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FISCAL IMPACT REPORT

ORIGINAL DATE 02/08/11

SPONSOR Jennings LAST UPDATED _____ HB _____

SHORT TITLE Drug Testing for Unemployment Compensation SB 263

ANALYST Peery-Galon

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$2,907.0	\$2,887.0	\$5,794.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workforce Solutions Department (WSD)

Attorney General's Office (AGO)

General Services Department (GSD)

SUMMARY

Synopsis of Bill

Senate Bill 263 requires the successful passage of a drug test as a prerequisite for eligibility for unemployment benefits. The proposed legislation requires applicants for unemployment compensation benefits to pay for the drug testing. An individual could be denied benefits if it is determined by the Workforce Solutions Department that the individual failed to pass a drug test or refused to submit to the drug test. Any individual who failed or refused a drug test would be disqualified from receiving unemployment benefits for 26 weeks, but could apply again after the 26 week time period.

FISCAL IMPLICATIONS

WSD reported the fiscal impact to the department includes the costs for testing, expenses associated with information technology changes, and salary and benefits for additional FTE. Based on a projection of approximately 110,240 claims annually and an estimated charge per drug test of \$26, the annual cost for the drug tests alone totals \$2.9 million. WSD reported the drug tests would need to be funded from the general fund because New Mexico's unemployment insurance trust fund cannot be used to fund the drug tests. WSD noted that these claimant figures only reflect regular claims and do not include extended benefit claims which would

further increase estimated costs. The cost for a contractor to modify the UI claims system to implement this change is estimated at \$20 thousand. The cost of two additional FTE to adjudicate test result challenges is estimated at approximately \$106.5 thousand, and the cost of one FTE to do additional validation for the billing from the drug testing sites/laboratory is estimated at approximately \$800 annually.

SIGNIFICANT ISSUES

WSD noted the proposed legislation requires an individual applying for unemployment benefits to take a mandatory drug test before the application is submitted. This unemployment insurance eligibility requirement raises several issues, including the constitutionality of an individual being required to take and pay for a drug test before they are determined to be eligible for benefits. No state currently requires drug testing to receive public assistance, but legislation that would require such tests has been proposed in 16 states.

WSD reported that according to the U.S. Department of Labor, the proposed legislation, which seeks to deny unemployment compensation benefits to individuals who fail to pass a drug test, would be contrary to federal unemployment compensation laws if enacted. WSD reported that while the state may require the individual to take and pass a drug test as a test of availability for work, this provision as currently drafted constitutes a denial of benefit rights and creates an issue under Section 3304(a)(10) of the Federal Unemployment Tax Act. This is because it is an indefinite disqualification and not a denial based on fraud in connection with the receipt of benefits, receipt of disqualifying income, or misconduct connected with work.

WSD also noted that requiring an individual to take a drug test administered by WSD prior to submitting an application for unemployment compensation benefits, would limit the opportunity of individuals to establish their right to unemployment compensation and would create an issue under Section 303(a)(1) of the Social Security Act. The Social Security Act requires state law to provide for such methods of administration as will reasonably ensure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible.

The proposed legislation requires the costs of a drug test administered pursuant to this section be paid for by the applicant for benefits and may be reduced from benefits paid. WSD reported Section 3304(a)(4) of the Federal Unemployment Tax Act requires that state law provide that “[a]ll money withdrawn from the unemployment fund of the state shall be used solely in the payment of unemployment compensation...” Section 303(a)(5) of the Social Security Act provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h) of the Federal Unemployment Tax Act defines compensation as “cash benefits payable to individuals with respect to their unemployment...” The U.S. Department of Labor also notes their interpretation of federal law prohibits the state from passing the costs of administering the state law along to the claimant, including drug testing. WSD noted that federal administrative funds may be used to pay for the testing, although there will not be an increase in federal administrative funds to do so.

WSD noted the Federal Unemployment Tax Act requires that withdrawals may be made from a state’s unemployment fund only for the payment of cash benefits with respect to an individual’s unemployment. The costs of taking a drug test in order to qualify for benefits is not a cash benefit with respect to an individual’s unemployment and therefore may not be deducted from a

claimant's unemployment compensation benefits. Thus, a state cannot deduct the costs of drug tests from unemployment compensation benefits.

WSD reported that another important consideration includes that, while it is certainly possible to write a drug testing requirement into New Mexico's unemployment compensation law, it is highly likely that the law would be challenged as unconstitutional by the American Civil Liberties Union. The courts look to the Fourth Amendment of the U.S. Constitution to determine whether a drug testing requirement is a violation of the prohibition on unreasonable searches and seizures. This Fourth Amendment analysis has been applied to circumstances where drug testing was required for the receipt of welfare benefits, specifically, when the state of Michigan passed a statute mandating that all Temporary Assistance for Needy Family claimants pass a drug test prior to eligibility. See *Marchwinski v. Howard*, 113 F.Supp.2d 1134 (E.D. Mich. 2000). The *Marchwinski* court held that a requirement to submit to suspicionless drug testing, either of all participants or a random selection, to obtain and maintain welfare benefits was a violation of the Fourth Amendment of the U.S. Constitution.

WSD reported the proposed legislation conflicts with Section 51-1-37 NMSA 1978 which provides that "no individual claiming benefits shall be charged fees of any kind in any proceeding under the Unemployment Compensation Law by the department or its representatives...".

WSD noted other considerations would accompany a drug testing requirement must be taken into account, such as the fact that not all employers require drug testing as a condition of employment, the cost of testing (such as costs associated with collection, analysis and administration), who will pay for the testing, how and where will the test be administered, and what procedures will be in place to challenge a test result. The proposed legislation provides that at the time of testing, individuals would be given information regarding the most common medications that may affect test results. Individuals would then have the opportunity to provide information concerning both prescription and non-prescription medication that may explain a positive test result in connection with interpreting the test results. WSD stated that given the potentially high number of test result challenges, this provision could create a significant burden on the department due to the resulting increase in claims adjudications.

WSD reported changes will need to be made to the unemployment insurance claims system to accommodate drug testing requirements. The department would need to create an automated data entry system to capture claimant test results from an internal or external data source. This project will require programming changes for the automation of the unemployment insurance claims system, as well as application programming changes through code and in the database. WSD information technology staff will also need to include the capability of incident reporting statistics for this category of suspension of benefits.

WSD reported if the proposed legislation is enacted, the department would need to conduct further research regarding the applicability of the Health Insurance Portability and Accountability Act (HIPAA), which regulates the privacy of protected health information, to the agency's administration of drug testing. WSD staff working on unemployment insurance claims, adjudications, and appeals would need to receive training on any applicable HIPAA provisions.

The proposed legislation provides that applicants shall have the opportunity to provide information concerning prescription or non-prescription medications that could cause them to

test positive, and states the information “shall be taken into account in interpreting test result.” AGO noted the proposed legislation provides no standard for evaluating the information and does not indicate who would make such determination. The proposed legislation could draw a due process challenge on the grounds that individuals who take legal medications are disadvantaged because they will be forced to take the test regardless of information provided, and there may be inadequate notice and opportunity to challenge the standards for judgment of “information” explaining positive results.

AGO noted the proposed legislation does not provide exceptions to testing for individuals who test positive because they use prescription drugs, use medical marijuana, participate in the licensed methadone program, or otherwise disabled by drug addiction. AGO references 42U.S.C.S. 12132 et. seq. in that individuals could challenge the proposed amendment on the grounds that they are disabled within the meaning of the Americans with Disabilities Act and argue that it discriminates against them by denying them an equal opportunity to receive this aid, benefit or service. AGO noted a similar challenge could be made as an equal protection claim arguing unequal opportunity to participate in a government benefit program and that drug testing is not rationally related to receipt of unemployment benefits.

ADMINISTRATIVE IMPLICATIONS

WSD noted additional staff will be required to administer the drug testing, issue and implement new determinations, and provide the claimant with appeal rights.

RPG/svb