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## F I S C A L   I M P A C T   R E P O R T

<b>SPONSOR</b>	Hochman-Vigil	<b>ORIGINAL DATE</b>	01/28/2020	<b>LAST UPDATED</b>	02/11/2020	<b>HB</b>	21/aHLVMC/aHJC
<b>SHORT TITLE</b>	Prohibit NDA for Sexual Harassment Cases			<b>SB</b>			
				<b>ANALYST</b>	Daly		

### **ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY20</b>	<b>FY21</b>	<b>FY22</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	NFI	NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

Related to SB 64

### **SOURCES OF INFORMATION**

LFC Files

#### Responses Received From

General Services Department (GSD)  
New Mexico Attorney General (NMAG)  
Public Schools Insurance Authority (PSIA)  
Workforce Solutions Department (WSD)

### **SUMMARY**

#### Synopsis of HJC Amendments

The House Judiciary Committee amendments to HB21, as previously amended, clarify that its bar against nondisclosure agreements in sexual harassment, discrimination or retaliation cases applies to a private employer. They also strike and rewrite the new exception added by the HLVMC that allows, at the sole request of the employee, nondisclosure of factual information relating to the underlying claim, but with a new exception when disclosure is required by law, including when disclosure is pursuant to a subpoena or other applicable order. They also provide that, except for the nondisclosures permitted in subsections B and C, any confidentiality provision in an agreement to which HB21 applies is void and legally unenforceable.

#### Synopsis of HLVMC Amendments

The House Labor, Veterans' and Military Affairs Committee amendments to House Bill 21 clarify that the nondisclosure provisions contained in the bill apply to settlement agreements

between a private employer and its employee or former employee in sexual harassment, discrimination or retaliation cases. In addition to the exceptions to the prohibition against nondisclosure that were delineated in the original bill which allow confidentiality of the monetary amount of settlement and at the employee's request facts that could lead to that person's identification, the committee amendments add another exception that allows, at the sole request of the employee, nondisclosure of factual information relating to the underlying claim. The amendments also declare in Section 1(D) that any confidentiality provision other than the new exception is void and unenforceable as a matter of law.

The language of Section 1(D) may need to be expanded to include Subsection B (as well as C) in order to allow the two confidentiality provisions authorized in Subsection B to be enforced.

#### Synopsis of Original Bill

House Bill 21 bars employers throughout the state from requiring an employee to sign a nondisclosure provision in a settlement agreement (NDA) relating to a claim of sexual harassment or sexual assault in the workplace. Similarly, an employer cannot prevent an employee from disclosing such a claim. Settlement agreements may, however, contain confidentiality provisions when: (1) if related to the monetary amount of a settlement; or (2) if the employee requests one to prohibit disclosure of facts that could lead to identification of the claimant. HB21 applies to agreements entered into or after May 20, 2020.

### **SIGNIFICANT ISSUES**

Responding agencies all assume that, given the use of the terms employer and employee, the bill applies equally to public and private sector employment. The public policy reason behind the provision granting confidentiality to the monetary amount is not apparent, or if the status of the employer as a private or public employer might impact that provision. Further, GSD points to its existing enabling statute, which provides that certain records created or maintained at Risk Management Division are confidential for 180 days after the latest for four dates. See Section 15-7-9, NMSA 1978. The department comments that it is unclear how HB21 and this law are to be reconciled.

NMAG notes that the provision granting confidentiality in two circumstances creates a new exception to disclosure under the Inspection of Public Records Act (IPRA). Currently, the provisions of settlement agreements of these types of claims are not exempt from disclosure under IPRA.

GSD also suggests that the phrase “as a term of employment” in Section 1(A), which assumes the employee is still employed, wishes to continue employment, or wants reinstatement, may not accurately reflect the intent of the bill.

WSD reports that the courts rather than the Human Rights Bureau would not be involved in this process.

### **RELATIONSHIP**

This bill is related to SB64, which revises existing law regarding inspection of settlement agreements between state agencies and their employees or former employees maintained by

GSD.

**TECHNICAL ISSUES**

GSD comments that if the terms “nondisclosure” and “confidentiality”, are meant to be used interchangeably, the word choice should be standardized.

MD/rl/sb