# LEGISLATIVE EDUCATION STUDY COMMITTEE
# BILL ANALYSIS
## 53rd Legislature, 2nd Session, 2018

**Bill Number** SB179 **Sponsor** Ingle

**Tracking Number** .209672.1SA **Committee Referrals** SPAC/SJC

**Short Title** Employee Preference Act

**Analyst** Force **Original Date** 2/5/18
**Last Updated**

## BILL SUMMARY

Synopsis of Bill

Senate Bill 179 (SB179) introduces the Employee Preference Act, which allows New Mexico public employees to form, join, or assist labor organization or to refrain from those activities. The bill prohibits mandatory membership or fees from labor organizations as a condition for hiring, promotion, or continued employment. SB179 also amends the Public Employee Bargaining Act, striking the definition of "fair share" and prohibiting a public employer from requiring employee to maintain membership in or pay dues to a labor organization.

## FISCAL IMPACT

SB179 does not make an appropriation. However, the Legislative Finance Committee notes that the bill requires the attorney general and the district attorneys to investigate and prosecute violations of the Employee Preference Act, which may result in increased costs to those entities.

## SUBSTANTIVE ISSUES

According to the Administrative Office of the Courts (AOC), the current Public Employee Bargaining Act allows public employees to unionize and collect "fair share" fees from nonmembers if the services and benefits secured by the union affect all members of the bargaining unit. SB179 removes the ability of unions to collect fair share or other similar fees. However, the Attorney General's Office (AGO), in response to a similar bill in 2017, noted that federal law mandates that a union has a duty to fairly represent all workers of a bargaining unit, whether or not the employee belongs to a union.

Additionally, this bill allows employees to either join a union or opt out of union membership, stipulating that union membership shall not be required as a condition of hiring, promotion, or continued employment. Laws that determine whether workers can be required to join a labor union to get or keep a job are commonly referred to "right-to-work" laws. Currently, 28 states have enacted right-to-work laws, according to the National Conference of State Legislatures. Though

labor unions still operate in right-to-work states, workers cannot be required to become members as a requirement of their job.

In the elementary and secondary education sector in New Mexico, three main labor unions represent teachers and other school workers: the National Education Association (NEA), the American Federation of Teachers (AFT), and the Albuquerque Teachers Federation (ATF). In FY16, the NEA and AFT had a combined membership of just over 17 thousand workers in New Mexico. According to the Bureau of Labor Statistics, 16.6 percent of all public sector employees in New Mexico belong to a labor union. Nationally, 44.9 percent of elementary and middle school teachers and 50.2 percent of secondary school teachers belong to a labor union.

## TECHNICAL ISSUES

AGO notes SB179 defines "labor organization" differently from how the Public Employee Bargaining Act defines labor organization. Having two definitions that vary in language may cause confusion and inconsistency in the application of the bill. Further, while it defines "employer," a more accurate definition would be "public employer," since the bill and the Public Employee Bargaining Act only apply to a narrow category of employer. The language used by the bill to define "employer" and the language used by the Public Employee Bargaining Act to define "public employer" vary. Amending the definition for consistency would help eliminate confusion in the application of the bill.

AOC refers to the language in Section 8, "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.

AOC further notes the provisions on damages, in Section 10, indicteas 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" is extremely broad. It may lead to far-roaming damage claims with unclear standards of proof, potentially necessitating the defense, and accompanying expense, off ambiguous claims.

## OTHER SIGNIFICANT ISSUES

"Fair share" or "agency shop" fees are sometimes levied against nonunion members of a bargaining unit, in lieu of union dues, to pay a fair share of the costs associated with collective bargaining. While precedent from the Supreme Court of the United States (SCOTUS) allows these fees for collective bargaining and other permissible union activities (but not for ideological or political activities) the legal status of these fees is now somewhat in question. Although a number of states have enacted "right to work" laws similar to the HB179 – which, as AGO noted, most courts have upheld under Section 14(b) of the federal National Labor Relations Act – in 2016, the constitutionality of fair share fees was directly challenged in *Friedrichs v. California Teachers Association (578 U.S. ___ (2016))*, where plaintiffs disputed the ruling of the Ninth Circuit Court of Appeals upholding the constitutionality of the fees. SCOTUS upheld the Ninth Circuit's decision, but only by a 4-4 split decision, due to the death of Justice Antonin Scalia. After the confirmation of Justice Gorsuch, the Ninth Circuit petitioned SCOTUS to rehear the case in order to settle the matter, but SCOTUS declined. Since then, certiorari has been granted to a similar

case, *Janus v. AFSCME (7th Cir. No. 16-3638 (2017))*, raising the possibility that, with a full complement of justices, SCOTUS may decide the issue differently than *Friedrichs*, potentially overturning 40 years of legal precedent and fundamentally changing this area of United States labor law.

**RELATED BILLS**

Duplicates HB 169, Employee Preference Act, although that bill, unlike SB179, is not designated as being for a state agency, where "SA" is added to the end of the tracking number.

**SOURCES OF INFORMATION**

- LESC Files

**RKF/rab**