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

SPONSOR Burt **ORIGINAL DATE** 03/07 /17 **LAST UPDATED** **HB**

SHORT TITLE Employee Preference Act **SB** 482

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 432 and SB 483

SOURCES OF INFORMATION
LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Office of the Attorney General (OAG)
Workforce Solutions Department (WSD)

SUMMARY

Synopsis of Bill

Senate Bill 482 enacts the Employee Preference Act, which declares that it "is the public policy of New Mexico that employees shall have, and shall be protected in the exercise of, the right to form, join or assist labor organizations or to refrain from those activities, freely and without fear of penalty or reprisal." SB 482 specifically excludes public employers and employees. It prohibits making hiring, promotion or continued employment conditional on becoming or remaining a member of a labor organization or paying related dues or fees. Similarly, the bill prohibits employers from requiring that a person be approved or recommended by a labor organization before employment, promotion or continued employment, as well as deducting dues or fees on behalf of a labor organization unless the employee so authorizes in writing, and provides that such authorization is revocable.

Formal or informal agreements or understandings between an employer and a labor organization that violate the Act are unlawful. Violations of the Act constitute misdemeanors. OAG and

district attorneys are required to investigate and prosecute violations. They may also seek injunctive relief. The bill does not apply to labor agreements in effect on its effective date, but does apply to renewals, extensions and new agreements entered into after that date.

The effective date of this bill is July 1, 2017.

FISCAL IMPLICATIONS

In light of the public employee exemption, no fiscal impact to the state is anticipated, although prosecutions for violations may somewhat increase the workload of OAG, AODA and the courts.

SIGNIFICANT ISSUES

SB 482 excludes employees of the state, a political subdivision of the state, a home rule municipality and state educational institutions from its coverage.

AOC notes that New Mexico is not a "right to work" state, though similar legislation has been introduced in past legislative sessions. Under right-to-work laws, states determine whether workers can be required to join a labor union to get or keep a job. Workers in collective bargaining units in New Mexico are currently not forced to join unions but can be required as a condition of employment to pay "agency fees" to cover what a union determines is its cost of representing those employees. According to the federal Bureau of Labor Statistics, 6.2 percent of the state's workforce are dues-paying union members. Fewer than two percent of New Mexico's workforce are not union members but are covered by collective bargaining units.

OAG first raises this issue regarding employees within the scope of SB 482:

> Although SB 482 would exempt an "employment contract" entered into before its July 1, 2017 effective date, it is not clear whether this exemption would cover the agreements with labor organizations referenced in Section 6 [making unlawful contracts that violate the Act]. For this reason, SB 482 may be in conflict with the Contracts Clause of Article II, Section 19 of New Mexico's Constitution, which prohibits the enactment of a law that would impair "the obligation of contracts." (Although this issue does not appear to have been addressed under New Mexico's Contracts Clause, the U.S. Supreme Court held in 1949 that a North Carolina "right to work" statute did not conflict with the Contracts Clause of Art. I, § 10 of the United State Constitution, which precludes states from enacting law that impair the obligation of contracts. *See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949)).

In addition, OAG points out that if an agreement between an employer and union conflicts with SB 482's terms, SB 482 would render unlawful the *entire agreement* as opposed to just the conflicting provision, which may reach beyond the sponsor's intent.

Additionally, both WSD and OAG assert that SB 482's scope may be too broad in another way. As OAG warns:

> if the bill is enacted a court likely would invalidate its application to significant categories of workers. First, "state right-to-work laws are of no effect in federal enclaves such as Indian reservations," *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th

> Cir. 2002), and military bases. *Vincent v. General Dynamics Corp.*, 427 F. Supp. 786, 796-99 (N.D. Tex. 1977). In addition, various federal statutes provide that, *inter alia*, railway and airline employees, federal executive agency employees, and United States Postal Service employees do not fall within the purview of state "right to work" laws such as the bill. *Local 514, Transport Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1324 (E.D. Okla. 2002). The bill, then, would have the effect of treating workers differently depending upon the character and physical location of their employers.

OAG also addresses the duty to "fairly represent" that is implicated in this bill. It advises that 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 the union. This duty applies to all union activity, including grievance and arbitration. *Sweeney v. Pence*, 767 F.3d 654, 672 (7th Cir. 2014) (Wood, J., dissenting) (citing *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Thus under this bill, unions retain the duty to "fairly represent" all members of a bargaining unit, even those who choose not to pay union dues.

PERFORMANCE IMPLICATIONS

OAG reports that its duty to investigate and prosecute violations under SB 482 is a significant addition to its existing responsibilities and will require additional FTE and funding. Given that the bill contains no appropriation to fund those new obligations, OAG expresses concern that its other performance-based budget targets will be impacted.

CONFLICT

SB 482 conflicts with SB 483, which also enacts the Employee Preference Act, which provides a private cause of action, contains a severability clause, and exempts employers and employees covered by the federal Railway Labor Act, federal employers and employees, or when the Act would be preempted by federal law. It also conflicts with HB 432, enacting yet another version of the Employee Preference Act that includes public employers and employees within its scope; it also amends the "fair share" provisions of the Public Employee Bargaining Act.

OTHER SUBSTANTIVE ISSUES

OAG comments that over the years, legal challenges to other states' legislation enacting right-to-work laws have been raised:

> The most common arguments are that such laws are preempted by federal labor law and that the laws violate several provisions of the United States Constitution including the Fifth Amendment's Taking Clause, the Equal Protection Clause of the Fourteenth Amendment, the Contracts Clause, and the First Amendment, or parallel provisions of other states' constitutions. Courts typically have found that other 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. *See, e.g.*, *Sweeney*, 767 F.3d at 665-670. While federal constitutional challenges to similar laws have largely been unsuccessful, it remains an open question whether challenges based upon parallel New Mexico constitutional rights will succeed. The New Mexico Supreme Court has at times interpreted state constitutional provisions differently, and in some instances more broadly, than

> comparable federal provisions, *see, e.g.*, *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶¶ 29-36, 114 N.M. 537; *State v. Gonzales*, 1991-NMCA-007, ¶¶ 28-29, 111 N.M. 590, and so it is not clear whether SB 482 would survive a challenge based on state constitutional grounds.

AOC reports that 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 HB 1 on Jan. 9, 2017; Missouri became the 28th by enacting SB 19 on Feb. 2, 2017.

AOC also provides this brief summary of Right-to-Work laws from the National Conference of State Legislatures:

> 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.
>
> 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.
>
> 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.

See http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#sum for additional Right-to-Work resources.

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 United States 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.

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 percent) more than five times higher than that of private-sector workers (6 percent).
- Workers in education, training, and library occupations and in protective service occupations had the highest unionization rates (34.6 percent and 34.5 percent respectively).
- Men have a slightly higher union membership rate (11.2 percent than women (10.2 percent).
- Black workers were more likely to be union members than were White, Asian or Hispanic Workers; 13 percent as compared to 10.5 percent, 9 percent, or 8.8 percent respectively.
- Median weekly earnings of nonunion workers ($802) were 80 percent 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

MD/al