

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 02/02/13

SPONSOR Trujillo, C.H. LAST UPDATED \_\_\_\_\_ HB 277

SHORT TITLE Prohibit Certain Employer-Required Meetings SB \_\_\_\_\_

ANALYST Soderquist

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

|              | FY13 | FY14 | FY15 | 3 Year<br>Total Cost | Recurring or<br>Nonrecurring | Fund<br>Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------|
| <b>Total</b> | NFI  | NFI  | NFI  | NFI                  |                              |                  |

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with House Bill 98

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General Office (AGO)

State Personnel Office (SPO)

Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

House Bill 277 would enact a new statute prohibiting, with certain exceptions, the practice of requiring employee attendance at meetings called by a covered employer, the employer's agent, or designee, for the purpose of conveying the employer's opinions on religious or political matters. The legislation would similarly apply to mandatory communications with the employer, the employer's agent, or designee regarding religious or political topics. The legislation would prohibit covered employers or their agents or designees from penalizing or threatening employees for not attending meetings or participating in communications regarding political or religious matters. HB 277 would also prohibit any action by an employer to penalize an employee who, acting in good faith, reports a violation of the provisions of the bill.

HB 277 expressly exempts meetings or communications initiated by religious organizations regarding an organization's religious beliefs, practices or tenets. The bill also exempts political organizations efforts to convey the organization's political tenets or purposes to its employees.

HB 277 would authorize aggrieved employees to bring an enforcement action in District Court, and expressly provides that a court may award a prevailing employee in such actions treble damages, reasonable attorney fees and other relief including reinstatement and back pay.

## **SIGNIFICANT ISSUES**

HB 277 is seeking to prevent specific acts covered by §28-1-7(A) NMSA 1978, which provides that “it is an unlawful discriminatory practice for an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of...religion”. HB 277 defines specific conduct which would be covered under §28-1-7(A). The functional difference is the creation of a cause of action with mandatory trebling of damages.

According to the response from the SPO, HB 277 contains a specific and narrow definition for “political matters” but no definition for “religious matters”. Also, requiring an employee to “participate in any communication with the employer” the purpose of which is to express the employer’s opinion about religious matters is prohibited. There is no definition as to what comprises participation in any communication. This raises questions concerning potential litigation. One example provided by SPO: could beginning a mandatory meeting with a prayer or invocation be considered forced participation in communication? Arguably, yes, as the employer is certainly expressing its opinion regarding religious by the content of the prayer and the fact that a prayer or invocation is being presented. These missing definitions could lead to complaints. Even barring retaliation by the employer, an aggrieved employee could file for injunctive relief pursuant to section 1(C) and be awarded attorney fees and costs.

The phrase “political matters” is defined broadly to include the decision to join “any lawful political, social or community group or activity or any labor organization.” HB 277 proposes to ban an employer from holding mandatory meetings the purpose of which is to express its opinion regarding the above. It is doubtful that this bill would pass constitutional muster. The restraints imposed on an employer in HB 277 would appear to violate the employer’s rights of free speech. The conduct HB 277 seeks to restrain is the mere expression of opinion. Moreover, the conduct of employers *vis* labor organizations are covered in the applicable collective bargaining agreement between that employer and the labor organization and under federal labor law (Title 29, Ch. 7, USCA).

Beyond the prohibition of mandatory meetings in HB 277 is the ban on requiring an employee to “participate in any communication” with the employer wherein the employer expresses opinion on “political matters”. As an example, without defining what “participate in any communication” means, then potentially employers would be subject to liability for, as an example, sending out opinion fliers. Again, as stated above, pursuant to section 1(C) there would not have to be any retaliation by the employer in order for the employee to initiate suit.

According to the State Personnel Office (SPO), HB 277 is in conflict with House Bill 98. HB 98 provides an exception to the Human Rights Act (§28-1-1 *et seq.*) if compliance would violate a person’s “sincerely held religious beliefs”. However, the protections contained in HB 98 only apply to compliance with the Human Rights Act. Therefore, an employer with a “sincerely held religious belief” could discriminate generally, but would be subject to suit for retaliating against employees’ failure to attend the proscribed mandatory meetings which are the subject of HB 277.

According to the Attorney General’s Office, in a staff analysis that is not a formal Attorney General’s opinion nor a Attorney General’s advisory opinion, HB 277, if enacted, could face First Amendment challenges from employers asserting violations of free speech rights in the wake of the U.S. Supreme Court’s *Citizens United* decision. See *Citizens United v. FEC*, 558 U.S 310 (2010). To the extent the bill would restrict an employer’s ability to address employees on union membership, it could also be challenged on the ground that it is preempted by National Labor Relations Act (NLRA), 29 U.S.C. §§159-69. Oregon enacted closely analogous legislation, SB 519, in 2009. See Or. Rev. Stat. §659.785. The Oregon law has been challenged on the grounds that it violates employers’ First Amendment right to free speech and is preempted by the NLRA. The case was dismissed on procedural grounds without reaching the merits of employers challenge. See *Assoc. Oregon Industries and Chamber of Commerce of the U.S.A. v. Avakian*, 2010 U.S. Dist. Lexis 44263.

### **CONFLICT**

Conflicts with HB 98. Duplicates as a subset of §28-1-7(A) NMSA 1978. Potentially conflicts with the State Personnel Act. Responses from agencies also warn against conflict with the U.S. Constitution and New Mexico State Constitution.

### **TECHNICAL ISSUES**

Greater definitional clarity on terms and phrases is required to ensure what actions could be subject to litigation.

RS/bm