LFC Requester:	Ruby Ann Esquibel

AGENCY BILL ANALYSIS
2017 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction ___ **Substitute** ____

Date 2/19/2017
Bill No: SB299

Sponsor: Senator Jacob R. Candelaria
Short Title: WHISTLEBLOWER PROTECTION ACT CHANGES

Agency Code: 924
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	**FY18**		
	None Noted		

(Parenthesis ( ) Indicate Expenditure Decreases)

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: Senate Bill 299 amends §10-16C NMSA 1978, et seq. of the New Mexico Whistleblower Protection Act by changing definitions in the Act; changing to whom public employees may report unlawful or improper acts; changing and remedies and affirmative defenses and requiring exhaustion of administrative remedies before Whistleblower Protection Act remedies are available.

FISCAL IMPLICATIONS

None noted

SIGNIFICANT ISSUES

In Section 2(A), the proposed amendment adds an element of objectivity to the requirement of a "good faith" belief that a reasonable basis exists in fact, for the employee's report of an action that they believe to be unlawful or improper. With the amendment, the employee would now have to demonstrate that their belief was "objective"; that a reasonable person similarly situated would reasonably have believed that there was unlawful or improper conduct occurring, rather than just that they believed it to be so, in order to be protected by the Act. **This may have the effect of reducing frivolous claims.**

While this revision may reduce frivolous claims, many states have gone a step further and have specifically included language in their Whistleblower Protection Acts that remove protections for employees who knowingly make a false disclosure or make a disclosure in reckless disregard for the truth. Further, some states, (New Jersey), have required that the employee must establish that they have an objectively reasonable belief that the employer's conduct was illegal or improper and ***not just an error in judgment*** on the part of the employer. Similar additional language would give public employers protection against awards being made on the basis of a report that arises solely on the back of mistakes having been made by the public employer.

Section 2(B) of the proposed amendment deletes "or contracts with" from the definition of "public employee", thus, eliminating protection, if any, for independent contractors, from the Act.

By adding "that results in a tangible or significant change" to Section 2(D)'s definition of "retaliatory action", the proposed amendment will require an employee seeking protection pursuant to the Act to now show more than just "any discriminatory or adverse employment action"; the employee will have to demonstrate that the effect on their employment was either tangible or significant. This may also have the effect of reducing frivolous claims.

Section 2(E) relating to the definition of "unlawful or improper act." The proposed revisions will eliminate both, a "practice, procedure, action or failure to act" on the part of a public employer that "constitutes malfeasance in public office" and the same that is "an abuse of authority", from constituting reports of "unlawful or improper acts" that would be protected by the Act. Additionally, the proposed revision to this section would elevate the reports of "waste of funds" that are given protection under the Act to only "***gross*** waste of funds." All of these changes to the definition of "unlawful or improper act" go to the reduction of potentially frivolous claims and help to ensure that the purpose of the act, to protect the public, is paramount.

The proposed amendment would revise Section 3(A) protects a public employer who communicates to "an individual or entity in a position to further the public interest," whereas without the amendment the Act protects a public employer who communicates to "the public employer or a third party." This amendment would eliminate claims pursuant to the Act based on reports made to individuals or entities without the means to take any action to further the public interest, such as possibly colleagues without authority to take any action. The proposed amendment however, doesn't make it clear whether or not this would include a disclosure to the

press. If the intent is not to include reports to the press, such reports should be expressly excluded. A scheme in which required step by step reporting is required might do more to ensure that only those reports that are truly motivated by an intent to protect the public interest, are reported. Many states require employees to bring the claim to the attention of a supervisor, allowing a certain amount of time for them to take action before the employer may then report to either a state's attorney general or other appropriate individual or entity.

Section 4(A) would be altered to provide for reinstatement to a position "with the same seniority status that the employee would have had but for the violation" only to classified non-supervisory employees, and not to all employees.

Section 5(B) is added to require that all available grievance and other administrative remedies be exhausted before remedies are available pursuant to the Whistleblower Act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Public employers will be exposed to Whistleblower Protection Act lawsuits and damages without the additional protective limitations on the use of and protections available under the Act.