

LFC Requester:	Marty Daly
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**AGENCY BILL ANALYSIS
2015 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 **Amendment**
Correction **Substitute**

Date February 25, 2015
Bill No: HB 532-305

Sponsor: Rep. Larry Larrañaga **Agency Code:** Attorney General's Office
Short Whistleblower Protection **Person Writing** Jennifer Salazar, AAG
Title: Posting Requirements **Phone:** 827-6990 **Email** jsalazar@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: N/A

Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

HB 532 amends the Whistleblower Protection Act (the “Act”), NMSA 1978, Sections 10-16C-1 to -6. Section 2 of HB 532 amends the definition of “retaliatory action”, which currently includes “any discriminatory or adverse employment action”, and limits the definition to only those actions that result in the “suspension, demotion or dismissal” of a public employee. HB 532 also amends the definition of “unlawful or unethical conduct” and deletes the definition of “good faith.”

Section 3 amends Section 10-16C-3(C) of the Act to strike language protecting communications made to a “third party”, and instead, clarifies that only those communications made to the public employer, the media, or a law enforcement entity, are protected. Section 3 also adds language to clarify that anonymous reports will not be considered protected communications for purposes of the Act. Finally, Section 3 adds language to state that “communication of information” shall not constitute whistleblowing if an employee is required to provide information as part of the employee’s job duties.

Section 4 of HB 532 adds language to limit the recovery of litigation and attorney’s fees to only those cases where the award is “greater than the offer of settlement.” Section 4 also clarifies that the employee bears the “ultimate burden” of proof to establish a claim under the Act. According to the amendment, an employee must demonstrate “but-for-causation” to show that the public employee would not have been dismissed from his/her position but for the employee’s communication disclosing the public employer’s unlawful/unethical conduct. Section 4 would also delete language regarding the non-exclusivity of remedies under the Act.

Section 5 would add language to state that a public employee’s back pay shall not accrue until an action is filed. Section 5 also proposes to add language to require public employees to exhaust “all available grievance and other administrative remedies” before pursuing a claim under the Act. Finally, Section 6 deletes Section 10-16C-5 of the Act, which currently mandates that public employers post a conspicuous notice to public employees setting forth

the provisions of the Act.

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

Under Section 2, the proposed amendment to the term “retaliatory action” would narrow the meaning of the term. Under the current Act, retaliatory action can include any “discriminatory or adverse employment action.” Furthermore, an adverse employment has been construed to include more than termination, suspension, or demotion; instead, it can also include other adverse actions taken against an employee such as a decrease in wages or salary, a less distinguished title, loss of benefits, and other employment actions that are materially adverse to the employee’s job status. See, e.g. Wells v. Colorado Dep’t of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003) (discussing “adverse action” in the context of a federal Title VII Civil Rights Act retaliation case).

Under Section 4, it is not clear whether the deletion of the paragraph regarding non-exclusivity of remedies is intended to preclude any additional remedies that a public employee may be able to pursue under another other law. If this is the intent, this may conflict with other applicable statutes.

As currently proposed, it is not clear how the new language, requiring exhaustion of administrative remedies, will effect a public employee’s ability to bring a claim under the Act given the two year statute of limitations imposed by Section 10-16C-6 of the Act.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

N/A

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS

N/A