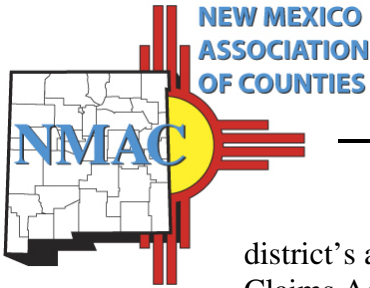




JOBS COUNCIL 10/24/16
LEGAL ENVIRONMENT-RELATED BARRIERS TO JOB CREATION

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1. Hiscox Guide to Employee Lawsuits: The 2015 report was compiled using data to determine the states with the highest probability of employees filing lawsuits. In 2014 U.S. companies across the country had at least an 11.7% chance on average of having an employment charge filed against them. However, there are eleven states and the District of Columbia that have laws and court rulings that go well beyond the U.S. federal guidelines, creating additional obligations and risks for employers. **New Mexico employers have the greatest chance in the country of being a defendant in an employment discrimination lawsuit, 66% higher than the national average.** These suits are costly: the average total costs of claims that resulted in a defense and settlement payout is approximately \$125,000, according to the Hiscox study.
2. U.S. Chamber Institute for Legal Reform: According to the 2015 Lawsuit Climate Survey, which aims to quantify how corporate attorneys view each state's liability system, **New Mexico was rated 45th in terms of how fair and reasonable the state's tort liability system is perceived to be.** 75% of businesses reported that a state's litigation environment is likely to impact important business decisions such as where to locate or do business. The most important issue identified for improving the litigation environment is eliminating unnecessary lawsuits.
3. New Mexico Case Law has Served to Erode the Protections for Public Sector Entities Contemplated by the Legislature in the Tort Claims Act: The legal climate in New Mexico for governmental entities is very troublesome and extremely challenging. In particular, there are numerous adverse court decisions that are contrary to the statutory language in the Tort Claims Act and that ultimately have cost the state, counties, municipalities, and schools many millions of dollars. Some examples of these court decisions:
 - Risk Management Div. v. McBrayer: Broadened the definition of "scope of duty" so that virtually every single case involving a public employee automatically goes to the jury to determine if the employee was acting within the scope of his or her duty, even if the act was criminal and clearly was not requested, required or authorized to be performed by the governmental entity as provided in the statute. As a result of this decision, public entities are forced to settle dozens of cases because of the risk of going to trial. McBrayer represents a broad expansion of liability for New Mexico public entities.
 - Upton v. Clovis Mun. School District: Greatly expanded the waiver of governmental liability for the operation or maintenance of a public building. In this case a school



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- district's alleged failure to follow procedures for at-risk students fell within the Tort Claims Act waiver of immunity for operation or maintenance of a public building.
- Martinez v. N.M. Dept of Transportation: Determined that even though a governmental entity does not waive immunity for design defects (as opposed to maintenance), as clearly articulated in the Tort Claims Act, a design defect becomes a maintenance issue under the court's interpretation. In this opinion the court stated that it was not going to limit maintenance to upkeep and repair, even though that is the dictionary definition ("to discern the Legislature's intent, the Court looks first to the plain language of the statute, giving the words their ordinary meaning..."). This case potentially greatly expands public entities' liability for accidents occurring on public roads.
 - Wachocki v. Bernalillo County: Found liability against a county for allegedly failing to respond to reports of speeding vehicles on a rural road and to adequately patrol an area, where an accident was caused by an individual who turned off his headlights at night and sped through a stop sign. This case potentially puts an impossible burden on law enforcement in our state.
 - Loya v. Gutierrez: Finding that a county government could be liable for the actions of a tribal police officer when the sheriff did not supervise or have any control over the officer, and when by the clear language in the Tort Claims Act the tribal officer could not be defined to be a law enforcement officer. The practical impact of this decision could be the reduction of law enforcement coverage in the state because sheriffs will be hesitant to commission tribal officers because of liability concerns.
4. Whistleblower Protection Act: This is an example of a new employment law that was well intentioned but deeply flawed. The Whistleblower Protection Act, which prohibits retaliatory action against public employees, is so broadly written that it has become a way to protect poorly performing employees including supervisors. There are no caps on damages (one case was recently settled for \$2 million), which include actual damages, reinstatement with the same seniority status that the employee would have but for the violation, two times the amount of back pay with interest, compensation for any special damages, and litigation costs and attorney fees. The employee doesn't need to show that the complained of act was illegal (only that he or she had a "good faith belief" that it was), and only has to communicate to any third party in order to state a valid cause of action. See also the Fair Pay for Women Act, which also has serious unintended consequences.
 5. Conclusion: The legal environment in New Mexico has had an adverse impact on job creation and economic development, both for private and public sector employers. This is an area that needs to be examined and reform is necessary. As a result of the court decisions and statutes noted above, funds that should be going to pay for essential governmental services such as public safety, roads, behavioral health, and infrastructure (which create important jobs for our state) are being spent on attorney fees and litigation settlements.