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FISCAL IMPACT REPORT

ORIGINAL DATE 2/18/19
LAST UPDATED 3/09/19 **HB** 456/aHJC/ec

SPONSOR Hochman-Vigil

SHORT TITLE Notice & Fees of Mechanics' Liens **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Unknown but could increase	Unknown but could increase	Unknown but could increase	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB105
 Relates to HB343 and HB344

SOURCES OF INFORMATION

LFC Files

Responses Received From
 Regulation and Licensing Department (RLD)
 Administrative Office of the Courts (AOC)
 New Mexico Attorney General (NMAG)
 Secretary of State (SOS)

SUMMARY

Synopsis of HJC Amendments

The House Judiciary Committee Amendments to House Bill 456 strike the new provisions: 1) prohibiting a person practicing without a license as required under the Construction Industries Licensing Act from filing or claiming a mechanic's lien for any work done; and 2) creating a new misdemeanor offense for misrepresenting the status of an employee as an independent contractor, or for treating an employee as an independent contractor on a state agency administered program.

Synopsis of Original Bill

House Bill 456 amends the penalty provisions in the Construction Industries Licensing Act to:

- Clarify that a person practicing contracting without a license or representing oneself as a sales representative or consultant for an unlicensed contracting entity is strictly liable and

is guilty of a misdemeanor (not a petty misdemeanor) and is subject upon conviction:

- For contracting work of \$10 thousand or less, to imprisonment for a definite term of less than one year (an increase from 90 days) or a fine of not more than \$1 thousand (an increase from between \$300 and \$500) or both;
- For contracting work exceeding \$10 thousand (an increase from \$5 thousand) to imprisonment for a definite term of less than one year (an increase from six months) or a fine of 10 percent of the dollar value of the work or both;
- Clarify that a person acting as a journeyman without a valid certificate is strictly liable and guilty of a misdemeanor and subject to imprisonment for a definite term of less than one year (an increase from 90 days) or a fine of not more than \$1 thousand (an increase from \$100 to \$300) or both;
- Prohibit a person providing a service without a license under the Act from filing or claiming a mechanic's lien;
- Create a new misdemeanor offense with a penalty fine of not more than \$5 thousand or imprisonment for a definite term of less than one year or both when a contractor who reports to a state agency or other client that an employee is an independent contractor or who, for a state agency administered program, intentionally and willfully treats or lists an employee as an independent contractor when that employee's status does not meet the standards for independent contractor. Subsection 1(E) expressly states this provision does not apply recovery in a tort action or change the common law interpretation of "independent contractor" in the context of tort liability;
- Set a three year statute of limitations for violation of a provision of this section; and
- Grant to employees of the Construction Industries Division (CID) of RLD who are currently certified by the New Mexico Law Enforcement Academy and whose principal duties are to investigate criminal violations of the Act:
 - peace officer powers with respect to arrests and enforcement of the Act; and
 - immunity from conviction or liability for any act performed pursuant to the Act if a peace officer lawfully could have performed the same act in the same circumstances.

HB456 contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

RLD reports no fiscal impact. AOC, on the other hand, advises that as penalties become more severe, defendants may invoke their rights to trial and their rights to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees. AOC reports these additional costs are not capable of quantification, and thus are reflected in the operating budget impact table as unknown.

SIGNIFICANT ISSUES

RLD reports that in 1967, when the Act was first enacted, unlicensed contracting was a petty misdemeanor. During the 1977 legislative session, the penalty section was amended to remove "petty" and make the violation a full misdemeanor. In 1979, legislation maintained the

designation as a misdemeanor. In 1989, the title of the section was changed from “penalty” to “Penalty-Misdemeanor”. RLD concludes from this history that legislative intent is clear that this violation constitutes a full misdemeanor, yet reports that numerous courts have determined, based on the term of imprisonment in the existing statute, that the violation is a petty misdemeanor with a one year statute of limitations. New Subsection (G) clearly establishes the statute of limitations to be three years.

That clarification is necessary, RLD asserts, both to clearly express legislative intent and also because in many circumstances a consumer is often unaware that a complaint should be filed against an unlicensed contractor until after the year has expired, resulting in the unlicensed contractor not being held accountable for his/her actions. Presently, existing statutes provide a one-year statute of limitations for a petty misdemeanor, (see NMSA 1978, § 30-1-8 (D)), a two-year statute of limitations for full misdemeanor (see Section 30-1-8 (C)), and a three-year statute of limitations if the crime is outside the Criminal Code. (See Section 30-1-8 (H)). It is clear that this offense is outside the criminal code. However, given the confusion over the limitations period, express language would be helpful. Further, RLD reports, an unlicensed person can often manipulate the consumer such that notification is late coming to CID. A three-year statute of limitations will assist in prosecuting such individuals, it asserts, as well as allowing persons who are victims of such crimes to be able potentially to obtain some recourse and possibly restitution.

According to RLD, clarifying that the three-year statute of limitations applies in these types of actions will provide CID’s Investigations & Enforcement Unit an opportunity to prosecute more unlicensed individuals without requiring legal counsel only in those cases where a jury trial is requested. RLD also reports that the provision that CID’s employees who are certified by the law enforcement academy have the authority of peace officers in respect to arrests and enforcement of Act helps to clarify that these investigators can prosecute and advocate against those practicing contracting without a license and help ensure enforcement of safety and building code standards. Further, as AOC notes, Subsection A and B provide for strict liability for the offenses defined in those subsections, which will make those cases easier to prosecute, as there is no state-of-mind element to prove.

AOC also points out that Section 48-2-2 NMSA 1978 provides that every person providing labor upon, providing or hauling equipment, tools or machinery for or furnishing materials to be used in construction, alteration or repair...has a lien upon the same for the work or labor done. HB 456, Subsection H, prohibits a person who provides a service without a license as required by the Construction Industries Licensing Act from filing or claiming a mechanic’s lien for that service. HB 456 does not amend Section 48-2-2 NMSA 1978, which creates a conflict between these two statutes.

PERFORMANCE IMPLICATIONS

As AOC notes, the courts participate in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

RLD reports the three year statute of limitations contained in HB456 will assist CID in

prosecuting more unlicensed contractor cases.

CONFLICT, RELATIONSHIP

This bill conflicts with SB105: the fine for acting as a journeyman is not *more* than \$1,000 in HB456, and is not *less* than \$1,000 in SB105.

This bill relates to HB344, which amends the same section of law to make failure to pay a subcontractor a felony.

This bill also relates to H 343, which amends other existing statutes concerning mechanics' liens.

AMENDMENTS

NMAG suggests adding a definition of the term “independent contractor” to this bill to avoid ambiguity.

MD/sb