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## FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 03-07-09  
LAST UPDATED \_\_\_\_\_ HB 628/HJCS  
SHORT TITLE Occupational Health Inspection Rights SB \_\_\_\_\_  
ANALYST Aubel

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	NFI			

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Environment Department (NMED)

Office of the Attorney General (OAG)

### SUMMARY

#### Synopsis of Bill

The House Judiciary Committee Substitute for House Bill 628 amends the Occupational Health and Safety Act (Act) to clarify employer and employee rights to representation by legal counsel or certified bargaining units when being questioned during an inspection or investigation. Legal counsel for the employer or employee may be present, provided that the same legal counsel does not represent both the employer and the employee. "Employer" is further defined to remove any ambiguity. The bill also deletes language that states the department's representative is not authorized to question privately the employer or employees until the Environmental Improvement Board has adopted regulations protecting the rights of such employer and employees. HB 628/HJCS makes other minor technical edits.

The effective date would be 90 days after the end of the 2009 Legislative Session.

### FISCAL IMPLICATIONS

House Bill 288 does not carry a fiscal impact.

## SIGNIFICANT ISSUES

The current policy in New Mexico is set by regulation by the Environment Improvement Board (EIB) in 11.5.1.21(E)(3)(a) NMAC. The OAG reports that during the 2008 rule-making hearing on the matter, the board had a lengthy policy debate on the merits of whether an employee should always be barred from using his company's counsel, and if so, who pays for an employee's counsel. The rule was adopted that allowed a company's legal counsel to be present at an employee's interview. This rule is not consistent with the federal Occupational Safety and Health Act (OSHA) rules.

NMED explains that the reference to the EIB rulemaking for occupational safety inquires is, therefore, deleted to allow the department to act under the federal rules to ensure compliance to those standards. The current policy at the federal level is found in 29 CFR 1903.3(a), permitting federal OSHA compliance officers the right to inspect a work site and "question privately any employer, owner, operator, agent or employee."

NMED provides the following background information:

The OHS Act authorizes the NMED representatives to enter and inspect any place of employment at reasonable times and without delay. The OHS Act further authorizes NMED representatives to question privately the employees and the employer. Modeled on the federal OSHA Act, the purpose of private questioning is to interview employees and the employer in a setting that encourages each to freely express workplace safety concerns and provide workplace safety information without pressure or intimidation from the other party.

Private questioning is an especially important protection for employees who may not speak openly about their workplace safety concerns in the presence of their employer or their employer's legal counsel for fear of being fired or suffering other retaliation. Thus, private questioning is an essential investigative tool for the department's occupational health and safety bureau (OHSB) inspectors to discover and correct workplace safety violations and to prevent workplace injuries and illnesses.

Federal OSHA allows states to have primacy over regulating occupational health and safety by approving a state's occupational health and safety program plan. New Mexico currently operates under a federally-approved plan. In order for a state to obtain primacy, its occupational health and safety program must be at least as effective as the federal program. Clear authority to conduct private questioning of employers and employees is critical to ensure that New Mexico's program is at least as effective as the federal program.

Through case law and subsequent amendments to New Mexico's occupational health and safety regulations, uncertainty and inconsistency have arisen concerning the role of legal counsel during private questioning. The issue is not whether legal counsel may be present during private questioning, but whether the same legal counsel may represent both the employees and the employer during private questioning.

The department has found that there is an inherent conflict of interest when legal counsel represents both the employees and the employer. Experience with counsel representing both the employees and the employer during questioning has shown the employee is often reluctant to speak openly. In these instances, employees have sometimes contacted OHSB at a later date to tell the investigator “what really happened.” The clarification to private questioning would eliminate this inherent conflict of interest by not permitting the same legal counsel to represent both the employer and an employee.

There is no constitutional right to have legal counsel present during a civil investigation when there is no loss of liberty at stake. Enforcement actions related to violations of the Act, if taken, are directed at the employer, not the employee. However, under the clarification to the Act provided by HB 628, both the employer and the employee still have the option to have legal counsel present during questioning. All rights of the employer and employees conveyed by the Act are addressed in current regulations adopted by the environmental improvement board.

Some employers voluntarily provide their employees with legal representation. The clarification to the Act embodied in HB 628 would not prevent an employer from continuing this practice. The clarification to the Act would only prevent the same attorney from representing both the employer and the employee.

## **PERFORMANCE IMPLICATIONS**

NMED anticipates that HB 628/HJCS will improve the department’s ability to meet the performance measures regarding the protection of the health and safety of New Mexico employees by enabling enforcement and compliance officers to question employees during inspections and investigations in a manner that allows the employee to speak freely. The agency notes that “private questioning will facilitate the compliance officer’s ability to gather factual information that might otherwise be withheld or altered due to fear of reprisal from the employer. Information obtained from employees during interviews is often used to identify workplace safety hazards that would otherwise go undetected and unabated. One department performance measure addresses the percentage of violations that are abated within timeframes designated on issued citations.”

## **ADMINISTRATIVE IMPLICATIONS**

HB 628 will reduce the administrative burden associated with legal issues that often arise regarding NMED’s authorization to privately interview employees.

## **TECHNICAL ISSUES**

The Office of the Attorney General points out that this statute will trump the following case law on the matter:

The New Mexico Supreme Court wrote in *Kent Nowlin v. Environmental Health Div.*, 99 N.M. 294, 297, 657 P.2d 621, 624 (1982): “Employees may employ counsel of their own choice, including company counsel, unless counsel of their own choosing obstructs or impedes the agency’s investigation.”

“The fourth holding of *In the Matter of Kent Nowlin Const. Co.*, 99 N.M. 294, 297, 657 P.2d 621, 624 (1982), which states in part that “[e]mployees may employ counsel of their own choice, including company counsel, unless counsel of their own choosing obstructs or impedes the agency’s investigation,” was not overturned by subsequent statutory amendments and remains binding precedent in New Mexico.” *In the Matter of the Occupational Health and Safety Inspection of Giant Industries*, D-101-CV-200502610 (Jan. 10, 2006).

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

NMED asserts that OHSB compliance officers will be constrained in their ability to gather information on health and safety hazards, and New Mexico workers maybe unnecessarily exposed to existing hazards. Additionally, federal OSHA may determine that the Occupational Health and Safety Program of New Mexico is not as effective as the federal program and initiate action to withdraw approval and funding of New Mexico’s program.

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