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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/7/16

SPONSOR Candelaria LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Unemployment Compensation Law Definitions SB 255

ANALYST Klundt

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

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workforce Solutions Department (WSD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 255 amends NMSA 1978, § 51-1-44(A)(5)(a) to clarify the definition of “employment” in New Mexico’s Unemployment Compensation Law. Section 51-1-44(A)(5)(a) currently excludes from Unemployment Insurance coverage any individual in a position which, under or pursuant to state law, is designated as a major nontenured policymaking or advisory position. SB 255 proposes to add definitions for the terms “advisory,” “major,” “nontenured,” and “policymaking.” Under SB 255, those terms would be defined as follows:

- Advisory means that the duties of the individual in the position include counseling and advising government entities and officers with respect to policy, program and administration even if the position does not have the authority to implement recommendations resulting from the advice or counsel;
- Major means that the duties of the individual in the position are significant or conspicuous in scope and have a substantial impact on the programs, operations or budget of a governmental entity, organization or political entity;
- Nontenured means that the individual’s position is at-will and is not subject to merit system or civil service law or rules with respect to duration of appointment to the service; and

- Policymaking means that the duties of the individual in the position include determining the direction, emphasis and scope of action in the development and administration of governmental programs.

## FISCAL IMPLICATIONS

WSD reports the agency is already charged with administering the exemption from Unemployment Insurance coverage for government employees who are in nontenured, major policymaking or advisory positions. SB 255 provides clarifying definitions for some of the operative terms of the exemption but otherwise does not alter the existing duties of the agency or the courts tasked with interpreting and applying the exemption.

## SIGNIFICANT ISSUES

The scope of the exemption from Unemployment Insurance coverage for nontenured, major policymaking or advisory positions has been the subject of multiple appeals that have reached state district courts, the New Mexico Court of Appeals, and the New Mexico Supreme Court. The appeals subject to court litigation have concerned a broad range of positions, from agency directors appointed by the various boards and commissions, senior members of a Governor’s staff, directors of divisions with defined statutory duties, directors of divisions without defined statutory duties, agency chief financial officers, and other senior administration officials.

In *Perez v. New Mexico Department of Workforce Solutions*, 2015-NMSC-008, 345 P.3d 330, the New Mexico Supreme Court was faced with three different Unemployment Insurance appeals from former high ranking state government officials. As it reviewed the three cases, the Supreme Court pointed out the need for definitions:

“Our Legislature has not defined the terms in Section 51–1–44(A)(5)(a) of the Unemployment Compensation Law. See §§ 51–1–1 to –59. *Our analysis in these consolidated cases would greatly benefit from legislation that defined the key terms in Section 51–1–44(A)(5)(a) . . .*” *Perez v. New Mexico Department of Workforce Solutions*, 2015-NMSC-008, ¶ 25, 345 P.3d at 337 (emphasis added).

## AMENDMENTS

WSD recommends a minor amendment to add the words “or tribal” after the word “state” on line 9 of page 10. The agency believes this amendment will harmonize state law with the requirement of the Federal Unemployment Tax Act that government employees be excluded from Unemployment Insurance coverage if they are “in a position which, under or pursuant to the State or tribal law, is designated as (i) a major nontenured policymaking or advisory position . . . .” 26 U.S.C. § 3309(b)(3)(E).

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