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FISCAL IMPACT REPORT

ORIGINAL DATE 1/16/08
 SPONSOR Jennings LAST UPDATED 1/16/08 HB _____
 SHORT TITLE Minimum Wage Act Exemptions SB 66
 ANALYST Francis

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
	(1,000.0)	(2,000.0)			Recurring	General Fund – State Police
	(1,058.0)	(2,108.0)			Recurring	General Fund – Corrections
Total	(17,500.0)			(17,500.0)	Recurring	Local Governments

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
<http://www.dol.gov/compliance/laws/comp-flsa.htm>

Responses Received From
 New Mexico Municipal League
 Department of Public Safety
 Albuquerque Area Fire Fighters Local 244
 State Personnel Office
 Department of Corrections

No Response Receive From
 Department of Health
 Department of Game and Fish

SUMMARY

Synopsis of Bill

Senate bill 66 as passed by the Senate amends the Minimum Wage Act [50-4-21 NMSA 1978], changing the definitions of “employer” and “employee” to exclude state and political subdivisions from all parts of the act except that section which sets the minimum wage [50-4-22(A) NMSA 1978]. This amendment only applies the provisions governing how overtime is

calculated and does not exclude state and local governments from the minimum wage rate currently set at \$6.50 per hour and rising to \$7.50 per hour on January 1, 2009.

SB66 contains an emergency clause and will be effective upon signing by the governor.

FISCAL IMPLICATIONS

There are two issues that affect the state: the ability to optimally schedule public safety personnel and the ability to grant compensatory time rather than over time pay to regular state employees. The fiscal implications for the state are not known at this time but will likely be significant and affect the ability of the state department of public safety and the motor transportation division to effectively schedule officers to avoid costly overtime that would result from the current law. The State Police has reported that they expect they will require an additional \$1 million in FY08 and \$2 million in FY09 to cover overtime expenses. LFC has also not received input from many groups of employees including legislative, Department of Health, and Department of Game and Fish.

State Personnel Office:

The requirement to pay cash overtime will have an effect on the ability of state agencies to provide certain services. Correctional Officers at the Department of Corrections and State Police Officers at the Department of Public Safety work significant amounts of overtime. The inability to provide compensatory time off in lieu of cash payment may result in these departments not being able to provide adequate coverage due to budget shortfalls. The Department of Corrections schedules Correctional Officers for 12-hour shifts. The inability provide this type of work schedule and revert to an 8-hour schedule is anticipated to negatively impact the recruitment and retention efforts of the department. This may also hold true for other state and public employers who engage in 24-hour operations and schedule employees in greater than 8-hour shifts. (i.e. state hospitals, city and county police and fire departments, etc.)

The New Mexico Municipal League has estimated the cost of complying with the current law at \$25 million per year, \$12 of which is the City of Albuquerque alone. The Association of Counties has estimated the cost to be \$10 million per year. The total calendar year impact is \$35 million and half of that will occur in FY08. The estimate assumes that by the beginning of FY09, local governments will be able to adapt to the stringent requirements of the current law.

Department of Corrections:

If this bill is not passed, the annual cost impact for all correctional officers statewide who are paid cash in lieu of compensation time would be \$1,130,300. If the Penitentiary of New Mexico were to continue having its correctional officers work 12-hour shifts, the annual cost would be \$997,700. The total annual cost impact for the two components is \$2,108,000. The cost impact of FY 2008 (half a year) would be \$1,054,000.

The reason the Penitentiary of New Mexico went to a 12-hour shift was to reduce the amount of overtime due to the significant number of correctional officer vacancies the institution has historically maintained. If the Pen were to go back to an 8-hour shift, the cost impact would still be substantial because the facility currently has 96 vacant positions. However, NMCD does not have a projection at this time of the actual cost of reverting back to an 8-hour shift.

SIGNIFICANT ISSUES

Last year, the Minimum Wage Act was amended to raise the minimum wage for New Mexico employees. At the same time, a provision that excluded state and local governments from the Act was removed. While the intent may have been only to make the governments subject to the same minimum wage that private sector employees are subject to, the change ended up removing some classes of government employees from the requirements of the federal Fair Labor Standards Act [29 U.S.C. 201-219] and subjecting employees who currently receive comp time for periods of overtime work to the overtime rules in the minimum wage act. The consequence of the change is that employees of state and local governments are now owed overtime pay if they work over 8 hours per day or 40 hours per week, a more stringent standard than that required by the federal law.

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in Sec. 553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days. [29 U.S.C. 201-219].

Law enforcement and emergency workers often work a different work schedule due to the nature of their work. The federal standards allow fire protection and law enforcement personnel allowing these employees to work double shifts and 24 hour shifts without the government incurring overtime pay. These classes of employees are specifically exempt from the 8-hour day/40 hour work week that other employees are subject to under federal law. Under current law, the counties and the affected state agencies must either adjust the way they schedule these employees or pay overtime.

Both AFSCME and the Albuquerque Area Fire Fighters Local 244 support the change and worry that their ability to schedule properly would be impaired by the current law. Local 244 also reports that if a local government has to pay overtime under current law, the government may reduce spending in support services which are vital to the mission and include activities like hazardous material response, training, arson investigation, and heavy technical rescue. AFSCME reports that the amendment is necessary because last year's legislation which the group supported did not intend to change the way overtime was calculated for state and local employees including fire, corrections and public safety personnel.

Department of Corrections provided a very useful illustration of how the current law will affect its operations:

The FLSA "law enforcement personnel" exemption, which allowed NMCD to legally have its officers work up to 84 hours in any two week period without having to pay overtime pay on that 4 hours, is no longer available to NMCD. It should be noted that the FLSA exemption actually allows up to 86 hours in any two week period (without having to pay for overtime), but the CBA between AFSCME and the State has been interpreted

to limit the exemption for corrections officers to only 84 hours and to only those officers working 12-hour shifts (as opposed to 8-hour shifts). Thus, Senate Bill 324 has caused NMCD to lose its ability under the FLSA to have its officers at the Penitentiary of New Mexico (who all work 12-hour shifts) to work four (4) extra hours every two weeks without having to pay overtime on those 4 hours. NMCD is currently contemplating modifying the schedules of these Pen officers, who currently work 12-hour shifts and who work 48 hours one week and 36 hours the next week, to work 40 hours per week every week/8-hour shifts. Using 12-hour shifts at the Pen was reasonable prior to Senate Bill 324--the Pen has a high vacancy rate for officers, and 12-hour shifts reduced or better managed the staffing needs at such a facility with high vacancy rates. It would not be financially prudent for NMCD to continue the 48/36 hour schedule at the Pen if Senate Bill 324 remains in effect--each of the 200 plus officers at the Pen would get 8 hours of overtime pay every week they worked the 48-hour week.

ADMINISTRATIVE IMPLICATIONS

According to the State Personnel Office, they will be required to change the State Personnel Board rules (New Mexico Administrative Code 1.7.4.14) to remove an existing provision allowed by federal law to provide compensatory time in lieu of cash payment for any hours worked over 40 in a workweek.

State Personnel Office:

Collective Bargaining Agreements with the American Federation of State, County and Municipal Employees, New Mexico Council 18 (AFSCME), the Communication Workers of America AFL-CIO, CLC (CWA) and the New Mexico Motor Transportation Employee Association, Fraternal Order of Police (FOP) will need to be re-negotiated. Collective Bargaining Agreements between all other union represented employees and their respective public employers may need to be re-negotiated.

By adopting this bill, existing payroll systems of public employers will be able to accommodate these types of payroll calculations.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If the amendment is not passed, agencies and governments that employ public safety and emergency personnel will be forced to adopt an 8-hour work day and 40-hour work week to avoid paying overtime. This will be very disruptive and could hurt recruiting and retention efforts of critical government employees. Alternatively, the governments could maintain the current scheduling and finance the costs of overtime.

If the amendment is not passed, all state agencies that currently offer comp time rather than cash payments to employees would have to make cash payments which could raise budget requests for operating and perhaps deficiency funds in the future.

Department of Corrections warns that this will have a significantly negative impact on morale and the ability to retain and recruit corrections officers.

NF/bb