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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/20

SPONSOR SJC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Public Project Prevailing Wage Complaints SB 98/SJCS

ANALYST Daly

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

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$627.0	\$487.0	\$1,114.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 391

### SOURCES OF INFORMATION

LFC Files

Responses Received From (on SB 98 as amended, as applicable)

Workforce Solutions Department (WSD)  
 Department of Transportation (NMDOT)  
 Indian Affairs Department (IAD)  
 New Mexico Municipal League (NMML)  
 University of New Mexico (UNM)

### SUMMARY

#### Synopsis of Bill

The Senate Judiciary Committee Substitute for Senate Bill 98 amends the Public Works Minimum Wage Act (Act). It requires the director of the Labor Relations Division (LRD) of WSD make an annual determination of the prevailing wage rates and prevailing fringe benefit rates for workers employed on public works projects, based on collective bargaining agreements in the locality or one nearby. It also expressly states that any contracting agency's certified weekly payroll records are subject to inspection under the Inspection of Public Records Act (IPRA), and any request to inspect must be fulfilled within 20 days of request. Those records are also made subject to the records retention requirements applicable to a state agency's payroll records.

SB98/CS authorizes any person to file a complaint that a contractor, subcontractor, employer or person acting as a contractor on the project has failed to pay wages or fringe benefits at the rates required by the Act. Either party may request mediation on a complaint within 30 days of its filing. After an investigation of the allegations begun within 30 days of that filing, the director

shall make a determination supported by findings of fact and conclusions of law whether there has been an underpayment of wages or fringe benefits or other violation of the Act. This determination shall be made within 75 days of the complaint if no mediation was requested, or 75 days after mediation is completed. If the complaint is of a complex nature or involving multiple projects or job sites, the director may extend that deadline by up to six months. The director, prior to making a determination, must provide the contractor, subcontractor, employer or other person against whom the complaint was filed with an opportunity to respond and provide any exculpatory evidence.

If the director determines that there has been an underpayment of wages or fringe benefits or a violation of the Act, the director must order the withholding of accrued payments unless there has been a voluntary resolution by the parties. The contracting agency must pay from any accrued payments withheld under the terms of the contract or designated for the project, three times (increased from simply the amount underpaid under current law) the amount of any wages or fringe benefits found due to the workers pursuant to the director’s determination. Additionally, within 30 days of that determination, absent a voluntary resolution, the contracting agency must (as opposed to may in existing law) terminate the work, consistent with contract termination provisions that are currently required by existing law. See Section 13-4-13.

Additionally, in the case of an aggregate underpayment greater than \$500, a noncompliant contractor must pay adversely affected employees three times the amount of the employees’ unpaid wages or fringe benefits (increased from the amount underpaid under current law), plus an additional \$100 for each calendar day on which the contractors require or permit employees to work in violation of the Act.

Finally, this bill makes the awarding attorney’s fees and costs to an employee adversely affected by a violation mandatory rather than discretionary as it is in existing law.

## FISCAL IMPLICATIONS

In its earlier analysis on a similar bill, WSD reported LRD already investigates wage and fringe benefit complaints filed with the division on public-works jobs. WSD anticipated the need for, at a minimum, three additional labor law administrators (one per office) to attempt to meet the proposed investigative time frame. Additionally, new regulations must be promulgated to implement the bill’s changes, which would include providing public notice and a public hearing for the proposed new regulations. The LRD would also need to update its website and any publications dealing with the Act in order to reflect the changes called for by the bill. WSD provides these cost estimates:

<u>Description</u>	<u>FY21 Amount</u>	<u>FY22 Amount</u>
3.0 FTE plus benefits	\$210.0	\$220.0
Website and Publication Updates	\$100.0	\$20.0
Public Hearing	\$10.0	\$0.0
<b>Total</b>	<b>\$320.0</b>	<b>\$240.0</b>

WSD also advised it is currently in the process of modernizing LRD to include the incorporation of case management capabilities using its existing technology stack. The increased volume and added complexity of the requirements proposed, it believed, would need to be provisioned in the ultimate solution including consideration of payroll audit review automation. Additional wide

area network security protocols would also need to be included given the office locations and the on-site reviews conducted by staff. This work effort would require full time business analyst, application developer for the first year with 1.5 FTE ongoing. Additionally, case management licensing will need to be expanded.

<u>Description</u>	<u>FY21 Amount</u>	<u>FY22 Amount</u>
2.0 FTE plus benefits	\$225.0	\$165.0
Expanded Case Management	\$82.0	\$82.0
<b>Total</b>	<b>\$307.0</b>	<b>\$247.0</b>

The total of these two categories of cost projections are included in the operating budget impact table above. In addition, WSD reported that the mediation provision could require an additional FTE; there is no mediator position in LRD, but one may be necessary, depending on caseload increase.

In its earlier analysis of a similar bill, NMDOT reported the provisions of this bill would not fiscally impact the agency since NMDOT already complies with mandatory withholding obligations imposed on federally funding projects through the Davis-Bacon Act. NMDOT would also begin this withholding obligation for state funded projects.

**SIGNIFICANT ISSUES**

WSD first commented that the new provision making both the contracting agencies and noncompliant contractors liable to pay affected employees three times the amount of their unpaid wages or fringe benefits is a significant change to existing law. See § 13-4-14, NMSA 1978. Currently, the statute makes the contracting agencies, noncompliant contractors, and sureties liable to pay affected employees any wages or fringe benefits found due to the workers. WSD noted the failure to differentiate between wage and fringe benefit violations that are the result of mere inadvertence or negligence and those that are willful and deliberate. Furthermore, WSD points out that the bill failed to address the timeliness of when a public compliant can be pursued by the Director. Requiring the Director to investigate a claim where the project has been accepted by the contracting agency, bonds in place have expired, and performance of work ceased could prove problematic if the Director learns no money can be withheld. Section 13-4-14 requires the Director to certify to the contracting agency the names of noncompliant contractors, which then triggers the contracting agency’s nondiscretionary obligation to pay the affected workers from accrued payments withheld under the terms of the contract or designated for the project. But if the project is completed and all monies have been paid out, the Director’s certification would not result in any payments to the affected workers. Although Section 13-4-18(A)(2) provides for the delivery of a “payment bond” to the state agency or local public body “for the protection of persons supplying labor and material to the contractor,” recovery in a suit on such a payment bond is limited to the “amount of the balance unpaid at the time of institution of the suit.” See Section 13-4-19(B), NMSA 1978. There is no provision in that statute for payment of treble damages, as called for in this bill. WSD advises that, in order to give Section 13-4-14 the effect intended by SB 98 with respect to treble damages, it would also be necessary to amend Section 13-4-18 so that violations discovered after completion of the project are covered.

Similarly, NMML noted that although the bill required the contracting agency to pay affected

workers three times the amount of any underpayment from withheld contractor payments, there was no corresponding mechanism for the contracting agency to recoup any payments made from the contractor.

In addition, SB98/CS eliminates the requirement that a violation be willful prior to terminating a contract. See Section 2.

Further, if the provision for triple payment in Subsection 3(C) is meant to apply if a worker sues pursuant to the right of action granted in Subsection 3(B), then language clarifying that intent should be added to Subsection C. Similarly, Section 3(D) requires the mandatory award of attorney's fee and costs in an action referenced in existing language as being brought "pursuant to Subsection C". Subsection C does not address the cause of action established in Subsection B; if that is the intent, the reference in Subsection D to Subsection C should be amended to refer to Subsection B.

SB98/CS also amends § 13-4-11 by requiring a contracting agency involved in a public-works project disclose copies of certified weekly payrolls within 20 days of a request made by any person. WSD commented that while this language could create transparency in compliance with prevailing wage law, currently there is no statutory requirement nor rule that contractors must send certified weekly payroll records to the contracting agency. A contracting agency or company acting as general contractor would not have such payroll records in its possession unless they were sent to the contracting agency by a contractor voluntarily.

## **CONFLICT**

SB98/CS conflicts with HB391 as to its provisions regarding inspection of payroll records and particularly their retention in Section 1(D).

## **TECHNICAL ISSUES**

Because this bill applies to all public works, buildings or roads across the state in excess of \$60 thousand, including those to which a political subdivision is a party, the reference to a state agency's record retention requirements in Section 1(D) may be too narrow.

## **PERFORMANCE IMPLICATIONS**

WSD expressed concern that the requirement that the Director investigate and determine whether a wage violation has occurred within 75 days is not feasible. According to WSD, effective compliance investigations can take considerable time and oftentimes involves requesting voluminous payroll and other records, conducting employee and witness interviews, and carefully examining all evidence collected. The 75-day completion deadline is unrealistic and could compromise the accuracy and thoroughness of prevailing wage-violation investigations, which would be contrary to the purposes of the Act. WSD also advises that regulations governing investigations under the federal Davis-Bacon Act do not impose a strict deadline for completion, making the need for such a deadline unclear. *See generally* 29 CFR § 5.6.

WSD also reported Labor Law Administrators also perform public works inspections at the job sites, handle a case load of wage and hour investigations, conduct hearings, and appear in court on behalf of claimants. At a minimum, as explained in the Fiscal Impact section, three additional

personnel would be required to attempt to keep service levels the same to the constituents of New Mexico and fully implement SB 98 as proposed.

Currently WSD advised the Division has three investigative staff (Labor Law Administrators) assigned to the Public Works Section, which cover the state's 33 counties. Currently Las Cruces has 1 LLA, Albuquerque office has 2 LLAs and the Santa Fe office has one vacancy. There are 68 open prevailing wage public works cases. However, the amount of payroll records being requested during investigation varies dependent on scope of work, number of employees and the time period of investigation. Investigations can take up to two months or two years to resolve, depending on the complexity of the case.

#### **OTHER SUBSTANTIVE ISSUES**

IAD reported that, to the extent its grantees construct public works, they follow federal guidelines.

MD/sb