F I S C A L I M P A C T R E P O R T

SPONSOR Moores **ORIGINAL DATE** 2/7/16 **LAST UPDATED** **HB**

SHORT TITLE Employee Preference Act **SB** 269

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		$62.0-82.0	$62.0-82.0	$124.0 – 164.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Workforce Solutions Department (WSD)
State Personnel Office (SPO)
Public Employee Labor Relations Board (PELRB)

SUMMARY

Synopsis of Bill

SB 269 creates the Employee Preference Act and states all persons shall have the right to belong or to refuse to belong to or support a labor organization without fear of penalty or reprisal. Under SB 269, a person shall not be required, as a condition of hiring, promotion, or continued employment, to become or to remain a member of a labor organization or to pay any dues, fees, assessments or other charges of any kind to a labor organization or to a charity or third party organization in lieu of payment to a labor organization.

SB 269 makes it illegal to deduct union dues or fees from an employee's compensation without written authorization. Furthermore, SB 269 prohibits employers from requiring that a person be recommended or approved by a labor organization as a condition of hiring, promotion, or continued employment. Any agreement, understanding, or practice between an employer and a labor organization to violate the Employee Preference Act would be unlawful according to the provisions of SB 269.

To enforce the Employee Preference Act, SB 269 imposes a duty upon the Attorney General's Office and upon all district attorneys to investigate complaints of violations and to bring actions

for injunctive or other appropriate relief. Violation of SB 269's provisions would be a misdemeanor punishable by a fine of up to $1,000 or by a maximum term of imprisonment of ninety days, or both.

In addition to Attorney General and District Attorney Enforcement, SB 269 creates a private right of action allowing employees subject to violations of the Act to sue for damages, injunctive relief, costs, and attorney's fees.

FISCAL IMPLICATIONS

The requirement for the Attorney General's Office (AGO) to investigate and possibly prosecute violations under SB 283 may create additional responsibilities for the AGO and therefore require additional resources. The estimate included in the operating budget table above is for one full-time assistant attorney general position. The funding would be recurring and would affect the general fund.

SB269 also proposes to amend the Public Employees Bargaining Act (PEBA) to eliminate the concept of "fair share," which means a required payment to a labor organization by an employee of a bargaining unit who is not a member of the organization. SPO states in 2015, non-union members paid approximately $630 thousand in "fair share" fees to AFSCME, CWA, and NMMTEA. The agency also reports AFSCME's "fair share" fees are approximately $3.00 less than paying full membership dues. For full-time employees, AFSCME's fees range from $12.50 to $14.89 per pay period depending on the local chapter. SPO reports this totals approximately $325.00 to $387.14 per year.

SIGNIFICANT ISSUES

In *Freidrichs v. California Teachers Association*, No. 14-915, the United States Supreme Court has heard oral arguments regarding whether "fair share" or "agency shop" provisions violate employees' First Amendment rights of freedom of speech and freedom of association. The United States Supreme Court should issue an opinion in June 2016.

According to NCSL 25 states and Guam have given workers a choice when it comes to union membership. Labor unions still operate in those states, but workers cannot be compelled to become members as a requirement of their job.

The PELRB reports, the U.S. Supreme Court ruled in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) insofar as the service charges are used to finance expenditures by the Union for collective bargaining, contract administration, and grievance adjustment purposes an agency shop clause is valid. Subsequent cases have held that a public sector employee who chooses to pay an agency fee in lieu of joining a union and paying full dues is entitled to "an adequate explanation" of the basis for the agency fee and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *CTU, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986). In order to address the question of an appropriate fee to be charges in lieu of dues the legislature enacted §4(J) of the Act requiring calculation based on expenditures incurred by the union "permissibly chargeable…under United States and New Mexico statutes and case law.." including the costs of negotiating the contract, servicing the contract and representing all such employees in grievances and disciplinary actions." To avoid subsidizing the union's political or ideological activities, nonmembers must affirmatively opt-out

within the prescribed time period following distribution of the Hudson notice. In each case the legitimacy of the "opt-out" procedures was presumed until recently when the Supreme Court accepted certiorari and heard argument in January in the case of *Friedrichs v. California Teachers Association*, No. 14- 915. A decision in now pending on the questions whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

By its terms, SB 269 applies to both public and private sector employees. Because it applies to public employees, SB 269 removes fair share as a permissive subject of bargaining under the Public Employee Bargaining Act.

SB 269 sets forth exceptions for federal employers and employees, employers and employees covered by the Federal Railway Labor Act, employers and employees in exclusive federal enclaves, and wherever federal law would otherwise be preemptive.

Although SB 269 creates a private right of action for violations of the Act, it does not specify what the statute of limitations is for such a cause of action. Nor does it set forth tolling provisions.

There are contradictory arguments about the benefits of employer preference. Arguments indicate that it may lead to state economic growth by attracting new business; other arguments indicate that it may lead to reduced wages and worker safety protections.

OTHER SUBSTANTIVE ISSUES

Public employers and labor organizations would be required to negotiate in compliance with the Employee Preference Act, and amend any language in existing collective bargaining agreements that violates the Employee Preference Act.

AMENDMENTS

SPO recommends the following amendments:

Page 2, Lns. 17-18	Delete "as a condition of hiring, promotion or continued employment, to:"
Page 6, Lns. 10-23	Keep 10-7E-4(J) first sentence only.
Page 10, Lns. 3-8	Delete "as a condition of hiring, promotion or continued employment".
Page 11, Lns. 24-25	Change 10-7E-9(G): Delete "as a condition of employment".
Page 12, Lns. 2-5	Change last sentence to read: "The issue of fair share shall be a prohibited and illegal subject of bargaining."
Page 13, Lns. 5-6	Change 10-7E-19(G): Delete Public Employee Bargaining Act and insert "Employee Preference Act".

Page 13, Lns.9-10	Delete 10-7E-19(H). [Note: This deletion would require that any alleged contract violations go through grievance and arbitration procedures pursuant to the CBA's rather than to the PELRB or local labor boards.]

ALTERNATIVES

The PELRB recommends an alternative to this bill would be to table the bill until the U.S. Supreme Court announces its decision in *Friedrichs v. California Teachers Association*, after which, if agency agreements are deemed constitutionally invalid, this bill could be a means of addressing that decision.