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

SPONSOR Ezzell **ORIGINAL DATE** 1/24/08 **LAST UPDATED** **HB** 281

SHORT TITLE Right to Work Act **SB**

ANALYST Lucero

Conflicts with the Public Employee Bargaining Act (PEBA): NMSA 1978, §10-7E-1 – 26

Relates to Appropriation in the General Appropriation Act

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	$-0-	$0.1	$0.1	$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the District Attorneys (AODA)
Attorney General Office
Department of Workforce Solutions (DWS)
New Mexico Corrections Department (NMCD)
New Mexico Municipal League
State Personnel Office (SPO)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

House Bill 281 would enact the "Right to Work Act." The legislation sets forth as public policy for the State "all persons shall have and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join, or assist labor organizations or to refrain from any such activities."

- HB281 establishes that a person shall not be required, as a condition of hiring, promotion or continued employment, to become or remain a member of a labor organization or to pay any dues, fees, assessments or other charges of any kind to a labor organization.
- HB281 provides that an employer shall not require a person to be recommended, approved by, or cleared through, a labor organization as a condition of hiring, promotion or continued employment.

- HB281 states that any agreement, understanding or practice between an employer and a labor organization – whether written or oral, implied or expressed – that is in violation of this new legislation (if enacted) is unlawful.
- HB281 prohibits an employer from deducting from the wages, earnings or compensation of an employee any dues, fees, assessments or other charges to be held for or paid to a labor organization, unless the employer has first received a written authorization for the deduction signed by the employee, which authorization may be revoked by the employee at any time by giving written notice of the revocation to the employer.
- In terms of law enforcement, the "Right to Work Act" provides that the attorney general and the district attorney of every district have a duty to investigate complaints of violations of the Right to Work Act and to prosecute a person suspected of violating that act.
- Regarding enforcement, HB281 provides that if the attorney general or a district attorney has good cause to believe that a person is violating or will violate a provision of the Right to Work Act, at the conclusion of an investigation, then 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.
- HB281 makes a violation of the Act a misdemeanor, and provides that in this instance, the misdemeanor is punishable by a fine of up to one thousand dollars ($1,000.00) or by imprisonment for a definite term not to exceed ninety (90) days or both.
- HB281 provides that the provisions of the "Right to Work Act" shall not apply to any contract or agreement between an employer and a labor organization in force on the effective date of that act but shall apply to a renewal or extension of the contract or agreement, or to a new contract or agreement entered into after the effective date of that act.
- HB281 has a severability clause, providing that if any part or application of the Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

FISCAL IMPLICATIONS

HB 281 does not contain an appropriation.

The Administrative Office of the District Attorneys (AODA) states that in addition to the ordinary costs of any new legislation – printing and distributing new statute books, minor to moderate costs associated with prosecutors and law enforcement familiarizing themselves with new criminal statutes – this statute is likely to entail potentially problematic expenditures for both the attorney general and the various district attorneys' offices in terms of investigations and enforcement. Both the attorney general and the district attorneys are specifically tasked with the responsibility for investigating alleged violations of the "Right to Work Act" and with the responsibility for prosecuting violations for which probable cause exists after said investigation are concluded. These additional responsibilities for both the attorney general and the district attorneys are not funded.

The Administrative Office of the Courts (AOC) reports that any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions and hearings. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The AODA notes that a significant factor other than the unfunded mandate to the attorney general and the district attorneys is that the legislation provides for criminal penalties – misdemeanors, but criminal penalties nonetheless – and uses mandatory language to describe the responsibility of the attorney general and the district attorneys to investigate alleged violations of the Act. Furthermore, "Section 8: Investigation" also uses mandatory language to describe the duty of the attorney general and the district attorneys to "prosecute a person suspected of violating that act." The use of such mandatory language is always problematic because it interferes with and runs contrary to prosecutorial discretion. Ordinarily, the prosecution has the unfettered discretion to charge or not to charge according to the best interests of justice. Moreover, in this specific instance, it also is problematic because it is an area where there are likely to be numerous complaints but little to no substantive evidence of violations. In other words, an area where there may well be much in the way of smoke but very little or no fire. For that reason, it may be wise to see how necessary the legislation is before enacting it.

The State Personnel Office (SPO) reports that state employees, unlike their counterparts in the private sector, enjoy constitutional and other legal protection when it comes to employment issues. Courts have determined that state employees hold a property right in their positions. The state is obligated to provide due process before changing the conditions of employment or disciplining a state employee. This process has been codified in the State Personnel Act. Currently the labor unions act in the employees' interest by providing low cost representation at these hearings.

The AOC states:

- While the stated policy of the Act is that all persons shall have and shall be protected in the right to form, join, or assist labor organizations or to refrain from any such activities, HB 281 deals exclusively with the latter portion of the statement and does not offer protections to those who wish to join or assist labor organizations but are hindered in their attempts to do so

- The following arguments are often made against right-to-work laws:
    - they create a so-called free-rider problem, in which non-union employees (who are bound by the terms of the union contract even though they are not members of the union) benefit from collective bargaining without paying union dues;
    - outlawing compulsory union dues makes union activities less sustainable;
    - the laws prevent free contracts between unions and business owners, and that this makes it harder for unions to organize and less attractive for people to join a union; and
    - because unions are weakened by these laws, wages are lowered and worker safety and health is endangered.

- For additional discussion see http://www.acsblog.org/economic-regulation-employment-guest-blogger-postkatrina-reconstruction-should-be-opportunity-for-workers.html.

- Conversely, right-to- work laws are lauded by others. See the website of the National Right to Work Legal Defense Foundation at http://www.nrtw.org/about.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

AODA notes that the unfunded mandate in HB281 will involve potentially substantial resource allocation by the attorney general and the district attorneys offices. Moreover, the injunctive process referenced as an alternative method of enforcement for the prosecution in Section 9 of the Act is not one ordinarily used by most prosecutors, and if used would involve a great deal of familiarization on the part of personnel with the district attorneys' offices in particular and probably also the attorney general's office. It is also extraordinarily complicated to put the prosecution in the position of prosecuting criminal violations that have already occurred but also preventing criminal violations that are supposedly being contemplated – which is arguably the effect of the following language, "If, as a result of investigation, the attorney general or a district attorney has good cause to believe that a person is violating or ***will violate*** a provision of the Right to Work Act, then 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."

Prior to the introduction of such legislation – along with a discussion about the need for it and advisability of it – an in-depth discussion also would have been wise regarding whether the prosecutorial arm of the state should be the principle "entity" investigating alleged right to work violations and seeking injunctive relief in court against violations being thus contemplated.

The Attorney General Office notes that this bill does not define "employer." It could be construed to include the state and its political subdivisions. If so, the bill would conflict with certain provisions of Public Employee Bargaining Act (PEBA), NMSA Sections 10-7E-1 et seq. For example, the "fair share" provisions of the PEBA provide that "fair share" provisions are a subject of permissive collective bargaining between a public employer and a labor organization. Those provisions could require payment of a percentage of union dues by non-members of the representative union in conflict with Sections 4 and 7 of this bill. See NMSA Sections 10-7E-4J; 10-7E-9G (1978 comp.). Also, NMSA Section 10-7E-6 (1978) grants public employers the right to hire, promote, discharge, etc. public employees "unless limited by the provisions of a collective bargaining agreement". If deemed applicable to public employers, this bill would also conflict with those provisions.

ADMINISTRATIVE IMPLICATIONS

The Corrections Department notes that state agencies will need clear guidance whether or not to deduct "fair share" fees from employees' paychecks after December 31, 2008, when the current collective bargaining agreement (CBA) with AFSCME expires. The CBA states that it will continue in full force and effect until it is replaced by a subsequent agreement, if either party provides notice to reopen for negotiations no later than July 1, 2008. It is likely that AFSCME will give such notice, meaning that the current CBA will remain in effect after December 31, 2008 and until a new agreement is reached.

SPO notes that without the restrictions placed on state employers by collective bargaining agreements, state employers would have greater flexibility in moving employees, adjusting wages or the size of the work force in response to changing workplace conditions.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB281 conflicts with the Public Employee Bargaining Act (PEBA): NMSA 1978, §10-7E-1 – 26

TECHNICAL ISSUES

The AODA states that it is unclear based upon the scope of prosecutorial duties otherwise whether the district attorneys can bring injunctive actions such as those contemplated in Section 9. Moreover, the terminology of Section 8 to the effect that "the attorney general and the district attorney of every district ***have a duty to investigate complaints of violations*** of the Right to Work Act ***and to prosecute*** a person suspected of violating that act (emphasis added)" is an intrusion upon prosecutorial discretion.

OTHER SUBSTANTIVE ISSUES

The State of New Mexico has a CBA with AFSCME. That CBA, which mandates all bargaining unit employees that are not members of the union to have "fair share" payments deducted out of their paychecks, expires on December 31, 2008. At the time of renewal, the CBA will fall under the purview of the Right to Work Act.

This bill would outlaw "closed shops" which are businesses or employers who require that their employees be members of certain labor organizations as a precondition to employment.

The bill would also outlaw "union shops" or places of employment where the employer may hire either labor union members or nonmembers but where nonmembers must become union members, or begin to pay union dues, within a specified period of time or lose their jobs.

The bill would also prohibit "agency shops" or places of employment in which employees must pay the equivalent of union dues, but which do not require them to formally join the union.

According to the National Right to Work Committee, (www.nrtwc.org) 22 states currently have enacted so-called "right to work" laws, including Texas, Arizona, Utah, Oklahoma and Kansas. New Mexico and Colorado do not have this type of legislation.

The Public Employee Bargaining Act (PEBA) currently allows for employers and unions to agree to "fair share" agreements through which employees are required as a condition of employment to contribute the equivalent of dues to a labor organization. However, subsection (B) of PEBA provides that if PEBA conflicts with other statues (which would include this bill if passed); the other statutes control or prevail. The result would be that "fair share" fees no longer being applicable upon expiration of any existing labor organization contracts.

ALTERNATIVES

(1) Not enacting the legislation, (2) conducting a study or studies similar to those discussed above, (3) amending the legislation to change (a) who is responsible for investigating alleged

violations of the Right to Work Act, (b) also removing the mandatory language concerning the duties of the attorney general and the district attorneys, and (c) either eliminating the provisions involving injunctive relief or changing which entities of state government can file such injunctive relief.

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