**

The appropriation of \$250 thousand contained in this bill is a nonrecurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY24 shall revert to the general fund. Although the appropriation in this bill is a nonrecurring expense to the

general fund, and does not specify future appropriations, this new act creates a CDO, a workforce diversity and inclusion council, and requires agency-specific diversity initiatives. There is an expectation that these efforts will continue in future years; therefore, costs will become recurring after FY24. The SFC amendment strikes the appropriation.

SPO supports a new CDO but says appropriation will only cover the position and implementation of the act year one, but not costs in future years. Additionally, SB226 requires agencies to participate in the council; develop and maintain diversity, equity, and inclusion plans; compile and analyze data for annual reporting; but, does not identify funding to cover these activities. Smaller agencies will have more difficulty than larger ones to absorb these costs.

## SIGNIFICANT ISSUES

The bill provides a framework to support and increase the number of employees in the state government workforce from underserved populations, who would otherwise provide meaningful contributions to the state and have well-paying jobs and opportunities for advancement.

SB226 convenes a council made up of agency liaisons and provides a CDO to oversee the program. The bill requires every state agency, office, department, board, commission, or authority under the executive branch to designate a CDO to report to the agency head and collaborate with the CDO to improve diversity and inclusion for the state government workforce. The bill includes broad data collection and reporting requirements for SPO and entities participating on the council.

While SB226 designates the CDO as a classified position within SPO, it also states the CDO shall be hired by and serve at the pleasure of the State Personnel Director. SPO said a State of New Mexico employee can either be part of the classified service and terminated only for just cause, or be part of the governor exempt service and terminable at will, but not both. In addition, SPO believes it would be more fitting for the CDO to “*consult with state agencies concerning compliance with laws and rules relevant to diversity, equity and inclusion efforts.*” As SPO emphasizes, each agency is responsible for their own compliance with state laws and regulations.

SB226 requires the CDO to “have full access to SPO's human resource management systems,” but SPO suggests “...access to SPO's human resources management systems *necessary to carry out the requirements of the act*” would be more appropriate. While the CDO needs access to race and gender data, the CDO would not need to access social security numbers, addresses, or time sheets.

According to CDHH, there is currently no requirement to collect demographic data on state employees, or contractors and subcontractors pursuant to the Procurement Code, to the level required in the bill. SB226 also requires an assessment of the state agency's ability to deliver reasonable accommodations for its state employees with disabilities. There is also no requirement in the bill for the new CDO within SPO to have training or education related to disabilities.

According to CFB, Section 5 of SB226 requires agencies to submit reports. However, it does not specify how agencies will acquire and protect confidential and personally identifiable information for the report. Confidential information about disabilities or genetic conditions might be identifiable to specific individuals, which would be a potential violation of the Americans

with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act. The data sets used to compile the report might also be subject to Inspection of Public Records Act (IPRA).

## PERFORMANCE IMPLICATIONS

OAAA said its operational mandate requires informing the African American community of opportunities, and coordinate services and activities of agencies pertaining to African Americans.

SPO said SB226 does not reference the Governor’s Advisory Council on Racial Justice.

## ADMINISTRATIVE IMPLICATIONS

Agencies will each designate a “diversity and inclusion liaison” that will participate in the council, which convenes as often as needed, report to their respective agency heads, and collaborate with the CDO in tracking certain data and developing and maintaining diversity and inclusion plans.

Under ADA, any online trainings must be accessible for persons who are blind or visually impaired and use assistive technology such as computer screen readers and screen magnification systems.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

IAD commented that it requires state agencies to have a designated tribal liaison, similar to the designation of diversity and inclusion liaisons in the bill, pursuant to the State-Tribal Collaboration Act (Act) Section 3E. However, because there is not a designated classification per SPO, or standards in the Act for tribal liaisons, there are varied results of performance of tribal liaisons.

CFB reported the Vocational Rehabilitation Program is governed by the Vocational Rehabilitation Act (Act) regulations at 34 CFR 361.19 and requires “the vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State agency takes affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as stated in section 503 of the Act.”

CFB also noted it often hires individuals who are clients of the Vocational Rehabilitation Program, which is covered by confidentiality requirements at 34 CFR 361.38. Employees of CFB may also become clients, which would again mean their disability and other personal information is covered by 34 CFR 361.38. CFB noted it would need to segregate this information from the demographic data gathered for reporting purposes under SB226. In addition, the regulations specify “centralization of functions on the state agency level is impermissible if it results in interference with the decision-making capacity” of the vocational rehabilitation agency.

## TECHNICAL ISSUES

The following clarifications were suggested by NMAG and include:

P.5, ln 17-18, describes the duties of the chief diversity officer to include “ensur[ing] that

all state agencies maintain compliance with all relevant and applicable laws and rules.” It may be prudent to add additional clarity as to which laws are referred to by this provision as it could be construed perhaps more broadly or less broadly than legislatively intended, depending on the interpretation of “relevant.”

Section 5 of the Act, beginning on Line 24 of page 8, would obligate reporting of specific demographic information to SPO. I believe it is SPO’s policy not to collect or maintain certain demographic data in order to avoid possible claims of discrimination based on constitutionally protected class. In order to maintain the demographic data collected by various state agencies as required by the Diversity Act, SPO would likely need to amend this policy. It may be prudent to include specific statutory direction to SPO.

P. 9, ln. 5 requires the collection of “demographic data.” In order to provide additional clarity, it may be prudent to define what “demographic data” is to be collected, or delegate the authority to create that definition by rule.

Generally, as written, there may be a desire to provide more clarification on the role of the WDIC [workforce diversity and inclusion council].

## **OTHER SUBSTANTIVE ISSUES**

CDHH reports employment rates from the American Community Survey in 2021 show the number of deaf individuals who are not in the labor force is 41.7 percent compared to 24.9 percent for their hearing counterparts. With reasonable accommodations, as well as considerations to various intersecting diversity and inclusion policies, individuals from underserved populations would have the opportunity for both entering the workforce of the state and the ability to advance in the state.

IAD commented New Mexico is one of three states and the District of Columbia in which ethnic minorities comprise the majority. New Mexicans identifying as American Indian and Alaska Native represent 11.2 percent of the population, the second highest in the country, following Alaska, and persons identifying as American Indian and Alaska Native increased by 9,452 since 2016, for an increase in share by 0.4 percent, therefore establishing that a historical perspective on the many racial and ethnic subpopulations that live in work in New Mexico is significant.

With 75 percent of Native Americans living off reservations, Urban Indian Centers, Tribal serving organizations, and state agencies are key recruitment resource for entities looking for applicants with varying backgrounds, education levels, skill sets, and cultural competent backgrounds. IAD believes it is critical employers create an environment in which applicants and employees are comfortable self-identifying to measure success of affirmative action efforts.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Data collection to support the State’s commitment to diversity and inclusion in its human resources processes and practices will be lacking for reporting and planning purposes.