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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/25/10  
 SPONSOR Beffort LAST UPDATED 02/02/10 HB \_\_\_\_\_  
 SHORT TITLE Whistleblower Protection Act SB 96/aSJC  
 ANALYST Varela

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate	Indeterminate		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
 Department of Transportation (DOT)  
 State Personnel Office (SPO)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Amendment for SB 96 strikes lines 23 and 24 on page 2 and inserts “constitutes gross mismanagement, a waste of funds, an abuse of authority or a substantial and specific danger to the public.” The new language redefines the third section for the definition of an unlawful or improper act. The amendment also removes lines 3, 4, and part of line 5 on page 3 which relates to employer retaliation against a public employee.

#### Synopsis of Original Bill

Senate Bill 96 enacts the *Whistleblower Protection Act* prohibiting public employers to retaliate against public employees who take action, object to, or refuse to participate in a matter they believe, in good faith, to be an unlawful or improper act.

Under the act, protected activities of employees include disclosing or threatening to disclose, providing information or testifying about unlawful or improper act(s) of a public employer, or objecting to or refusing to participate in an activity, policy or practice of the public employer that constitutes an unlawful or improper act. An unlawful or improper act that constitutes malfeasance is defined as a practice, procedure, action or failure to act on the part of the public employer that violates a federal law or regulation, a state law or administrative rule, or a law of any political subdivision, or would or does result in a misuse of public funds or poses a substantial danger to public health and safety.

Legal action against the public employer must be brought within 2 years after the date of the occurrence, and may be brought in any court of competent jurisdiction. Affirmative defenses may be raised, such as the disciplinary action was warranted due to misconduct, poor job performance, reduction in work force or other legitimate business purposes. The remedies provided for in the act are not exclusive and do not preclude civil or criminal actions against an employee who files a false claim under the act.

### **FISCAL IMPLICATIONS**

According to several agencies, Senate Bill 96 would adversely impact disciplinary actions (discharge, suspension or demotion) imposed on public employees by their employer. A non-probationary employee may appeal an adverse disciplinary action to the State Personnel Board. If the employee is dissatisfied with ruling of the State Personnel Board, the employee may appeal the decision to the state district court.

According to DOT, the proposed act provides public employees with a separate avenue of redress that may result in public employers having to defend disciplinary actions or employees' charges of discrimination and retaliation in a SPO administrative proceeding and possibly a separate court proceeding initiated under this proposed act. DOT states that the bill may result in significant additional costs to the public employer in defending against the action, including the possibility of two separate defense attorneys and employee time away from their jobs while they help prepare for both defenses and testimony in both separate actions.

DOT cites that the financial impact of a successful employee is expanded under the proposed act. In a SPO hearing, the department may be required to reinstate the employee and pay all back pay. Under the proposed act, the agency not only must reinstate the employee but pay twice the amount of back pay, interest on the back pay, is liable for "actual damages," and compensate the employee for any special damage sustained as a result of the agency's wrongful act, plus litigation costs and reasonable attorney fees. If the employee is not successful and the public employer is found to have taken appropriate disciplinary action, the employer may be required to pay for the employee's litigation costs. Depending upon the number of lawsuits, this could have a significant impact upon the budgets of public entities.

### **SIGNIFICANT ISSUES**

DOT notes that state and federal law already provides public employees with legal remedies against their employers for the prohibited activities. Under the First Amendment of both the state and federal constitutions, government employees have protection from retaliation for protected speech on matters of public concern, which could include whistle blowing. If the employee is successful in an action against a public employer, the employee can be awarded costs and attorney fees.

In addition to the constitutional protections, the *Fraud Against Taxpayers Act*, NMSA 1978, Section 44-9-11 (hereinafter, “*Fraud Act*”), an employer, including public employers, are prohibited from retaliating against an employee for engaging in whistle blowing type activities. If the state does retaliate, the *Fraud Act* requires that the employer make the employee whole, including reinstatement to the same seniority status, pay two times the amount of back pay with interest, compensate the employee for his special damages (undefined), costs and attorney’s fees and, “if appropriate, punitive damages.”

SPO states that this bill may be seen as a mirror to the federal law named similarly. *The Whistleblower Protection Act of 1989* is a United States federal law that protects federal whistleblowers, or persons who work for the government who report agency misconduct. A federal agency violates the Whistleblower Protection Act if it takes or fails to take (or threatens to take or fail to take) a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

SPO states that 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 state-by-state comparison of existing whistleblower protection laws originally compiled in 2005 and updated in November 2009. In addition to the state laws listed below, there are numerous federal laws with whistleblower protections that apply to public and private employers. An overview of federal provisions can be found on the U.S. Dept. of Labor website at: <http://www.dol.gov/dol/compliance/comp-whistleblower.htm>.

## **ADMINISTRATIVE IMPLICATIONS**

According to SPO, the bill may place an additional administrative burden on the Human Rights Division of the Department of Workforce Solutions since they are charged with enforcement of this act. The lack of empirical data makes it difficult to determine how much of a burden this would be.

## **TECHNICAL ISSUES**

DOT states that the definition of “good faith” is vague. As written, the bill may allow employees the right to file a lawsuit and subject the state to litigation on the premise that the public employer has acted improperly. The proposed bill does not require minimal threshold evidence for an employee to bring such an action. Because a lawsuit is authorized to proceed on this basis, the employee may make accusations that in another context would be defamatory but will be privileged if brought under this Act. Although Section 4.D attempts to protect employers from false claims, the state must initiate a separate lawsuit and prove lack of good faith in order to prevail. This is a high and costly burden for public employers to overcome.

**OTHER SUBSTANTIVE ISSUES**

According to SPO, the scope of possible violations is broad and may extend to the violations of administrative rules. This is a higher standard of liability than currently exists for public employers.

**AMENDMENTS**

DOT suggests the following amendment:

In order to reduce frivolous claims and lawsuits that may result under this proposed Act, the Act should be amended to provide that in the event the defendant public agency or officer prevails, or if the complaint is found to be frivolous or not filed in good faith, the public employer or officer may recover litigation costs and attorney fees. It should not require that the public employer initiate a separate lawsuit to recover these costs.

The act should be amended to exclude actions based upon alleged improper disciplinary actions, as there is currently adequate remedy at law through the State Personnel Act and, if applicable, federal law.

The act should be amended to require at least some evidence of unlawful or improper conduct to constitute a good faith belief that such conduct has occurred. Requiring a good faith belief to be based upon only whatever facts may be available to the public employee is an undefined minimal threshold.

PTV/mt:mew