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FISCAL IMPACT REPORT

ORIGINAL DATE 02/12/10

SPONSOR Beffort LAST UPDATED _____ HB _____

SHORT TITLE Exempt and Classified Employee Benefit Parity SB 109

ANALYST Varela

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

State Personnel Office (SPO)

Department of Public Safety (DPS)

Department of Transportation (DOT)

Energy, Minerals, and Natural Resources Department (EMNRD)

Department of Finance and Administration (DFA)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 109 creates the State Benefit Parity Act, which would require all covered and exempt employees of the Personnel Act to earn annual leave at the same rate, based on years of service as determined by the State Personnel Board. This bill introduces new definitions to expand the scope of this Act and provides direction on the accrual and disposition of annual leave, administrative leave, compensatory time and personal leave. This bill also designates exempt employees as term employees and removes the involuntarily unemployed consideration at the end of the term of employment.

FISCAL IMPLICATIONS

There is no appropriation contained in this bill. This bill does not specify an “effective” annual leave accrual rate the fiscal impact cannot be projected. There is no actual cost realized until funds are physically dispersed when an employee separates from service if they have accrued annual leave. With the exception of the Governor’s Exempt salary plan, the other salary administration plans reviewed currently cap this amount at 240 hours.

SIGNIFICANT ISSUES

SPO reports the following significant issues:

SB109 requires employees in all salary administration plans to accrue annual leave at the same rate based on years of service, as determined by the State Personnel Board. Currently, accrual schedules are established by the governing body of each salary administration plan. §10-9-4 NMSA of the Personnel Act identifies exceptions to the coverage of the Personnel Act. For example, the legislative and judicial branches of government, and State Police are exempt and not under the coverage of the State Personnel Board. This bill will require the State Personnel Board to set annual leave accrual rates for entities not under its authority, therefore, bypassing the governing body for each salary administration plan.

Currently, there are seven primary leave plans with different accrual rates at different lengths of service. These plans range from the lowest accrual rate of 3.08 hours per pay period (80 hours per year) in the classified service to the highest accrual rate of 7.38 hours per pay period (192 hours per year) in the Legislative, Administrative Office of the Courts, Administrative Office of the District Attorneys, State Police and Governor’s Exempt Salary Administration Plans.

Section 2 of the bill adds a new position - highly compensated employee – and defines it as a state employee position that pays a total annual compensation of one hundred thousand dollars (\$100,000) or more for executive, administrative or professional services. The bill’s terminology is inconsistent with standard compensation language. Total compensation of \$100,000 is very different from a base salary of \$100,000. Subsection H of §1.7.4.7 NMAC defines total compensation to mean all forms of cash compensation and the dollar value of the employer sponsored benefits. In the 2009 Classified Service Compensation Report published by the State Personnel Office and adopted by the State Personnel Board, research shows that the value of selected employer-sponsored benefits is 63.9 percent of base salary. As written, this definition would include any classified employee earning a base salary of approximately \$61,012 annually to be considered “highly compensated.” A high percentage of state employees in all three branches of state government would fall in this category.

SB109 requires that if a state employee retires from the executive branch of state government, and subsequently returns to work for the executive branch, the employee will be considered a new state employee for the purpose of calculating annual leave, based on years of service. The employee will accrue annual leave at the new employee level. In contrast, a state employee who retires from a branch of state government other than the executive branch and obtains employment in any other branch of government

will have cumulative years of service counted for leave accrual purposes. The conditions mandated in the bill will create unintended disparate treatment between state employees and other covered employees.

The bill states that annual leave would be transferable when an employee moves from one state agency to another and payable in cash when an employee leaves state government. Currently 1.7.7.18 NMAC, SPB Transfer of Leave rule, allows employees in the classified service to transfer annual leave when they transfer to another classified position in an executive agency even if they are transferring to a new position in the classified service. Classified employees are paid for up to 240 hours of accrued annual leave upon separation from the classified service even if they are going to another branch of government. Under SB109, unused administrative leave would not be transferable when an employee transfers from one agency to another. This is currently the case within the classified service. Elected officials would not accrue annual leave and would not be paid for unused administrative leave.

Elected officials and exempt employees earning more than \$100,000 annually would not accrue compensatory time for hours worked over forty in a work-week. Under current policies, it would be extremely rare for an exempt employee earning over \$100,000 annually to be covered by the overtime provisions of the Fair Labor Standards Act (FLSA).

SB109 would prohibit a state agency from paying a state employee for unused compensatory time. Agencies currently allow both FLSA overtime (OT) exempt and FLSA OT non-exempt employees to accrue compensatory time for additional hours worked. If an agency has sufficient budget available and meets approval requirements, it may choose to pay employees at anytime during the year for unused compensatory time. Although there is no requirement to compensate a FLSA OT exempt employee for accrued compensatory time, there may be special circumstances where it is appropriate or desirable to cash-out compensatory time for FLSA OT exempt employees for extraordinary effort on special projects. However, there are requirements under FLSA that require an agency to cash-out compensatory time for FLSA OT non-exempt employees. If a FLSA OT non-exempt employee agrees to work overtime for cash payment, they must be paid out the next pay cycle. If a FLSA OT non-exempt employee has over 240 hours of accrued FLSA compensatory time on the books and works overtime causing their balance to go over 240 accrued hours, they must be paid out to reduce their balance to 240 hours, even if they originally agreed to accept compensatory time in lieu of cash payment for overtime in that workweek. There is a similar limit of 480 hours for public safety employees under the Section 207(k) exemption of the FLSA. Once a FLSA OT non-exempt employee separates from service they must be paid out for any accrued compensatory time at the time of separation.

In addition to FLSA covered compensatory time, the bill would prohibit an agency from paying for any other accrued non-FLSA compensatory time such as holiday compensatory time. Holiday compensatory time is typically used in 24-hour facilities such as a hospital or a recreational facility that is open every day, year round.

Section 5 of the bill would classify exempt employees as term and not be considered involuntarily unemployed at the end of their term of employment. This bill would

prohibit all exempt employees in the executive branch from collecting unemployment compensation after separating from state service. The bill has the unintended consequence of defining all exempt employees (legislative, judicial, state police, etc.) as term employees and, in doing so, would prohibit these employees from collecting unemployment compensation. This section of the bill makes reference to §55-1-44 NMSA, which is part of the Unemployment Compensation Law.

According to DPS, the bill requires that all exempt employees in the executive branch shall be considered term employees and can't be considered to be involuntarily unemployed at the end of their term of employment. There are exempt employees in the executive branch, such as NM State Police, to whom this provision should not apply.

DPS reports that the bill will lower the annual leave accruals for NM State Police officers. Further, prohibiting payment of compensatory time received by non-exempt FLSA employees will impact employee morale. Finally, there are certain circumstances where it is appropriate to pay exempt FLSA employees for compensatory time for special projects, like DWI checkpoints, or other projects requiring extraordinary effort.

ADMINISTRATIVE IMPLICATION

According to SPO, this bill would require changes to the relevant sections of each of the governing body's administrative code through the rulemaking process that would take approximately four to six months to complete. The Judicial and Legislative branches of state government would need to make similar appropriate changes through their own rulemaking process.

TECHNICAL ISSUES

SPO reports the following technical issues:

The definition of in Subsection D of Section 2 of this bill defines a state employee to mean "an employee in the executive branch of state government, including an appointee to civil office but not including an elected official." Subsection A of Section 3 of this bill would prohibit "state employees" that retire and return to work from including their years of employment to determine the years of cumulative employment. This requirement is in direct conflict with Subsection B of 1.7.7.8 NMAC that allows any employment in the classified or exempt service and judicial legislative branches of New Mexico state government to be counted in determining years of cumulative employment for leave accrual rates.

This bill authorizes each employee one day of non-compensable personal leave each year. It is unclear in this bill if this is construed to mean that personal leave is not compensable upon separation or that it is simply not compensable at all (i.e. leave without pay day). 1.7.7.17 NMAC (SPB Leave Personal Leave Day rule), 1.4.6.21 NMAC (District Attorney Personal Leave Rule) and New Mexico Judicial Branch Personnel Rule 5.14 already authorize one day of personal leave each year for employees that have completed one year of service and specify employees will not be paid for their personal leave if they do not take it before separation. This bill makes no reference to authorizing a personal day before the employee completes one year of services making unclear if the intent is to remove the one-year waiting period. Governor's exempt policies state that executive exempt employees are eligible for one personal day upon hire.

An exempt employee who is considered FLSA OT non-exempt for overtime purposes would make this act in direct conflict with the federal FLSA law. An FLSA OT non-exempt employee must be paid cash, or agree to compensatory time in lieu of cash payment, for any hours worked over 40 in a workweek. It is not permissible under FLSA to simply remove compensatory time hours from the books for an FLSA OT non-exempt employee.

As written, this bill would have an effect on all legislative, judicial, educational and public school employees as well as state police officers, etc. as listed and currently exempted from the Personnel Act, §10-9-4 NMSA, prohibiting them from collecting unemployment compensation after an involuntary separation.

Section 5 of this bill makes reference to §55-1-44 NMSA, which is part of the Unemployment Compensation Law. As written, it appears a conflict in law exists between this bill and §55-1-44 NMSA.

By considering all exempt employees term employees, it would have a significant impact on the legislative and budgeting processes. This would require legislative and executive leadership to re-evaluate how they authorize positions in HB2 and other statutory and/or budgetary documents.

PTV/svb