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FISCAL IMPACT REPORT

SPONSOR Mc Sorely ORIGINAL DATE 2/6/2009 HB _____
LAST UPDATED _____
SHORT TITLE Job Security Act SB 385
ANALYST Moser

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$1.0	\$1.0	\$1.0	Recurring	General Fund, other state funds and federal funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (AGO)

NM Department of Transportation (NMDOT)

Department of Workforce Solutions (WSD)

SUMMARY

Synopsis of Bill

Senate Bill 385 enacts the "Job Security Act," which requires an employer to allow an employee to use sick leave or other paid leave to: care for a child with a health condition that requires treatment or supervision; care for a spouse, parent, parent-in-law or grandparent with a serious health condition or emergency; or participate in school-based activities for the employee's child.

The Act prohibits an employer from discharging or disciplining an employee that exercises his or her rights under the Act and an employee may go to court for an injunction to keep an employer from taking action that would deny the employee the protection of the Act.

FISCAL IMPLICATIONS

Senate Bill 385 has minimal fiscal impact. It may result in reduced productivity or increased overtime from the use of sick leave for attending school-based activities that is not currently available for this purpose and may also cause a rise in litigation costs if employees routinely seek injunctive relief when the employer denies, due to a legitimate business purpose, requested sick leave to attend school activities.

SIGNIFICANT ISSUES

The Office of the Attorney General (AGO) indicates that:

- Section 3, p. 3, lines 6-8 allows an employee to use paid leave to care for a spouse, parent or grandparent who has an “emergency.” The bill does not define the term “emergency,” and may be interpreted to cover emergencies that do not involve medical or health conditions.
- Section 3, p. 3, lines 9-10 allows an employee to use paid leave to participate in a child’s school-based activities. The term “school-based activities” is not defined and could cover a wide variety of programs and activities, including sports and other activities that occur weekly or more often.
- SB 385 is more expansive than the federal Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) (“FMLA”) to the extent the two enactments allow employees to take leave for similar reasons. (Note: the FMLA does not cover “school-based activities and clearly defines emergencies.)
 - The FMLA requires employers who employ at least 50 employees to allow “eligible” employees (generally, those employed for at least 12 months) to take up to 12 workweeks of unpaid leave during a 12 month period.
 - In contrast, SB 385 applies to all employers regardless of how many employees they have; applies to all employees who have accrued sick or other paid leave, regardless of how long the employees have worked for an employer; and contains no limit on the amount of time an employee can take time off, provided the employee has paid leave available.
 - The FMLA allows employers to require their employees to substitute accrued paid leave for any part of the 12 weeks of leave authorized by the FMLA. This means that SB 385 would not necessarily give employees more leave than they would otherwise be entitled to under the FMLA. For example, if an employee had two weeks of accrued paid leave and needed to take time off to care for a sick child, the employer could require the employee to use the paid leave as part of the 12 weeks of leave allowed under the FMLA. In other words, the employee would use 2 weeks paid leave and 10 weeks unpaid leave during a 12-month period.

The NMDOT indicates the following concerns:

- There is no limit of leave that an employee can take included in SB 385. Specifying a maximum leave limit to provide care for a family member with a serious health condition and for a child’s primary caregiver to participate in school-based activities would allow for more consistency in the workplace and equity to employees, and enable employers to more effectively manage business operations. NMDOT indicates that Minnesota law provides 16 hours of leave during any 12-month period for employees to attend school-related activities, which is unpaid, but may be substituted with annual or other appropriate paid leave.

- Inconsistencies between SB 385 and FMLA such as:
 - SB 385 includes parents-in-law, grandparents and grandchildren in family members with serious health conditions for which sick leave can be used, but excludes a stepchild (unless the employee is “standing in *loco parentis*”).
 - The bill does not include language on how leave for the care of defined family members interacts with or is separate from the FMLA, if it can be used concurrently with FMLA leave when the FMLA applies, and, if it can be used concurrently, how the aforementioned differences between the FMLA and the bill would be addressed.
 - If FMLA and the leave set forth in the bill to care for family members is not concurrent, without a set limitation of leave that can be taken in any given year, an employee could potentially be absent from the workplace in excess of one year.
 - There are no notification or certification requirements in the bill. Reasonable notification requirements, unless the leave is unforeseeable, would assist the Department of Transportation in managing business operations. Certification requirements would assist in ensuring that leave is taken in compliance with the proposed bill.
 - Section G.A (2) of the proposed bill allows sick leave to care for a spouse, parent, parent-in-law or grandparent of the employee in the event of an “emergency.” However, emergency is not defined. “Emergency” could be interpreted to include a broad range of situations that may not be consistent with the intent of the bill.
 - The bill makes no provision for an employer to deny a request for annual or other paid leave to attend school-based activities due to legitimate operational need. The Department of Transportation’s Administrative Directives (policies) and the current Collective Bargaining Agreement with the American Federation of State, County and Municipal Employees incorporate language that allows the disapproval of annual, personal and compensatory leave requests. Such a provision would benefit the public to respond to emergency situations, such as flood and snow removal, and critical deadlines.
 - Allowing employees to use sick leave to attend school-based activities has the potential of having an adverse impact on morale, creating a perception of inequity, or other unfavorable perception for employees who work for an employer who does not otherwise allow the use of sick leave for reasons other than medical treatment or illness.

WSD indicates that SB 385 could strengthen a primary care-givers’ participation in the educational activities of their children by giving them the ability to attend those activities while still having job protection. Increased support of educational processes may enhance a child’s sense of connectedness to the educational system and improve that child’s chances of success.

The New Mexico Municipal League is concerned that this legislation appears to be expansive of FMLA and may place a hardship on small employers that currently are exempt from the FMLA. Local governments are covered by the FMLA and enactment of this legislation may complicate and expand the amount of time an employee can be away from work as the employee may exhaust their paid leave accumulated or granted by the local government employer and then apply for and receive unpaid FMLA leave.

Small local governments with limited financial resources and small numbers of employees could be faced with the prospect of not being able to provide essential services to the community due to an employee using a combination of the rights granted by this legislation and those granted under the FMLA.

TECHNICAL ISSUES

Senate Bill 385 provides for the use of sick leave to participate in school-based activities for the employee's child. Use of sick leave for this purpose conflicts with State Personnel Board Rule Section D of 1.7.7.10 NMAC, which sets forth that "an employee may use sick leave for personal medical treatment or illness or for medical treatment or illness of a relation by blood or marriage within the third degree, or of a person residing in the employee's household. Employees affected by pregnancy, childbirth, and related medical conditions must be treated the same as persons affected by other medical conditions."

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