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FISCAL IMPACT REPORT

ORIGINAL DATE 1/31/2009

SPONSOR Cervantes LAST UPDATED _____ HB 394

SHORT TITLE _____ SB _____

ANALYST Moser

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Office of the Attorney General (AGO)

State Personnel Office (SPO)

SUMMARY

Synopsis of Bill

House Bill 394l allows government employees to sue their employer if they are retaliated against for (1) reporting government corruption, (2) testifying before a public body, or (3) refusing to participate in unlawful activity. The remedies are taken from the "Fraud Against Taxpayers Act", Section 44-9-11, NMSA 1978.

In short, the bill gives public employees the same protections that are available to private employees under the common law claim of retaliatory discharge.

The bill provides that nothing in the Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under the Act. HB 394 provides a two-year statute of limitations from the date on which the retaliatory action occurred.

The Act applies only to civil actions for damages resulting from retaliatory action that occurred on or after July 1, 2007

FISCAL IMPLICATIONS

The bill may have a fiscal impact contingent upon the number of suits filed and their disposition. The AGO indicates that if any government employer violates the Act, the employer would likely ask its Risk Management representative to defend the suit and possibly pay a settlement/judgment. Possible remedies include:

- actual damages,
- reinstatement with the same seniority status that the employee would have had but for the violation,
- two times the amount of back pay with interest on the back pay
- compensation for any special damage sustained as a result of the violation.
- litigation costs and reasonable attorney fees of the employee.

SIGNIFICANT ISSUES

The AGO points out that House Bill 394 follows the majority of states—including our neighboring states Texas, Utah and Colorado—which all protect public employees against retaliation.

The bill according to the AGO simply re-instates the protection that was previously available to public employees under federal law, 42 USC Section 1983. In 2006 in *Garcetti v. Ceballos*, 126 S.Ct. 1951, the US Supreme Court withdrew this protection by holding that public employees are not protected under Section 1983 when they take action "pursuant to their official duties". As a result, public employees are no longer protected against retaliation for reporting government corruption, and will not be so protected unless a bill like this is enacted.

HB 394 allows for an affirmative defense that the action taken against a public employee was due to the employee's misconduct, the employee's poor job performance, a reduction in work force or other legitimate business purpose unrelated to conduct prohibited pursuant to the Act and that retaliatory action was not a motivating factor.

The National Conference of State Legislatures (NCSL) reports that:

Most states offer general whistleblower protection to public employees, while fewer than half offer the same protection to all workers. States which have enacted whistleblower protection laws for private sector employees are even fewer. Many state statutes protect whistleblowers whose disclosures involve mismanagement, waste or abuse of authority.

See <http://www.ncsl.org/programs/employ/whistleblower.htm> for a 2005 state-by-state comparison of existing whistleblower protection laws.

OTHER SUBSTANTIVE ISSUES

The AGO advises that the remedies are taken from the "Fraud Against Taxpayers Act", Section 44-9-11, NMSA 1978.

Additionally, the AGO points out that the bill expands the protection created by the "Fraud Against Taxpayers Act", which only protects a public employee from retaliation for (1) reporting information related to public fraud, or (2) testifying before a public body regarding public fraud.

ALTERNATIVES

SPO indicates that government employees have protection from retaliation for protected speech, which would include “whistle blowing,” under the First Amendments of both the State and Federal constitutions and concludes that government agencies and departments could be excluded from the act. SPO concludes that this would alleviate concerns relating to possibly substantial punitive damages awards against the State.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AGO indicates that “When aware of unlawful conduct by a public body, public employees may be placed in the extremely difficult position of having to violate the law or risk retaliation, including possibly losing their jobs, if they report the activities. This bill provides protection to public employees and encourages good faith reporting of suspected unlawful actions by public bodies. In addition, the safety and welfare of the public may be jeopardized if this bill is not enacted because there will be a disincentive (i.e. retaliation) for reporting illegal activities.”

GM/mc