

March 11, 2022

The Honorable Renee Erickson, Chairperson
Senate Committee on Commerce
Statehouse, Room 546-S
Topeka, Kansas 66612

Dear Senator Erickson:

SUBJECT: Fiscal Note for SB 470 by Senator Sykes

In accordance with KSA 75-3715a, the following fiscal note concerning SB 470 is respectfully submitted to your committee.

SB 470 would require workers employed by a state agency or by an employer on behalf of a state agency and engaged in the construction of public works to be paid at least the prevailing wage applicable to the work's occupation category as determined by the Secretary of Labor. The bill's provisions would not apply to construction of public works for which either the engineer's estimate or the bid accepted by a state agency for the total project cost is less than \$75,000; contracts by the Secretary of Transportation for nonfederal aid state-funded projects, contracts for any nonfederal aid, public works projects for scientific research and development facilities under the University Research and Development Enhancement Act; or any contracts governed by the federal Davis-Bacon Act.

The bill would require state agencies to request the Secretary of Labor to determine the prevailing wage rates and basic hourly rates for all trades and occupations required for the project before advertising bids. The Secretary's wage schedule would be required to be attached to the specifications for the construction project. The project contract would require the contractor and subcontractors to provide the contracting state agency or the Department of Administration with copies of payrolls. The payrolls would be required to contain all the data required by the state agency or the Department of Administration and either the contracting state agency or the Department of Administration may examine all records relating to wages paid to workers for work pursuant to the contract.

The bill would require the contractor or subcontractors to keep detailed records showing the workers' names and occupations, plus hours worked and wages paid. The records would be available for inspection by the contracting state agency or the Department of Administration during working hours. The records could not be destroyed or removed from the state for the period of one year following the completion of the public works construction project. Before the final payment could

be made, the contractor and subcontractor would be required to file an affidavit with the contracting state agency that the contractor or subcontractor has fully complied with the bill's provisions.

In addition to payment to any employee for backpay of any prevailing wages not paid and any other civil or criminal penalties or remedies pursuant to the bill or under law, the contractor would be required to pay a civil penalty to the Secretary of Administration of \$200 for each worker employed for each calendar day that the worker is paid less than the specified prevailing wage rates for any work done under the contract by the contractor or by any subcontractor of the contractor. Any contractor may withhold from any subcontractor sufficient sums to cover any penalties withheld by the contracting state agency on account of the subcontractor's failure to comply with the bill's provisions and if payment has already been made, the contractor may recover from the subcontractor the amount of the penalty in district court.

The Department of Administration and the contracting state agency would be responsible for enforcement of the bill's provisions. Complaints of violations may be filed with the Department or the contracting state agency. An agency that receives a complaint would be required to notify the respective other agency. If the Secretary of Administration concludes that a violation has occurred and a penalty is due, the Secretary would notify the contractor and subcontractor, if applicable, of the finding. The penalty would not be due until 45 days after the date of the notice of the penalty. The employer would have the right to dispute the notice of penalty in writing to the Secretary within 45 days of the date of the notice. Proceedings would be in accordance with the Kansas Administrative Procedures Act.

If the employer fails to pay all wages due as determined by the Secretary of Administration within 45 days following the notice of penalty, or if the employer fails to exercise the right to dispute the penalty, as an alternative or in addition to withholding penalty amounts due from payments under the contract, the Secretary of Administration may pursue an action to enforce the monetary penalty provisions against the employer in any district court. If the court orders payment of the penalties, the Secretary would be entitled to recover actual costs of enforcement from the penalty amount.

If the Secretary of Administration finds that a state agency, contractor, or subcontractor has not complied with the bill's provisions, the Secretary would be required to give notice of the precise violation in writing and stating that the Secretary may seek an injunction. The Secretary may inform the Attorney General in writing that the notice has been given and the state agency, contractor, or subcontractor has not complied. The Attorney General would bring an action in the district court of the county where the state agency is located or where the contractor or subcontractor is engaged in the public works construction project. The court may issue a temporary restraining order and the Attorney General would be required to post an adequate bond to be set by the court. If the Attorney General prevails, the court would issue an order enjoining the awarding of the contract for the public works construction or any further work or payments under the contract if the contract has been awarded, until the state agency, contractor, or subcontractor fully complies with the requirements of the notice to the satisfaction of the court. The plaintiff and defendant would have the same rights of appeal as were provided by law in other injunction proceedings.

The bill would specify the requirements for the Secretary of Labor in determining prevailing wage rates for each occupational title applicable to every locality on or before July 1, 2022, and July 1 of each year thereafter. Any person affected by the rate could file a challenge within 30 days of the

schedule being filed with the Secretary of State and the Department of Administration. If an objection is made in writing, the Secretary of Labor would be required to set a hearing in accordance with the Kansas Administrative Procedure Act and would be subject to review in accordance with the Kansas Judicial Review Act.

Contractors, subcontractors, and agents that willfully pay workers less than the prevailing wage rate would be guilty of an unclassified misdemeanor punishable by a fine of not more than \$500 or imprisonment for not more than 30 days, or both. Each day a violation continues would constitute a separate offense. The same penalties would apply to any officer, official, member, agent, or representative of a state agency, contractor, or subcontractor who willfully violates the bill's provisions. SB 470 would prohibit any employer from violating the prevailing wage provisions of any contract governed by the bill and also from requiring any employee to work for less than the prevailing wage required by the contract.

Any worker paid less than the prevailing wage rate would have a right of action against the contractor or subcontractor for twice the difference between the wage paid and the prevailing wage rate. If the worker prevails, the worker would be entitled to recover reasonable attorney fees to be determined by the court. The worker could also request the Secretary of Labor accept an assignment of the wage to pursue enforcement of the claim. The bill would remove the prohibition on city, county, or local governments from enacting or administering any ordinance, resolution, or law, that require, or discriminate against, favoring, preferring, or base any ordinance, law, policy, economic development program, agreement, grant, or incentive on an employer's compensation or wages at rates higher than the minimum wage.

The Office of Judicial Administration states enactment of SB 470 could increase the number of cases filed in district court because it allows for enforcement actions, which could increase time spent by court employees and judges processing and deciding these cases. Since the bill carries a misdemeanor penalty, there could be additional supervision required to be performed by court service officers. The Office states enactment of the bill could result in the collection of additional docket and supervision fees and fines in those cases filed under the bill's provisions. According to the Office, a fiscal effect cannot be estimated until the Judicial Branch has had an opportunity to operate under the bill's provisions.

The Department of Administration states that it cannot estimate a fiscal effect. The Department of Labor states that presuming the Secretary of Labor could set the state level rates to match the federal rates, the number of wages claimed related to the bill would not be substantial and the agency would not need additional resources to implement the bill's provisions.

The Kansas Department of Transportation states the bill's enactment would affect the agency's Airport Development Program and Capital Improvements Building Program by requiring additional monitoring of contracts; however, the agency estimates it could handle the bill's provisions within existing resources.

The Office of Administrative Hearings states without information on the number of agencies and individuals subject to registration, the agency cannot estimate the number of appeals filed in a year. According to the Office, the Department of Labor receives approximately 25 phone calls a year regarding prevailing wages and those are referred to the U.S. Department of Labor. The Office states it could need additional positions if the bill is enacted.

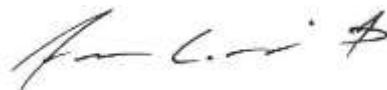
The Board of Regents indicates enactment of the bill would create a fiscal effect for the state universities if contractors were required to pay employees a prescribed wage rather than a competitive free market rate, which could create an increase in construction costs. Also, the Board states the bill's enactment would require additional administrative time at the state universities in tracking the rates to be paid to employees and reviewing contractor documentation for compliance.

The Office of the Attorney General states the agency has no way of determining how many cases would be required to be filed by the agency against agencies, contractors, or subcontractors for violations. If a state agency were the subject of one of these actions, the Office indicates it may have to hire outside counsel to represent the agency under the Kansas Tort Claims Act as the Office of the Attorney General would be conflicted from also representing the agency in litigation.

The Office further states that the constitutionality of the legislation could be challenged. Depending on which court system, federal or state, the case was filed in, getting to an appellate decision could take two to four years. The defense could be handled by Office staff; however, the Office indicates it is possible that specialized outside counsel would be needed to defend a lawsuit. The defense could entail expending several hundred thousand dollars over the life of the lawsuit and if a challenge is successful, the state could end up being ordered to pay the plaintiff's attorney fees and costs. Any fiscal effect associated with SB 470 is not reflected in *The FY 2023 Governor's Budget Report*.

Both the League of Kansas Municipalities and the Kansas Association of Counties state the bill's enactment could increase costs for local governments that elect to pay a prevailing wage.

Sincerely,



Adam Proffitt
Director of the Budget

cc: Jay Hall, Association of Counties
Kelly Oliver, Board of Regents
Vicki Jacobsen, Judiciary
Willie Prescott, Office of the Attorney General
Celeste Chaney-Tucker, Department of Administration
Dawn Palmberg, Department of Labor
Cheryl Whelan, Administrative Hearings
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Wendi Stark, League of Municipalities