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

**SPONSOR** Trujillo

**ORIGINAL DATE** 02/24/21
**LAST UPDATED** 03/10/21

**HB** 289/aHLVMC

**SHORT TITLE** College Faculty Minimum Wage

**SB**

**ANALYST** Bachechi/Valenzuela

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

| | FY21 | FY22 | FY23 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | | See Fiscal Implications | | | Recurring | Institution I&G Funds |
| | | | | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

## SOURCES OF INFORMATION
LFC Files

Responses Received From
Central New Mexico Community College (CNM)
University of New Mexico (UNM)
New Mexico Independent Community Colleges (NMICC)
Council of University Presidents (CUP)
Higher Education Department (HED)
Santa Fe Community College (SFCC)
Workforce Solutions Department (WSD)

## SUMMARY

Synopsis of HLVMC Amendment

The House Labor, Veterans' and Military Affairs Committee amendment to House Bill 289 strikes Section 1 of the bill in its entirety, leaving only the bill's provisions regarding unemployment benefits for non-tenure-track faculty at colleges and universities. The amendment makes technical changes and adds a new subparagraph (f) clarifying how contingent offers should be analyzed. Specifically, the new subparagraph reads:

> "(f) based on a totality of the circumstances, it is highly probable that there is a job available for the claimant in the following academic year or term. If a job offer contains a contingency, primary weight should be given to the contingent nature of the offer of employment and the totality of the circumstances must show that it is highly probable that the contingencies of that employment will be satisfied."

Synopsis of Original Bill

House Bill 289 (HB289) establishes a minimum wage of $5,000 per course credit hour for non-tenure-track faculty at colleges and universities and it extends unemployment benefits to those same faculty. In addition, the bill amends Section 51-1-5 NMSA 1978 pertaining to unemployment compensation benefits and eligibility conditions for state higher educational institutions by modifying the meaning of "reasonable assurance". The bill expands the meaning of "reasonable assurance" to require the following conditions are met:

1. The educational institution has made a written, oral or implied offer of employment in the following academic year or term;
2. The offer of employment was made by an individual with authority to offer employment;
3. The employment offered is the same position as the previous job;
4. The job offer is not less than 90 percent of the amount that the non-tenure-track faculty member claimant earned in the then-current academic year or term; and
5. The job offer is not contingent on a factor(s) within the educational institution's control.

**FISCAL IMPLICATIONS**

HB289 does not contain an appropriation. However, it could increase the number of workers eligible for unemployment benefits and will have administrative implications for the unemployment division of WSD.

**Costs To Expand "Reasonable Assurance".** Higher education institutions did not provide the financial costs to expand and meet the new requirements of "reasonable assurance" set forth in House Bill 289. However, the amended bill will have an impact on institutions, depending on current practices for managing non-tenure track faculty. For instance, UNM reported it employs 750 contingent non-tenure track faculty, for whom UNM already pays unemployment taxes. San Juan College reported similar management of non tenure track faculty, but is unsure how to assess the financial impact on its unemployment costs, but believes its costs will increase. Other institutions use the State's Risk Management Division, who front the cost of the claims, but then invoice the institutions for the full cost of unemployment claims. The fiscal impact would be based on the new level of unemployment claims filed against institutions.

The fiscal impact of Section 1 of the bill would be significant to the state general fund and to institutions general operating budgets. Several institutions have reported its faculty costs would increase significantly if HB289 is enacted into law:

- Central New Mexico reports a minimum of a 400 percent increase in non-tenure-track faculty from $5.2 million to more than $20 million annually.
- University of New Mexico reports a minimum of a 413 percent increase in non-tenure-track faculty expenditures of more than $35.2 million.
- Santa Fe Community College reports all of its faculty are non-tenure-track, impacting the college by a rise in costs of more than $6 million annually.

**Rising Tuition Could Further Decrease Enrollment**. Tuition and student fees represent 36 percent of instruction and general operating funding, on average, across all institutions in the state, generating $360 million annually. The revenue supports faculty salaries. HB289 would increase the cost to institutions to provide instruction. The rise in instructional cost could result in increased tuition cost and may result in additional declines in student enrollment. If these revenues dropped by 5 percent, institutions could lose more than $18 million in tuition and student fee revenue.

**Faculty Salary Expenditures**. Financial reporting by public colleges and universities does not breakout the expenditures for faculty salaries to show the actual amounts for tenure-track faculty compared with non tenure-track faculty. In FY20, institutions reported $370 million in faculty expenditures, shown in Attachment 1. A cursory analysis based on 25 percent growth and without the benefit of detailed faculty data, shows that the costs to the state could increase by $47.4 million and the costs to institutions could increase by $45.6 million. The analysis averages the impact to institutions at 25 percent, but it is important to note that some institutions are highly reliant on non-tenure-track faculty and could be impacted at a much higher level.

As a comparison, the New Mexico Independent Community Colleges report an increased cost to its member institutions of more than $136.1 million (i.e., $54.1 million increase for non-tenure-track fulltime faculty and $82 million increase for non-tenure-track part time faculty). NMICC represent only 10 of the 24 public institutions in New Mexico.

## SIGNIFICANT ISSUES

Federal law explicitly addresses the payment of unemployment compensation for services performed for an educational institution and provides that faculty member may not be paid unemployment compensation between academic years or terms, and during vacation periods or holiday recesses within terms, if that employee has a ‘contract’ or ‘reasonable assurance’ of performing services in such educational employment in the following year, term, or remainder of a term. The current statutory framework in New Mexico aligns with the federal regulation, and provides a faculty member is not eligible for benefits for any week of unemployment commencing during a period between two successive academic years or terms if the services are performed in the first of such academic years or terms and there is a reasonable assurance that the individual will perform services for any educational institution in the second of such academic years or terms.

Thus, for contingent faculty, the primary relevant factor for determining eligibility for unemployment compensation is whether the faculty member has “a reasonable assurance of employment” in the subsequent semester. If the faculty member has such an assurance, they are generally not eligible for unemployment during the break between semesters; however, if they do not have such an assurance they may be eligible for unemployment compensation starting at the end of their last period of employment.

More than half of U.S. faculty members now work in one or more part-time appointments, generally on a semester-by-semester basis. Many more, both full- and part-time non-tenure-track faculty members, hold renewable academic-year appointments. Those serving in contingent appointments often do not know until a semester actually begins whether they will have a job for that semester and do not know in May whether they can expect to be employed at the same institution in the fall. For these teachers, summer and winter breaks can be periods of unemployment.

The bill aligns with the US Department of Labor, *Unemployment Insurance Program Letter No. 05-17*, published in 2017. The guidance letter explains that, in order to deny unemployment to contingent faculty based on a claim of employment in the following semester, the state unemployment compensation office must first determine that three prerequisites are all met:

1. The offer of employment must be genuine and made by an individual with authority to offer employment;
2. The employment offered must be in the same capacity; and
3. The earnings in the following year or term may not be significantly less (generally at least 90 percent) than the preceding one.

Assuming that these prerequisites are met, the state must determine whether the contract offered constitutes a reasonable assurance of employment. The guidance focuses on the "contingencies" that define contingent appointments. It explains that "If any contingencies in the offer are within the employer's (i.e., the educational institution's) control, the state agency must determine the claimant does not have a reasonable assurance." It then addressed the particular contingencies often faced by contingent faculty. "The department considers contingencies such as course programming, decisions on how to allocate available funding, final course offerings, program changes, and facility availability to be within the control of the employer.

Similarly, offers that contain contingencies that allow employers to retract the offer at their discretion are considered to be within the employers' control. The guidance considers contingencies based upon circumstances such as enrollment, funding, such as an appropriation for a specific course, and seniority to not be in the employers' control. However, as explained above, if the employer receives a general appropriation and can choose how to allocate those funds, this contingency would be within the employer's control." The Labor Department also explains how the "state agency must analyze the totality of circumstances to find whether it is highly probable that there is a job available for the claimant in the following academic year or term," and how the state agency must weigh the "contingent nature of the offer."

Applying this guidance in particular situations is up to the state unemployment agency and its staff. The faculty member seeking unemployment compensation is not required to be an expert in the law, and is not required to "prove" his or her case. As the guidance explains, the burden of proof is not on the claimant to prove whether there was a reasonable assurance, rather this is a determination that the state agency is responsible for making.

USDOL has informally reviewed the HB269/aHLVMC for conformity with federal unemployment compensation (UC) law and did not identify any conformity issue with the bill.

**ADMINISTRATIVE IMPLICATIONS**

The questionnaires for reasonable assurance issues would have to be reviewed and updated to ensure NMDWS was gathering all information related to the five criterion for determining reasonable assurance issues. Training material for the specific criteria for determining reasonable assurance will have to be developed and delivered to all NMDWS Unemployment Insurance adjudication staff. Both the Claimant and Employer UI Handbooks require revisions.

CB/MFV/rl/sb/al