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FISCAL IMPACT REPORT

ORIGINAL DATE 03/09/09

SPONSOR HJC LAST UPDATED _____ HB 849/HJCS

SHORT TITLE Recompile Certain Construction Industry Laws SB _____

ANALYST Peery-Galon

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Indeterminate*	Indeterminate*	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

*See Fiscal Implications narrative

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workforce Solutions Department (WSD)
 General Services Department (GSD)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of HJC Substitute

The House Judiciary Committee substitute for House Bill 849 proposed to add a new definition of “employee” to Section 60-13-2 NMSA 1978 the Construction Industries Licensing Act and makes the necessary corresponding changes to other sections of the Act. The substitute also provides clarification to a licensing exception for construction work performed on farms and ranches.

The House Judiciary Committee substitute for House Bill 849 removes the labor relations section from Section 60-13-3.1 NMSA of the Construction Industries Licensing Act and recompiles it in Chapter 50 NMSA 1978 Employment Law, and adds language clarifying that it does not apply to the licensing requirements adopted by the Construction Industries Division of the Regulation and Licensing Department pursuant to the Construction Industries Licensing Act. The substitute also adds language that no permit is required for installation of electrical wiring that is not connected to electrical energy supplied from a power source outside the premises of a farm or ranch when the installation is performed by a person, or the employee of a person, who owns, occupies or operates the farm or ranch.

FISCAL IMPLICATIONS

RLD noted the House Judiciary Committee substitute for House Bill 849 will support and facilitate enforcement of contractor licensing laws. Unlicensed activity has two main fiscal impacts:

- Unlicensed contracting deprives licensed contractors of income, results in construction that is not inspected for code compliance, and promotes consumer fraud – all of which has an adverse affect on the New Mexico’s economic well being.
- Fines levied against and paid by individuals who have been charged with unlicensed contracting create a significant revenue stream for the State, often totaling hundreds of thousands of dollars, annually. Any impediment to the prosecution of these individuals has a direct adverse effect on State revenue.

SIGNIFICANT ISSUES

WSD reported that Section 60-13-13.1 NMSA 1978 was created as a separate section and defines the employee and employer relationship and independent contractor status. These issues are more relevant to wage and hour statutes covered in Chapter 50. Many people who are looking for information on employee relationship and independent contractors miss this section because of where it is published in statute.

RLD reported Section 60-13-3.1 NMSA 1978 was placed in the Construction Industry Licensing Act even though the legislation enacting it was amended during the legislative process to remove it from the Construction Industries Licensing Act (2005 Regular Session – Senate Bill 657). This section of the Act contains a test for determining whether one is an employee; this test is applicable only in the context of labor relations and not in determining compliance with licensing laws. Nevertheless, it has been wrongly applied and has confused and hampered enforcement of the licensing laws.

PERFORMANCE IMPLICATIONS

RLD noted the Construction Industries Division’s ability to enforce the unlicensed contracting laws is impeded by the labor relations test for employee because it creates an unintended licensing exception. This erroneous exception will be eliminated by the House Judiciary Committee substitute for House Bill 849. The substitute will insure that the correct test is used for contractor license enforcement.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

RLD noted the House Judiciary Committee substitute for House Bill 849 has a relationship with House Bill 478 – Construction License Revocation & Penalties. This bill would escalate the crime of unlicensed contracting to a fourth degree felony upon a second or subsequent conviction. This escalator is necessary because of the degree of recidivism in unlicensed activity and the harm done by it. If Section 60-13-3.1 is not removed from the Construction Industry Licensing Act conviction of unlicensed activity will continue to be compromised by its broad presumption that one is an employee. Because employees are exempt from licensure, it is necessary to have a narrow, rather than a broad, definition of employee in the Construction Industry Licensing Act so that unlicensed activity can be successfully prosecuted.

OTHER SUBSTANTIVE ISSUES

WSD noted the change will improve the applicability and readability of Chapter 50.

RLD reported Section 60-13-30 NMSA 1978 of the Construction Industry Licensing Act, prohibits an unlicensed contractor from suing on a contract for construction and from placing a lien on construction. Courts that have interpreted this statute have found that unlicensed contractors must repay money received for construction work, even when the person who hired the unlicensed contractor knew that the contractor was unlicensed.

RLD stated that by invoking Section 60-13-3.1 NMSA 1978, a licensed contractor can use an unlicensed sub-contractor to perform construction and evade all of the prohibitions of Section 60-13-30 NMSA 1978. In a case currently pending before the New Mexico Supreme Court, Section 60-13-3.1 NMSA 1978 is being used by a licensed contractor to argue that he should be allowed to sue for, and lien, work performed by his unlicensed sub-contractor. This subverts the purpose of Section 60-13-30 NMSA 1978 and the case law that has developed around it.

RLD noted unless it is clarified Section 60-13-3.1 NMSA 1978 is not applicable to the enforcement of contractor licensing requirements. It will continue to provide a way to evade those requirements, as well as the consequences of engaging in unlicensed activity, and will impede prosecution of unlicensed activity.

RPG/mc