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

SPONSOR Townsend/Wooley/Ezzell/Youngblood/Brown

ORIGINAL DATE 02/22/17
LAST UPDATED 02/24/17

HB 432

SHORT TITLE Employer Preference Act

SB

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts SB482, SB483

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (NMAG)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
State Personnel Office (SPO)

SUMMARY

Synopsis of Bill

House Bill 432 proposes the Employee Preference Act. The bill supports persons in New Mexico to form, join or assist labor organization or to refrain from those activities. Membership and fees are not mandatory as a condition of hiring, promotion or continued employment and prohibits an employer to have the recommendation or approval of a labor union.

FISCAL IMPLICATIONS

HB432 requires the attorney general and the district attorneys to investigate and prosecute violations of the new "Employee Preference Act," which will result in increased costs to those entities.

Although it is difficult to accurately estimate the cost of increased trials because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly, in thousands, for the district courts, district attorneys and public defenders are as follow:

- District Attorneys: $195.4
- District Courts: $335.6

SIGNIFICANT ISSUES

AODA states the prohibition against "an agreement, understanding or practice, written or oral, implied or expressed, between an employer and a labor organization that is in violation of" the act, is very broad.

The Attorney General's Office (OAG) notes a significant issue raised by HB432 is whether the state has the authority to compel labor organizations to represent all members of a bargaining unit even when nonmembers do not pay dues. Under federal law, a union has a duty to fairly represent all workers of a bargaining unit, whether or not the employee members belong to a union. This is the duty of fair representation and the duty exists with respect to all union activity, including grievance and arbitration. *Sweeney v. Pence*, 767 F.3d 654, 672 (7th Cir. 2014) (dissent) (*citing Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Under SB 269, unions will still have the duty to fairly represent all members of a bargaining unit, even those who choose not to pay union dues.

The Administrative Office of the Courts (AOC) notes New Mexico is not a "right to work" states, though similar legislation has been attempted in past legislative sessions. Under right-to-work laws, states have the authority to determine whether workers can be required to join a labor union to get or keep a job. Currently, 28 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. Kentucky became the 27th right-to-work state when it enacted HB1 on Jan. 9, 2017. Missouri became the 28th by enacting SB19 on Feb. 2, 2017.

The State Personnel Office (SPO) reports that in 2016, non-union members were required to pay approximately $278 thousand in "fair share" fees to AFSCME through payroll deductions. AFSCME's "fair share" fees are about $3.00 less than paying full membership dues. For full-time employees, AFSCME's forced "agency shop" fees range from $12.50 per pay period, to $14.89 per pay period, depending on the local chapter. This totals approximately $325.00 to $387.14 in payments to unions each year; stemming from compulsory and involuntary deductions from a public employee's paycheck. Additionally, more may have been paid directly to the unions. SPO believes that HB432 would eliminate many of the issues that state employees currently face as a consequence of "fair share" fees.

SPO notes the current collective bargaining agreement allows labor organizations to refuse to represent a public employee under the labor organization's sole discretion. Further, the collect bargaining agreement prohibits an employee from bringing their case through the grievance process themselves in those instances where the labor organization refuses to represent the employee. Although non-union employees may benefit from the actions of a labor organization, a labor organization may refuse to provide a benefit to any of its dues-paying membership See AFSCME CBA, Article 11, Section 3; Appendix A and B; CWA CBA, Article 3, Section 3; Appendix A and B. HB432 would address this issue.

SPO suggests that HB432 would prohibit state employees from having to make political contributions by way of supporting a specific labor union.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Conflicts with SB482 and 483 Employee Preference Act

TECHNICAL ISSUES

OAG indicates that while the proposed bill creates a private right of action, it does not specify what the statute of limitations is, nor does it provide any specific tolling provisions.

OAG also notes that there could be some confusion created by the bill's new definition of "labor organization" in Section 4, while also leaving the existing definition of "labor organization" in the new proposed Section 13, as the two definitions vary in their language. Similarly, there needs to a be a closer look at the possible conflicts arising out of providing a new definition for "employer" and the existing statute's use of the term "employer" somewhat interchangeably with the term "public employer."

AOC notes the following issues with the bill:

> Section 8 of HB432, "the attorney general or district attorney may bring an action for injunctive or other appropriate relief in the district court for the county in which the violation is occurring or will occur or in the district court for Santa Fe County." For alleged violations occurring elsewhere in the state, filing in Santa Fe County may give rise to change of venue motions due to inconvenience, hardship to defend remotely, or lack of nexus between the venue and the alleged violations.
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> Section 10 of the bill, a person injured or threatened with injury as a result of violations is entitled to injunctive relief and may recover "any and all damages, including costs and reasonable attorney fees, of any character." This damage provision is extremely broad and may lead to far-roaming damage claims with unclear standards of proof and necessitating the expenses of defending ambiguous claims.

OTHER SUBSTANTIVE ISSUES

OAG states that Title 5 of the United States Code (5 USC Section 7114(a)(1)) requires a union acting as exclusive representative to fairly represent all employees during collective bargaining "without regard to labor organization membership." The current state statute provides that those expenses incurred negotiating a contract that is applicable to all employees without regard to their union membership, may be defrayed amongst all employees, regardless of their union membership. These permissible charges are defined by the Public Employment Bargaining Act ("PEBA") in §10-7E-4 NMSA 1978 as "fair share" fees. The proposed bill would eliminate this definition.

SPO cites a study by the Mackinac Center for Public Policy which reported data from the Bureau of Economic Analysis, right-to-work states showed a 42.6 percent gain in total employment from 1990 to 2011, while non-right-to-work states showed gains of only 18.8 percent." The study also found inflation-adjusted gross personal income in right-to-work states increased 86.5 percent between 1990 and 2013, versus 51.3 percent for forced-unionization states.

OAG cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the U.S. Supreme Court ruled that to the extent service charges are used to finance expenditures by a

labor organization for collective bargaining, contract administration, and grievance adjustment purposes, an agency shop or "fair share" clause is valid. Since *Abood*, there have been several challenges to state legislation enacting right-to-work laws. The most common arguments are that these laws are preempted by federal labor law and that the laws violate several constitutional provisions, including the Fifth Amendment's Taking Clause, the Equal Protection Clause of the Fourteenth Amendment, the Contracts Clause, and the First Amendment. Most courts have found that the states' authority to enact right-to-work laws are not contrary to federal labor law because Congress has granted states the authority, under Section 14(b) of the National Labor Relations Act, to create right-to-work laws.

OAG continues that in January 2016, the United States Supreme Court accepted certiorari and heard argument in the case of *Friedrichs v. California Teachers Association*, No. 14-915. On March 29, 2016, the Supreme Court affirmed (by an equally divided court) the appellate court's decision without issuing a written opinion (The Ninth Circuit had summarily affirmed the trial court's ruling, stating we "have reviewed appellants' motion for summary affirmance and appellees' opposition thereto, the record, and the briefing filed in this appeal. Upon review, the court finds that the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent. *See United States v. Hooton,* 693 F.2d 857, 858 (9th Cir.1982) (per curiam) (stating standard for summary affirmance); *Abood v. Detroit Bd. Of Ed.,* 431 U.S. 209, 232 (1977) (allowing public-sector agency shop); *Mitchell v. L.A. Unified Sch. Dist.,* 963 F.2d 258, 263 (9th Cir.1992) (allowing opt-out regime). Accordingly, we summarily affirm the district court's judgment."). Consequently, at this time *Abood* remains good case law.

The National Conference of State Legislatures in a brief summary of Right-to-Work laws explains that:

> In states without a right-to-work law, employees may be required to join a labor union if it represents workers at their place of employment. Those who refuse to join the union may still be required to pay for the costs of representation, since they profit from the union's efforts in negotiating wages and benefits on behalf of all employees. Such "fair share" payments are often equivalent to the cost of union dues.
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> The first right-to-work laws were passed in the 1940s and 1950s, predominantly in Southern states. Most right-to-work laws were enacted by statute but 10 states adopted them by constitutional amendments. There was a surge of interest in the issue in the 1970s and again in the 1990s, but only a handful of states have enacted right to work laws since the initial wave in the mid-20th century.
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> Federal law sets standards for the operation of labor unions in the private sector through the Labor-Management Reporting and Disclosure Act of 1959. Provisions of federal law govern union elections, management, finances and reporting. Right to work, however, has remained a state issue.

The January 2017 Bureau of Labor Statistics News Release related to union membership in 2016 states:

- Public-sector workers had a union membership rate (34.4%) more than five times higher than that of private-sector workers (6.4%).
- Workers in education, training, and library occupations and in protective service occupations had the highest unionization rates (34.6 % and 34.5% respectively).

- Men have a slightly higher union membership rate (11.2%) than women (10.2%).
- Black workers were more likely to be union members than were White, Asian or Hispanic Workers; 13% as compared to 10.5%, 9%, or 8.8% respectively.
- Median weekly earnings of nonunion workers ($802) were 80% of earnings for workers who were union members ($1,004).
- 15 major work stoppages (private and public sector) involving 99 thousand workers, resulting in 1.5 million idle days

Below is a list of right-to-work states and the years when the statute or constitutional amendment was adopted.

Right-to-Work States

State	Year Constitutional Amendment Adopted	Year Statute Enacted	State	Year Constitutional Amendment Adopted	Year Statute Enacted
Alabama	2016	1953	Nebraska	1946	1947
Arizona	1946	1947	Nevada		1952
Arkansas	1944	1947	North Carolina		1947
Florida	1968	1943	North Dakota		1947
Georgia		1947	Oklahoma	2001	2001
Idaho		1985	South Carolina		1954
Indiana		2012	South Dakota	1946	1947
Iowa		1947	Tennessee		1947
Kansas	1958		Texas		1993
Kentucky		2017	Utah		1955
Louisiana		1976	Virginia		1947
Michigan		2012	Wisconsin		2015
Mississippi	1960	1954	West Virginia		2016
Missouri		2017	Wyoming		1963

Sources: U.S. Dept. of Labor, state websites

The National Right to Work Act was introduced in the House of Representatives on February 1, 2017. H.R. 785 protects an individual's choice to form, join or assist labor organizations or to refrain from such activities.

SPO report that the Communication Workers of America require public employees who do not wish to join its union to pay the full amount of membership dues, which are the equivalent of two hours of their hourly rate of pay per pay period, and then requires those employees to "opt out" as members, and receive an unknown "rebate" amount. Union "fair share" fees may only be used to support the costs associated with "performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 763 (1988).

ABS/sb/jle