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## FISCAL IMPACT REPORT

ORIGINAL DATE 3/4/17

SPONSOR SPAC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Whistleblower Protection Act Changes SB 299/SPACS

ANALYST Esquibel

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
N/A	N/A	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Hearings Office (AHO)  
 Administrative Office of the Courts (AOC)  
 Albuquerque Public Schools (APS)  
 New Mexico Association of Counties (NMAC)  
 Attorney General's Office (AGO)  
 General Services Department (GSD)  
 New Mexico Municipal League (NMML)  
 Public Education Department (PED)  
 State Personnel Office (SPO)

### SUMMARY

#### Synopsis of Bill

The Senate Public Affairs Committee substitute for Senate Bill 299 (SB299/SPACS) would amend the Whistleblower Protection Act (WPA) by changing to whom public employees may report public employers' unlawful or improper acts to someone in a position to further the public interest, and requiring the exhaustion of all administrative remedies before bringing forward a WPA case.

### FISCAL IMPLICATIONS

The General Services Department (GSD) notes in assessing Whistleblower Protection Act (WPA) claims, state agencies incur fiscal challenges complying with the WPA's damage

provisions permitting an award of double back wages. In addition, the public liability fund administered by the GSD Risk Management Division is responsible for paying defense fees and costs, awards of plaintiff's attorney's fees and other awarded damages. In the four fiscal years prior to enactment of the WPA, the public liability fund paid an average of \$ 7,569,753 per year for defense and settlement of civil rights claims. In FY12, those costs jumped 65 percent to \$11,514,885. The costs are trending upward as more WPA claims are asserted, settled and litigated.

The bill would require application of more administrative remedies as defined under the grievance procedures of the Human Rights Act (HRA) requiring additional costs for more administrative mediation services at affected agencies. Conversely, under the provisions of the bill, cost savings could be realized from reduced legal defense and settlements.

### **SIGNIFICANT ISSUES**

The General Services Department (GSD) indicates currently, the WPA places no burden on a public employee to seek resolution through administrative remedies prior to bringing a whistleblower claim. SB299/SPACS requires the employee to first fully exhaust all available administrative remedies.

The Administrative Office of the Courts (AOC) notes Section 3 in the bill states remedies provided for under the WPA shall not be available unless the public employee first exhausts all available grievance and other administrative remedies. While all reasonable internal mechanisms available should generally be attempted first, mandating a delay to a claim does not seem prudent in matters of gross mismanagement, gross waste of funds, or substantial and specific dangers to the public. Requiring employees to exhaust remedies may effect an employee's ability to bring a claim under the WPA, potentially discouraging legitimate reportings under the WPA.

The New Mexico Association of Counties writes:

“...cities, counties, public schools and the state collectively spent over \$31 million to resolve whistleblower claims....Faced with the cost of going to trial, public employers often make a cost-based decision to settle cases....Fifty-six percent of the lawsuits brought against city employers were brought by management employees.”

### **TECHNICAL ISSUES**

The bill would amend Section 3(A) protecting a public employee who communicates to “an individual or entity in a position to further the public interest;” however, it is not clear if this includes a disclosure to the press.

### **OTHER SUBSTANTIVE ISSUES**

The AOC writes “[W]histleblower laws in general are meant to encourage employees to report illegal practices without fear of reprisal by their employers.” *Janet v. Marshall*, 2013-NMCA-037, ¶ 21, 296 P.3d 1253 (internal citations omitted). New Mexico's WPA “applies exclusively to public employers and public employees,” *Herald v. Board of Regents of the Univ. of N.M.*, 2015-NMCA-104, {24}, cert. denied, 2015-NMCERT-009. Criticisms of the WPA by various state agencies have asserted:

- The law is too broad, allowing vexatious, frivolous claims by disgruntled or former employees;
- Public entities cannot assert the same degree of control over contractors as employees, and contractors are also protected by the terms of their contracts and other taxpayer fraud laws, so contractors should not be eligible to file WPA claims;
- WPA is duplicative of other existing remedies under the Human Rights Act, tort and contract law, increasing the chance of duplicative recoveries;
- WPA allows immediate access to the court, causing public entities time and the expense of defense, without any obligation to exhaust administrative remedies first and to act with good faith in administrative proceedings to resolve the matter.

The Public Education Department (PED) indicates other states have added language to their Whistleblower Protection Acts removing protections for employees who knowingly make a false disclosure or make a disclosure in reckless disregard for the truth. New Jersey requires the employee must establish that they have an objectively reasonable belief that the employer's conduct was illegal or improper and *not just an error in judgment* on the part of the employer.

#### **ALTERNATIVES**

As an alternative to SB299's proposed changes to the New Mexico Whistleblower Protection Act, the General Services Department's Risk Management Division would also propose a close tracking of the language in the federal Whistleblower Protection Act.

RAE/jle/al