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FISCAL IMPACT REPORT

ORIGINAL DATE 2/2/19
 LAST UPDATED 2/23/19

SPONSOR Chandler HB 246/aHJC

SHORT TITLE Prevailing Wage Complaint Resolution SB _____

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$320.0	\$240.0	\$560.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workforce Solutions Department (WSD)
 Administrative Office of the Courts (AOC)
 Department of Transportation (DOT)

SUMMARY

Synopsis of House Judiciary Committee Amendment

The House Judiciary Committee (HJC) amendment to House Bill 246 (HB 246) extends the deadlines by which certain actions described in the original bill occur. First, the amendment gives a contracting agency 20 days rather than 15 days to produce certified weekly payrolls on request of any person. Next, the amendment gives the Labor Relation Program of the Workforce Solutions Department 30 days, increased from 20 days, to commence an investigation following the filing of a complaint by any person. The amendment then extends the number of days that the Director of the Labor Relations Program has to make a determination on a complaint from 60 days to 75 days. However, when a complaint is of a significantly complex nature or involves multiple projects or job sites, the amendment gives the director up to six months to make a determination, provided the director gives written notice and an explanation to all parties of the need to extend the time.

WSD reported the amended deadlines allow the agency to better serve the constituents affected by the Public Works Act and will allow more efficient enforcement of these provisions.

Synopsis of Original Bill

House Bill 246 (HB 246) amends the Public Works Minimum Wage Act (PMWMA) in several ways. First, it provides that accrued payments shall be withheld from a contractor if either the Director of the Labor Relations Division (LRD) of the Workforce Solutions Department or the contracting officer of the state or one of its political subdivisions considers it necessary to withhold such payments to pay laborers and mechanics who have been underpaid by a contractor. Currently, Section 13-4-11(C) provides that such accrued payments *may* be withheld; HB 246 makes it mandatory to withhold such payments. Additionally, Section 13-4-11(C) only gives the contracting officer the authority to require withholding of accrued payments; HB 246 also gives the LRD Director this authority.

Next, HB 246 permits any person to request and receive from a contracting agency copies of certified weekly payrolls within 15 days of the date of request. The bill also permits any person to file a complaint with the LRD Director alleging a prevailing wage and fringe benefits violation. The Director must commence an investigation within 20 days of the complaint and make a determination within 60 days. The Director's determination must be supported by findings of fact and conclusions of law. If the Director determines an underpayment or other PWMWA violation has occurred, the Director must order withholding of accrued payments from the contractor within 30 days of the Director's determination, unless the parties reach a voluntary resolution.

Next, HB 246 makes it mandatory for a contracting agency to terminate a contractor's right to proceed with work within 30 days of the Director's determination that a violation has occurred, regardless of whether the violation is willful, unless there is a voluntary resolution between the parties.

HB 246 provides if the Director certifies to a contracting agency that a contractor has failed to pay PWMWA-mandated wages or fringe benefits, the contracting agency must pay the affected workers three times the amount of wages or benefits found to be due them from accrued payments withheld under terms of the contract. Currently, Section 13-4-11(A) provides that the contracting agency must only pay the amount of wages and fringe benefits the Director has found are due the affected workers and only if the contractor has "disregarded their obligations" under the PWMWA. Additionally, in the case of an aggregate underpayment greater than \$500, HB 246 makes noncompliant contractors liable to pay adversely affected employees three times the amount of the employees' unpaid wages or fringe benefits, plus an additional \$100 for each calendar day on which the contractors require or permit employees to work in violation of the PWMWA.

Finally, HB 246 provides that in a court action for damages pursuant to the act, the court shall (versus may) award attorney fees and costs incurred on behalf of an employee adversely affected by a violation. This bill makes awarding attorney's fees and costs mandatory and not discretionary.

FISCAL IMPLICATIONS

WSD reported on public-works jobs, the LRD already investigates wage and fringe benefit complaints filed with the Division. If passed, WSD believes HB 246 will require, at a minimum, three additional labor law administrators (one per office) to attempt to meet the proposed

investigative time frame. Additionally, new regulations must be promulgated to implement the bill's changes, which would include providing public notice and a public hearing for the proposed new regulations. The LRD would also need to update its website and any publications dealing with the PWMWA in order to reflect the changes called for by the bill. Cost estimates provided by WSD are below:

<u>Description</u>	<u>FY20 Amount</u>	<u>FY21 Amount</u>
3.0 FTE plus benefits	\$210.0	\$220.0
Website and Publication Updates	\$100.0	\$20.0
Public Hearing	\$10.0	\$0.0
Total	\$320.0	\$240.0

The AOC reported minimal administrative cost 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 actions to enforce IPRA, employee actions for damages, and appeals from actions to enforce and private actions seeking damages. 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.

The NMDOT reported this bill will not fiscally impact the agency since NMDOT already does this under obligations imposed on federally funding projects through the Davis-Bacon Act. NMDOT would also begin this withholding obligation for 100 percent state funded projects under the Public Works Minimum Wage Act.

SIGNIFICANT ISSUES

WSD believes HB 246's new provision making both the contracting agencies and noncompliant contractors liable to pay affected employees three times the amount of their unpaid wages or fringe benefits is a significant change to NMSA 1978, § 13-4-14. Currently, the statute only makes both the contracting agencies and noncompliant contractors liable to pay affected employees any wages or fringe benefits found due to the workers. Generally, statutes permitting an award of treble damages do so only in certain egregious situations where the defendant or wrongdoer has acted deliberately. HB 246 fails to differentiate between wage and fringe benefit violations that are the result of mere inadvertence or negligence and those that are willful and deliberate. HB 246 eliminates any consideration of the willfulness of a violation. By making contracting agencies and noncompliant contractors both liable for treble damages, HB 246 can be read as potentially allowing affected workers to receive six times the amount they are owed, plus \$100 per day in additional damages payable by contractors.

WSD also stated requiring contracting agencies to pay affected workers three times the amount they have been underpaid could prove problematic if the Director learns of violations only after the public-works project has been completed. Section 13-4-14 requires the Director to certify to the contracting agency the names of noncompliant contractors, which then triggers the contracting agency's nondiscretionary obligation to pay the affected workers from accrued payments withheld under the terms of the contract or designated for the project. But if the project is completed and all monies have been paid out, the Director's certification would not result in any payments to the affected workers. Although Section 13-4-18(A)(2) provides for the delivery of a "payment bond" to the state agency or local public body "for the protection of persons supplying labor and material to the contractor," recovery in a suit on such a payment bond is

limited to the “amount of the balance unpaid at the time of institution of the suit.” NMSA 1978, 13-4-19(B). There is no provision for payment of treble damages, as called for by HB 246. In order to give Section 13-4-14 the effect intended by HB 246 with respect to treble damages, it would also be necessary to amend Section 13-4-18 so that violations discovered after completion of the project are covered.”

PERFORMANCE IMPLICATIONS

WSD stated HB 246’s requirement that the Director investigate and determine whether a wage violation has occurred within 60 days is not feasible. Effective compliance investigations can take considerable time and involve requesting oftentimes voluminous payroll and other records, conducting employee and witness interviews, and carefully examining all evidence collected. HB 246’s 30-day completion deadline is unrealistic and could compromise the accuracy and thoroughness of wage-violation investigations, which would be contrary to the purposes of the PWMWA. Regulations governing investigations under the federal Davis-Bacon Act do not impose a strict deadline for completion, making the necessity of such a deadline by HB 246 unclear. *See generally* 29 CFR § 5.6.

Labor Law Administrators also perform public works inspections at the job sites, handle a case load of wage and hour investigations, conduct hearings, and appear in court on behalf of claimants. At a minimum, three additional personnel (one per office) would be required to attempt to keep service levels the same to the constituents of New Mexico and fully implement HB 246 as proposed.

OTHER SUBSTANTIVE ISSUES

HB 246 proposes to amend § 13-4-11 by requiring a contracting agency involved in public-works projects to disclose copies of certified weekly payrolls within 15 days of a request made by any person. This proposed language could create confusion since there is currently no statutory requirement nor rule that contractors must send certified weekly payroll records to the contracting agency. A contracting agency would not have such payroll records in its possession unless they were sent to the contracting agency by the contractor voluntarily. Certified payroll records maintained by a private contractor performing work on a public works project are not public records subject to IPRA. *See generally* *Toomey v. City of Truth or Consequences*, 2012-NMCA-104 ¶ 14.

The proposed language, requiring disclosure by contracting agencies of certified weekly payroll records within 15 days, also ignores that there are already existing requirements in place that contracting agencies, like any government agency, are subject to IPRA for anyone wishing to inspect public records and to make such documents available for inspection no later than 15 days. *See* NMSA 1978 § 14-2-8.

The AOC noted HB246 section 1, subsection D, requires that upon request by a person, the contracting agency shall within fifteen days of request provide copies of certified payroll records. With a potential that some construction projects will take over two years to construct, the time for providing the request may be a burden to the contracting agency.

HB246 section 1, subsection F adds a timeline for the director of 20 days from the time of the filing of the complaint to commence an investigation and within 60 days make a determination.

Section 1, Subsection G gives the director the authority to order withholding of accrued payments, if there is no resolution within 30 days.

KK/sb/gb/al