

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 2/24/07

SPONSOR Beffort LAST UPDATED 3/16/07 HB _____

SHORT TITLE Whistleblower Protection Act SB 1043/aSJC/aHJC

ANALYST Lucero

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non- Rec	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to: House Bill 1295.
Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AG)
State Personnel Office (SPO)
Administrative Office of the Courts (AOC)
New Mexico Department of Transportation (NMDOT)
Administrative Office of the District Attorney (AODA)
Public Education Department (PED)
Corrections Department (CD)
New Mexico Department of Labor (NMDOL)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to SJC amended Senate Bill 1043 strikes the word “actual” and inserts in lieu thereof “compensatory” in reference to court awarded damages to public employee whistle blowers.

The HJC amendment also adds “and wholly without merit” in reference to frivolous complaints and or lawsuits brought on by whistle blowers.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 1043 deletes a reference to the New Mexico Lottery Authority in the definition section of “public employer”.

Synopsis of Original Bill

Senate Bill 1043 enacts the “Whistleblower Protection Act,” prohibiting retaliatory action or blacklisting by a public employer against a public employee who takes certain actions. “Public employee” is defined in the Act as a person who works for or contracts with a public employer. “Public employer” is defined in the Act as:

- (1) any department, agency, office, institution, board, commission, committee, branch or district of state government, including appeals, district, magistrate and metropolitan courts, district attorneys and charitable institutions for which appropriations are made by the legislature;
- (2) any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; municipalities; regional authorities; entities created through joint powers agreements; drainage, conservancy, irrigation or other special districts; and school districts;
- (3) any entity or instrumentality of the state specifically provided for by law, including the New Mexico finance authority, the New Mexico mortgage finance authority and the New Mexico lottery authority; and
- (4) every office or officer of any entity listed in Paragraphs (1) through (3) of this subsection

SB 1043 provides a public employee claiming to be subject to a retaliatory action prohibited by the Act an opportunity to file a written complaint with the Human Rights Division (division) of the Department of Labor, within 180 days after the alleged retaliatory action was committed. If the director of the division determines that probable cause exists for the complaint, the director shall attempt to achieve a satisfactory adjustment of the complaint “through persuasion and conciliation.” Under the Act, it is a misdemeanor offense for an officer or employee of the Labor Department to make public in any manner whatsoever any information related to the complaint. A public employee who has filed a complaint may request and receive an order of no determination that may be appealed to the district court pursuant to Section 39-3-1.1 NMSA 1978.

SB 1043 provides that if conciliation fails, the public employee may request a waiver of right to hearing and seek a trial de novo in the district court. If a public employee prevails, the court may award actual damages, punitive damages and reasonable attorney fees. Conversely, if the employee does not prevail and the court finds that the complaint is frivolous, the court must award the public employer reasonable attorney fees. If the employee does not request a waiver of right to hearing upon failure of conciliation, the Human Rights Commission must issue a written complaint in its own name against the public employer, requiring the public employer to answer the allegations of the complaint at a hearing before the commission or hearing officer. SB 1043 sets out the hearing procedures that must be followed. The bill requires the commission or the director, within one year of the filing of a complaint by an aggrieved public employee to either:

- (1) dismiss the complaint for lack of probable cause;
- (2) achieve satisfactory adjustment of the complaint as evidenced by order of the commission;

(3) file a formal complaint on behalf of the commission.

SB 1043 provides that upon the commission's petition, the district court may grant injunctive relief pending hearing by the commission or pending judicial review of an order of the commission so as to preserve the status quo or to ensure that the commission's order as issued will be effective.

SB 1043 provides that if a public employer does not comply with an order of the commission, the secretary of labor may request the attorney general or district attorney to secure enforcement of the order by filing a petition in the district court. The court may make and enter upon the proceeding an order to decree enforcement of the order of the commission. A party may appeal the final decision of the commission to the district court under Section 39-3-1.1 NMSA 1978.

SB 1043 requires every public employer to post in a conspicuous place notices prepared by the division that set forth excerpts of the Act and other relevant information as determined by the secretary.

FISCAL IMPLICATIONS

There is no appropriation in this bill.

Punitive damages, which generally are not available against the state, are allowed under the proposed act, and is a significant concern. There is no legal standard set forth to provide guidance as to when punitive damages would be awarded, nor is there any cap to the potential punitive damages awards. The State, could incur significant financial liabilities under this act as it is currently proposed.

This bill provides for injunctive relief pending a hearing by the Human Rights Commission or judicial review of the Commission's order. Because the issues raised by the complainant could relate to NMDOT operations, an injunction could delay those operations for a significant period of time.

Over the last three years, the legislature has added several new protected classes by way of legislation. These include: spousal affiliation, sexual orientation, and gender identity. The legislature has also extended the amount of time that a complaining party has to file a complaint with the Human Rights Division (HRD) from 180 days to 300 days. All these changes have resulted in significant increases in the investigatory and mediation workload for HRD staff.

The legislature has enacted additional duties for HRD staff, however there has been no new FTEs authorized for HRD. In fact, in the past there have been consistent cuts in funding for the Human Rights Division. Currently, the Division has seven (7) investigators that are managing a caseload of 20-40 **new** cases per month. In order to achieve the goals of SB1043, it is important that the Bill be funded in a manner that will allow HRD staff to meet the increased investigative, mediation and hearing duties that will result.

This bill has the potential to save tax payer money if inefficient, wasteful and improperly managed programs get exposed by whistleblowers. There is an increased possibility that whistle blowing may encourage greater efficiency and honesty for public employers. The savings could be moderate to significant.

There will be a minimal administrative cost to the judiciary for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, appeals and petitions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

Under the amended bill, “public employees” who work for or contract with “public employers” are protected and granted rights. As amended, the relevant portion of the definition section for “public employer” will include “*any entity or instrumentality of the state specifically provided for by law, including the New Mexico finance authority and the New Mexico mortgage finance authority*”. However, those entities, along with the Lottery Authority, are created as public bodies “separate and apart from the state”. See NMSA Section 58-18-4 (MFA), 6-21-4A (NMFA), and 6-24-5A (Lottery Authority). The amendments appear intended to exclude the Lottery Authority from the terms of the Whistleblower Protection Act. However, by including other entities “specifically provided for by law” within the definition of “public employer”, even though they are also “separate and apart from the state”, the exclusion of the Lottery Authority may not be as clear as apparently intended by the amendment.

The Act is vague as to what constitutes an “improper act” on the part of the employer. The definition indicates that the employer action must be of public concern and violate a state, or federal law or regulation.

Currently, there is established case law that guides the Division/Commission in making a determination of whether the Human Rights Act was violated (case law regarding discrimination). Such case law would not exist in this case and thus, more explicit guidelines, definitions should be included in this Act.

The Act would allow a court to award punitive damages, and specifies that the State will be liable the same as a private person.

Because there is no empirical data on the prevalence of acts that might be reported it is difficult to know if this act would address the issue of public employer misconduct of negligence.

Existing case law does offer some limited protections for whistle blowers. Also whistle blowers who report health and safety violations already enjoy limited protection.

Section 6, sub-section A, sets a 180 day time limit from the date of an alleged retaliatory violation occurs within which the employee may file his or her complaint. There may be some situations wherein the employer engages in retaliation that does not become apparent until after the 180 days has elapsed. An example would be where the employer “flags” the employee’s personnel file with a notation that would be retaliation if the employee were to later seek promotion.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed

- Percent change in case filings by case type

The misdemeanor created by this section would likely rarely occur and would not be a significant burden on local district attorneys offices.

The bill would require the local district attorney to seek enforcement of the commission's order in the district court if the employer refused to comply. This would also be a rare occasion and would not significantly burden the district attorney.

ADMINISTRATIVE IMPLICATIONS

This would place an additional administrative burden on the New Mexico Department of Labor's Human Rights Director and Commissioner. The lack of empirical data makes it difficult to determine how much enforcement of the Act may be. The Bill creates an additional "protected status" classification that the Human Rights Division will be responsible for investigating and mediating. NMDOL will need at least one additional FTE to address new cases. Currently; Human Rights investigators are handling 30-40 new cases per month and has only one mediator. The new FTE would be used to investigate or mediate these new whistle blower cases. Additionally, training would be necessary for Investigators, Mediators, Staff and Commissioners to enforce this new Act.

There may be an administrative impact on the courts as the result of an increase in caseload and/or the amount of time necessary to dispose of cases.

The NMDOT Office of Inspector General is currently responsible for responding to these types of complaints by NMDOT employees. It is anticipated that would be a continued practice, and would require coordination with the NMDOT's Office of General Counsel to the extent necessary or in the event of a complaint to the Human Rights Division. Adequate staff positions currently exist to respond to such complaints, which would be handled similarly to other complaints filed with the Human Rights Division.

Reasonable attorney fees are available to a complainant who prevails in an action under this proposed act. To avoid frivolous complaints against employers, which frequently occur when an employee is facing disciplinary action or performance issues, reasonable attorney fees and costs should also be awarded to employers when the complaint has been filed in bad faith or without a reasonable belief as to the truth of the allegations.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 1295 adds new sections to the Governmental Conduct Act which provide similar protections to public employees.

Possible conflict with HB 685- Administrative Accountability Act. Section 3A of that bill provides that during the course of an agency proceeding, the name of the complainant shall be public record unless the agency determines that the release of the complainant's name may result in substantial harm to any person or to the public health or safety. If both this bill and HB 685 are enacted, there may be instances where the alleged act of public concern under this bill is subject to the procedures of the proposed Administrative Accountability Act, in which case, the confidentiality protections of this bill would or might be compromised.

TECHNICAL ISSUES

There is an existing crime, known as Blacklisting, Section 30-13-3, which is a misdemeanor, and prohibits some of the same conduct as, proposed in this Act.

It is not clear how this Act would interact with the existing State Personnel discipline procedures. It is possible that the State Personnel Board could uphold a discipline action as being for just cause but the Human Rights Commission finds the same facts as being retaliatory. This situation could be further complicated if it is found that the alleged improper acts had not occurred but the employer retaliated for filing the grievance.

The stated purpose of the proposed Act is, in part, to assist public bodies charged with ensuring adequate safety and health standards. However, the scope of "illegal" or "improper" acts, as defined in this bill, goes far beyond safety and health standards, and includes "a practice, procedure, action or failure to act on the part of an employer that is of public concern and violates state or federal law, federal regulation or state administrative rule." It is not limited to safety and health standards.

The Act mirrors the timelines and procedures that existed before the Human Rights Act was amended in 2004. This Act should reflect those amendments. This includes Section 6 Grievance Procedure – (A) “All complaints shall be filed with the division within 180 (Human Rights Act now reads 300 days) after the alleged retaliatory action was committed. (E) A public employee who has filed a complaint with the division may request and shall receive an order of no determination from the director one hundred and eighty days after the division’s receipt of the complaint. (The Human Rights Act was amended to state that “a person who has filed a complaint with the human rights division may request and shall receive an order of no determination from the director without delay after the division’s receipt of the complaint and in jointly filed cases, after the federal complaint has been closed”).

OTHER SUBSTANTIVE ISSUES

SB 1043 does not state that the Act provides an exclusive remedy for any aggrieved public employee subject to a retaliatory action.

The National Conference of State Legislatures (NCSL) reports that:

Most states offer general whistleblower protection to public employees, while fewer than half offer the same protection to all workers. States which have enacted whistleblower protection laws for private sector employees are even fewer. Many state statutes protect whistleblowers whose disclosures involve mismanagement, waste or abuse of authority.

See <http://www.ncsl.org/programs/employ/whistleblower.htm> for a 2006 state-by-state comparison of existing whistleblower protection laws.

There might be some evidentiary problems with proving cases based on this act. This is particularly true with respect to blacklisting. In order to prove blacklisting the grievant would need to prove that the employer had informed others of the whistle blowing and that it was done to intentionally hinder the employee’s ability to obtain employment.

ALTERNATIVES

Similar protection could be made available by amending the procurement code and the State Personnel Act. Also there is a possibility that the courts could develop this sort of protection without legislation.

Currently, government employees have protections from retaliation for protected speech, which would include "whistle blowing," under the First Amendments of both the State and Federal constitutions. Therefore, government agencies and departments could be excluded from the act. This would alleviate concerns relating to possibly substantial punitive damages awards against the State.

Exclude punitive damages as an available award.

Put a cap on the amount of damages that could be awarded under this act.

POSSIBLE QUESTIONS

It appears that the Human Rights Division/Commission would have to determine if the act was "improper" based on this definition but it is unclear how this determination would be made. Would the Division/Commission have to wait to see if the employer were charged with a violation of a law? Would they independently make this call? What legal standard of proof would be applied?

DL/nt:csd