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

ORIGINAL DATE 2/15/2020
SPONSOR SJC **LAST UPDATED** 2/17/2020 **HB**

SHORT TITLE Public Sector Collective Bargaining Changes **SB** 110/SJCS

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From

Public Employee Labor Relations Board (PELRB)
Administrative Office of the Courts (AOC)*
Central New Mexico Community College (CNM)
New Mexico Association of Counties (NMAC)*
New Mexico Attorney General (NMAG)
New Mexico Council of University Presidents (CUP)
New Mexico Municipal League (NMML)*
State Personnel Office (SPO)*

*on original bill, as applicable

SUMMARY

Synopsis of Bill

Senate Judiciary Substitute for Senate Bill 110 makes numerous changes to the Public Employee Bargaining Act (PEBA), which:

- Clarify definition of management employee to exclude an employee whose fiscal responsibilities are routine, incidental or clerical, and to include as public employees those whose positions are partially or wholly funded by grants (Section 1);
- Remove references to and definition of “fair share”, in light of the U.S. Supreme Court ruling in Janus v. AFSCME, which held public sector unions cannot charge fees to employees who decline to join the union but are covered by its collective bargaining agreement (Sections 2, 4);

- Add "other concerted activities" to the rights of public employees, but expressly continue the prohibition against strikes (Section 3);
- Enumerate specific administrative remedies the board is authorized to impose: actual damages related to dues, back pay including benefits, reinstatement with the same seniority status, declaratory or injunctive relief (including temporary restraining orders or preliminary injunctions, but prohibiting awards of punitive damages or attorney fees (Section 4);
- Allow for continued existence of local boards already in existence on June 30, 2020 upon state board determination that ordinance, resolution or charter amendment authorizing continuation:
    - provides same or greater rights to employees and labor organization as the Act;
    - allows for determinations of and remedies for prohibited practices under the Act; and
    - contains impasse resolution procedures equivalent to those established in the Act (Section 5);
- Continue existence of a local board existing as of July 1, 2021 only upon affirmation that public employer and each labor organization representing employees of that employer have affirmatively elected to continue to operate under that board (Section 5);
- Define events causing a local board to cease to exist, including a vacancy in membership exceeding 60 days (Section 5);
- Make local board rules, which must comply with state law, subject to state board approval (Sections 4, 5);
- Require state and local board rules be posted on publicly accessible website, along with listing of members of board, and require local board notice to state board of changes in rules or membership within 30 days (Section 4);
- Require jobs included in a bargaining unit under a local ordinance in effect on January 1, 2020 remain in that unit (Section 6);
- Upon acceptance of valid petition for election, require public employer to provide contact information for bargaining unit employees; continue the 40 percent requirement for valid elections; and authorize "card check" as alternative to election if a majority of employees in bargaining unit have signed valid authorization cards, subject to a verification challenge by the employer, in which case the state or local board must hold a fact-finding hearing to confirm majority of employees in unit have signed valid authorization cards (Section 7);
- Codify six month statute of limitations for public employee claims of breach of the duty of fair representation (currently in state board rules for prohibited practices) (Section 8);
- Require public employer grant an exclusive union representative reasonable access to and information concerning bargaining unit employees, as well as use of public employees' facilities or property, all as defined in this section (Section 8);
- Prohibit a competing labor organization from seeking an election within 12 months of initial certification (Section (9);
- Make changes to scope of bargaining:
    - allowing parties to bargain regarding employer "pick up" of retirement contributions, subject to limitations of this section;
    - clarifying bargaining agreement does not conflict with statute if it grants greater rights, remedies and procedures;
    - dictating procedures regarding how and when dues deductions are determined, and addressing issue of liability in wake of <u>Janus</u> decision; and

    - recognizing the duty to bargain in good faith during term of agreement, unless parties clearly and unmistakably waived right to bargain, provided that no party may be required to renegotiate existing terms of agreements already in place;
    - as to the State, bargaining may include enhancements of employee rights and benefits under the Personnel Act; and
    - leaving in place existing provisions specifying appropriation contingencies as to impasse resolutions and agreements by the state that require the expenditure of funds (Section 10);
- Remove deadline for resolving impasse (Section 11); and
- Make public employer expenditure of public funds to influence an election regarding representation a prohibited practice (Section 12).

The effective date of this bill is July 1, 2020.

FISCAL IMPLICATIONS

PELRB staff predicts that the operating budget impact of SB 110/CS is minimal. Although it requires PELRB to determine whether local ordinances, resolutions or charter amendments authorizing continuation of a local board provides the same or greater rights to public employees and labor organizations as the PEBA, PERLB advises that approximately 89 percent of all local boards now existing were organized pursuant to Section 10 of the Act whereby PELRB review and approval of local ordinances for compliance with the PEBA has already taken place. Additionally, since the beginning of the 2020 legislative session, approximately 12 local boards have either voluntarily rescinded their ordinances, resolutions or charter amendments, or the PELRB has revoked its prior approval of those ordinances. Staff does not anticipate the need for additional hearing officers nor will review of remaining local boards unduly strain existing resources. CNM and CUP, on the other hand, express concern that the general abolition of local boards (which CUP estimates total anywhere from 50 to 90 boards) will result travel costs either by PERLB or public employers, depending on the locale of a PERLB hearing, as well as additional staffing costs for substitutes or overtime pay for employees covering for those who must attend.

Additionally, SPO and CUP called attention to the provision expanding the remedies PELRB may impose which they contended could cause significant fiscal impact on state departments, agencies and other governing bodies. If PELRB awards a significant amount of damages in a case, the public employer might have to seek supplemental appropriations to pay those damages However, PERLB argues that allowing its administrative remedies to include reinstatement, back pay and benefits does not result in an increased fiscal impact because the cost of those remedies is a constant whether they are imposed by a court, an arbitrator, the SPO Board or the PELRB.

In its earlier analysis, SPO also foresaw costs due to the provisions authorizing the use of state resources by exclusive representatives of the bargaining unit, including facilities and email infrastructure, without appropriations for additional personnel that may be required to make those resources available. AOC noted, in its previous analysis, that expansion of administrative remedies that may be imposed by the state or a local board could increase the number of cases for the courts. All of these costs are not quantifiable.

SIGNIFICANT ISSUES

Administrative Remedies. NMML contended that the power to impose the types of administrative remedies delineated in the bill should be exercised only by a court of law. On the other hand, PERLB commented that under current law, parties to proceedings before the PELRB frequently dispute what constitutes an "appropriate administrative remedy" (existing statutory language). PELRB staff believe that without more specific delineation of available administrative remedies, an injured party may not be made whole.

Employee Definitions. CUP continues its objection to the definition of "management employee", which it maintains would allow unions to organize key management personnel, particularly those in budget and financial positions who are critical to employers during collective bargaining negotiations. CUP reiterates its concern, similar to the objections of NMML and NMAC, to the expansion of the definition of "public employee" to include "employees whose work is funded in whole or in part by grants or other third-party sources". NMML observed that grant employees are not regular employees; they have no expectation of continued employment, often have conditions of employment and pay dictated by the grant and do not share a community of interest with regular employees. CUP argues including grant-funded workers in the definition of public employee shifts the employer's focus from meeting the grant's terms to meeting labor organization demands that might be contrary to the grant or not consistent with its purpose.

Union Elections. NMML and NMAC questioned the elimination of the need for public employer consent to utilize card checks instead of an election with secret ballots to determine union certification. NMAC commented that a private vote is more likely to reflect a worker's true intention. Further, CNM notes that most public sector bargaining units in New Mexico are minority status (less than 50 percent of the employees are dues-paying members), and it believes this change potentially could increase the problem of representation without consent. CUP points to language limiting review of elections to verification of card county elections, and questions why labor boards are not permitted to review the entire election process. In addition, many responding agencies pointed out that, for decertification, an election and secret ballot are still required. CUP also appears to read the new prohibited practice in Section 12 as eliminating a public employer's ability to communicate with its employees during an organizing campaign, and questions why public employers are not permitted to provide their employees with information about collective bargaining as part of a fair election process.

Other Concerted Activities. The bill gives public employees the "right to engage in other concerted activities for mutual aid or benefit." Although the right to strike is expressly prohibited, both CUP and NMML raise concerns that this provision, particularly without any clear definition of allowed activities, might allow unions to conduct other job actions that could adversely affect a public body's ability to provide necessary services that protect the health, safety and welfare of the public.

No Liability for Fair Share Claims. NMML believed new Subsection 10(E) would infringe on the rights of public employees to pursue legal action regarding "fair share" dues collected prior to the Janus decision; it contended the language would effectively end any pending litigation regarding the issue.

Local Boards. CUP comments that one of the rights granted to public employers in PEBA is the right to have a local board, but the bill allows continued existence of these boards only with approval from labor organizations, which CUP and CNM believe will eliminate them. Further,

CUP argues in favor of allowing a local board that ceases to exist to be resurrected if the employer, employees and labor organizations all agree. CUP comments that the right to a local board has existed since the 1992 inception of PEBA, and parties concerned with an action under a local ordinance or resolution already have a right to bring an action before the local board, and to appeal that board's action in court. CNM reports it has had a local board for 25 years whose decisions are subject to challenge in court, yet no decision has been appealed over that time period. In the same vein, NMML believed the local option to establish a local board is imperative, and both NMML and NMAC believed the continuation of local boards should not be dependent on the unanimous consent of local bargaining units to be governed by a local board. NMML pointed out that such language would allow a very small local bargaining unit to cause a local board to be abolished, despite another, larger, bargaining unit's agreement to continue to operate under the local board. Further, NMML asserted local boards should continue to have the right to operate independently and determine local rules that work in their jurisdictions.

In addition, in its earlier analysis, NMAG noted that Section 5, which repeals and replaces Section 10-7E-10 removes much of the language governing local board membership, such as composition, term limits, and filing of vacant positions. Complete repeal of existing law and replacement with Section 5 may create confusion as to these matters for local boards that continue in existence.

Union Activity on Paid Time and Use of Public Facilities. CUP and CNM challenge provisions of the bill that allow union representatives to conduct union business while being paid by a public employer as violating the anti-donation clause of the New Mexico Constitution by using public monies for services not rendered. It also objects to a union's use of public facilities at no cost, and at times and places as determined by the union.

Scope of Bargaining. CUP calls attention to the new language in Section 9(B) authorizing public employers to assume any portion of a public employee's retirement contribution obligation, which at least in terms of municipal employers appears to conflict with a 75 percent cap set in existing law. See Section 10-11-5, NMSA 1978. Given the new language in Subsection (C) allowing a collective bargaining agreement to provide greater rights than contained in state statute, Subsection (B) may override the existing statutory cap. As to bargaining while an agreement is already in place, CUP reports that employers and labor organizations address issues that arise after entry into an agreement in other ways, including labor management committees, meet-and-confer arrangement and mediation. It argues in favor of these approaches, rather than re-engaging in collective bargaining negotiations. CNM also expresses concern over "perpetual bargaining".

Release of Employees' Personal Information and Employees' Ability to Stop Dues Deductions. SB110/CS requires public employers to release employees' personal phone numbers, personal email addresses and home addresses without their employees' consent. It also limits employees' ability to stop their union membership dues to a 10-day window each year. CUP posits these changes appear to impinge upon employees' rights and privacy, and also create a potential for litigation against the public employers for releasing employees' private information and for forcing employees to continue paying dues to an organization contrary to principles of freedom of association. CUP suggests these issues could be addressed by limiting employers' release of employee information to a work address and phone number or providing this personal information with employee's express consent, and by removing the 10-day annual limitation for cancelling of union dues.

ADMINISTRATIVE IMPLICATIONS

PERLB reports that, according to its 2019 annual report, of the 29 case files opened in 2019, 14 are prior PELRB approvals of local government ordinances, resolutions or charter amendments reopened by the Board for review of compliance with Section 10 of the PEBA. Setting aside those 14 Board-initiated case files, yields a total of 15 new filings – 13 fewer than in 2018 representing a 57 percent decrease in initial filings during the reporting period. That decrease is part of a two-year trend in which 2018 saw a 29 percent decrease from the average number of filings over the preceding 5 years. By undertaking review of *all* local board ordinances, resolutions or charter amendments as well as their rules, the PELRB would be returning to a case load commensurate with its pre-2015 levels – a caseload that was managed and is manageable with existing staff.

SPO and NMML suggested the timelines requiring a state department or agency provide information regarding employees within a proposed bargaining unit may be impractically short, redundant, and cause administrative burdens.

TECHNICAL ISSUES

NMAG noted that the term “fair share” appears in new language (on page 27, line 9), although the definition of that term is removed (see page 3, line 25 through page 4, line 13.

OTHER SUBSTANTIVE ISSUES

CUP comments that no public employer was consulted during the past year as this bill was being developed. It requests that counties, cities, school districts, colleges and universities be given time to review and discuss the legislation and work with labor organizations to address issues under existing law, citing to the collaboration that occurred concerning the initial legislation in 1992 and again in 2003. CNM echoes similar concerns, and notes the limited time available during this session to assess the impact of the changes being proposed.

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Additionally, PERLB provided this comment on the duty of fair representation and its interplay with administrative remedies available under the statute:

> Consideration should be given to the ongoing dilemma of labor organizations compelled by law to represent all employees in a bargaining unit regardless of whether they pay dues or not. That dilemma has been exacerbated by the *Janus* decision. Furthermore, a “duty of fair representation” arises out of the common law of labor and is a necessary corollary to the statutory right of a union to be recognized as the exclusive representative of the employees in a particular bargaining unit. (See *Vaca v. Stipes* 375 US 335 (1964)). Under existing law, the definition of ‘appropriate administrative remedies’ has not been interpreted to permit either an award of monetary damages to an aggrieved union member for a union’s breach of this duty or an order to reinstate an employee who has been improperly terminated as a result of the union’s breach. Therefore, claims for a breach of the duty of fair representation must be brought before the District Courts. (See *Callahan v. NM Federation of Teachers-TVI* - 2006-NMSC-010 (Callahan I) and *Callahan v. New Mexico Federation of Teachers-TVI* - 2010-NMCA-004 (Callahan II)). If the legislative intent is to allow the PELRB to accept jurisdiction over claims for the breach of the duty of fair representation as a necessary consequence of redefining administrative remedies

as proposed, SB110 should so state and consideration should be given to provisions of the New Mexico Constitution governing the jurisdiction of the District Courts. If the intent of SB110 is to allow the PELRB to accept jurisdiction over claims for the breach of the duty of fair representation as a necessary consequence of redefining administrative remedies as proposed, it should so state.

AMENDMENTS

SPO suggested that requiring the window period for employees to revoke authorization of a payroll deduction for dues to be stated on an employee's union card may avoid litigation similar to that brought in the wake of the Janus decision.

CUP recommends amending the bill to require labor organizations use of public facilities be in the same manner as other private organizations, including compliance with the public employer's use procedures.

MD/sb