

LFC Requester:	Ruby Ann Esquibel
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**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: Date 3/6/2017
Original **Amendment** **Bill No:** SB299SPAC/s
Correction **Substitute**

Sponsor: Senate Public Affairs Committee **Agency Code:** 924
Short Title: WHISTLEBLOWER PROTECTION ACT CHANGES **Person Writing:** Dawn E. Mastalir
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SECTION II: FISCAL IMPACT

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate but Significant				

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

Senate Bill 299 amends Chapter 10, Article 16C NMSA 1978 relating to whistleblower protection by revising the entities to whom reporting by a public employee is protected pursuant to the Act and requiring exhaustion of administrative remedies prior to the availability of protections under the Act.

FISCAL IMPLICATIONS

The fiscal implications to the state could remain fairly significant pursuant to the amended language of the Act because public employees remain able to obtain the protections of the Act for reports to a vague, and broad, range of entities.

SIGNIFICANT ISSUES

Section 10-16C-3 would be amended to protect a public employee from retaliation for reports made to the public employer or “to an individual or entity in a position to further the public interest” rather than to the public employer or “a third party.” While the intent of this language may be to define or limit the term “a third party”, the proposed language may not go far enough to provide sufficient clarity under the Act. It isn’t clear, pursuant to the proposed amendment, whether a public employee communicating to a media outlet, the press, a blog site, a community action group, the civil liberties union, an attorney, etc. is or is not protected by the Act. Language could be added to further limit the relevant entities to whom communications will lead to protections, such as, “communicates to the public employer or to an individual or entity in public office, within State or Federal government, with authority to respond to such communication”, which would provide further clarity. Given that the public employee’s communications do not have to be accurate, or even reasonable, but only have to be made based on a “good faith belief”, such a limitation would strike a balance between protection of the whistleblower, and the protection of public employer from frivolous claims.

Section 10-16C-6 amends the statute of limitations by replacing it with an exhaustion of remedies provision. The proposed amendment requires an individual seeking remedies under the Act to exhaust the “grievance and administrative remedies” provided by Section 28-1-10 NMSA. The grievance and administrative remedies provided by Section 28-1-10 NMSA are the grievance procedures for the New Mexico Human Rights Commission, which states that “A person claiming to be aggrieved by an unlawful discriminatory practice . . .” may file with the human rights division of the labor department a written complaint. These grievance procedures would apply in the event that the report involves an “unlawful discriminatory practice”, as defined by the Human Rights Act, but do not appear to apply to the broader range of activities that may be encompassed by the terms “unlawful or improper acts” appearing in the Whistleblower Protection Act. There may be other administrative remedies that should be included in this proposed amendment as remedies to be exhausted prior to suit, such as the internal grievance procedures of any specific state entity employing the public employee, state personnel procedures, etc.

Even with an exhaustion requirement, the limitations period may be useful, and could be tolled until after the exhaustion of administrative remedies. Given that evidence may become stale, and state entities would have a need to know how long to keep relevant records, a statute of limitations would be beneficial.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There will be no limitation on what entities constitute “third parties”, for purposes of protected communications and exhaustion of administrative remedies will not be required.