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FISCAL IMPACT REPORT

ORIGINAL DATE 2/4/10

SPONSOR Ryan LAST UPDATED _____ HB _____

SHORT TITLE No Legal Defense for Certain State Employees SB 220

ANALYST Archuleta

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		*Indeterminate – See Fiscal Implications	*Indeterminate –See Fiscal Implications			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
General Services Department (GSD)

SUMMARY

Synopsis of Bill

Senate Bill 220 amends NMSA 1978, § 44-4-4(F). Section 44-4-1 et seq. is the New Mexico Tort Claims Act, which waives immunity from suit for the state and state employees and officials in certain enumerated situations. Section 44-4-4 primarily provides that the governmental entity involved shall provide a defense and indemnity from a judgment for governmental employees. SB 220 creates an exception for the requirement of a government to provide a defense and indemnity for any action in which the state is the Plaintiff or if the action is brought pursuant to the Fraud Against Taxpayers Act (FATA). The bill also makes the statute gender neutral, by changed the occurrences of “him” or “his” to “the public employee’s.”

FISCAL IMPLICATIONS

Since the enactment of this legislation would prevent the payment of any costs, attorney fees, penalties, settlements or judgments by the State of New Mexico, there may be a positive fiscal impact as public employees would be held personally liable for any and all costs, attorney fees, penalties, settlement amounts or judgments awarded in association with a FATA civil suit.

SIGNIFICANT ISSUES

The AGO's analysis suggests that perhaps the best alternative in this instance is to amend the FATA so that the courts do not have jurisdiction over state actors in qui tam cases. Certainly, if there is inappropriate misconduct on the part of a state actor, there are other, better means to bring that state actor to justice, without granting up to one third of the final award to the qui tam plaintiff, and requiring the state to provide a defense and indemnification. If a defendant's conduct is found to be criminal, and he or she is investigated and charged in a criminal context, the defense and indemnification requirements would not apply, and that, perhaps is the best manner in which to confront governmental misconduct, as opposed to through the use of the FATA.

The AGO also identified another alternative, that would probably be useful in any case: include clauses in the PERA and ERB indemnification statutes whereby the state could recover the money for the defense and indemnification of a state employee if his conduct was found to be based upon a willing intention to cause harm to the state.

TECHNICAL ISSUES

While the Risk Management is currently defending two civil actions brought pursuant to FATA, enactment of this legislation would not impact any pending litigation. It may be that a court ruling on some motions already filed by the state defendants in the pending litigation may make this legislation unnecessary.

OTHER SUBSTANTIVE ISSUES

GSD suggests that perhaps New Mexico citizens could be reluctant to serve on boards and commissions if they become personally liable for violations of FATA.

ALTERNATIVES

Rather than amend the Tort Claims Act, amend the FATA to exclude the state and public employees as "persons" under the act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The Risk Management Division may continue to incur costs and attorney fees associated with providing a defense to public employees in civil suits brought under FATA as well as any settlement amounts or penalties and judgments awarded if the public employee is found to have violated FATA. As such, public employees would not be personally liable for such costs and violations associated with civil actions brought pursuant to FATA.