LFC Requester:	Connor Jorgensen

AGENCY BILL ANALYSIS
2015 REGULAR SESSION

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction ___ **Substitute** ____

Date January 28, 2015
Bill No: HB 75

Sponsor: Rep. Dennis Roch
Short Title: Employee Preference Act

Agency Code: Attorney General's Office
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	**FY16**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	**FY16**	**FY17**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

BILL SUMMARY

Synopsis: HB 75 (or "the Bill") would enact a new law that the Bill calls the "Employee Preference Act." The Bill would prohibit certain employers – namely any "person" or the State and its political subdivisions (Section 3) from requiring that an individual pay union dues or payments to "a charity or other third party" as a condition of hiring, promotion or continued employment (Section 4). HB 75 also would prohibit an employer from requiring a person to be recommended or approved by, or to be cleared through, a labor organization as a condition of hiring, promotion or continued employment (Section 5). Section 6 of the Bill would deem unlawful any agreement between an employer and a labor organization "that is in violation of" the Employee Preference Act.

The Bill also obligates the Attorney General and District Attorneys to investigate complaints alleging violations of the Act as well as to prosecute suspected violations of the Act (Section 7). HB 75 further would authorize the Attorney General and District Attorneys to seek injunctive relief for any violation of the Employee Preference Act (Section 8), and would create a new misdemeanor offense for violation of any provision of that Act, punishable by a fine of up to $1,000.00 or imprisonment for up to 90 days (Section 9). Unlike some of the other related bills that have been introduced, see below, HB 75 separately creates a private right of action that would permit "a person injured or threatened with injury as a result of a violation or threatened violation of the Employee Preference Act" to sue for injunctive relief, money damages and attorney fees/costs (Section 10).

The Bill would not apply to specified federal employers/employees and where otherwise preempted by federal law (Section 11), and includes a severability provision (Section 12). The Bill does not include an effective date, meaning that if enacted it would take effect 90 days after the adjournment of the Legislature. *See* N.M. Const. art. IV, § 23.

In addition, HB 75 would amend the Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7E-1 through -26 (2003, as amended through 2005). The amendment would add language to Section 10-7E-5 of PEBA to state that a public employee shall not be required to become a member of a labor organization, or to pay union dues, as a condition of employment. Sections 13 and 15 would eliminate the issue of "fair share" (i.e. union dues paid by an employee of a bargaining unit who is not a member of the union) as a permissive subject of bargaining.

Section 14 would prohibit a public employer from requiring an employee to "become or remain a member of a labor organization" or to pay dues to a union or third party acting on the union's behalf. The Bill similarly would prohibit a public employer from "discriminat[ing] against a public employee … because of the employee's membership or nonmembership in a labor organization" (Section 16(A)). Finally, any public employer other than the State which has "adopted by ordinance, resolution or charter amendment a system of provisions and procedures" allowing employees to form a labor union for purposes of collective bargaining, would be required under the Bill to include within such ordinance/resolution/charter amendment a provision establishing employees' "right to refuse … payment of dues, assessment or other charges to a labor organization…." (Section 17(B(1)).

FISCAL IMPLICATIONS

The Bill's mandate that the Attorney General's Office investigate and prosecute violations of the Act would be a significant addition to the Office's responsibilities and require additional FTE and funding.

SIGNIFICANT ISSUES

HB 75 would outlaw "union shops," or places of employment where employers may hire either labor union members or nonmembers but where nonmembers must become union members or otherwise begin to pay union dues within a specified period of time to remain in their positions. 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 employees to formally join a union.

HB 75 (Section 6) makes no exception for contracts or agreements which were executed prior to the date when the Bill, if enacted, would take effect. For this reason, the Bill 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, if an agreement between an employer and a union conflicts with the Bill's terms, the Bill would render unlawful the *entire agreement* as opposed to just the conflicting provision, which may reach beyond the sponsor's intentions.

Another issue the Bill implicates 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 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)). Under the Bill, unions retain the duty to "fairly represent" all members of a bargaining unit, even those who choose not to pay union dues.

Over the years, several challenges to state 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 this Bill would survive a challenge based on State constitutional grounds.

HB 75 by its terms would apply only to particular employers, i.e. an employer which either is a "person" or is the State and its political subdivisions (Section 3). Without express language that is absent from the Bill as introduced, it is not at all clear that the reference to "person" would extend its sweep beyond human beings, for example to corporations. *See, e.g.*, *Fin. Techs. Int'l, Inc. v. Smith*, 247 F. Supp. 2d 397, 413 (S.D.N.Y. 2002) (interpreting the term "person" to mean natural persons, where statutory definition did not explicitly include corporations). This concern is highlighted by numerous other state statutes' specificity regarding the including or exclusion of corporations from a defined term. *See, e.g.*, *Rainaldi v. City of Albuquerque*, 2014-NMCA-112, ¶ 14, 338 P.3d 94 (discussing NMSA 1978, Section 50-4-1(A)'s definition of "employer" as "every person, firm, partnership, association, corporation," a definition which the Court of Appeals considered to "include[] New Mexico employers of any category"); *cf*. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 14, 309 P.3d 1047 (discussing Medical Malpractice Act, NMSA 1978, Section 41-5-3A's definition of "health care provider" as "a person, corporation, organization, facility or institution" licensed to provide certain services).

The Bill as introduced, then, would have the likely effect of treating workers differently depending upon whether those workers are employed by an individual (Bill applies), a partnership or a corporation (Bill may not apply), a State governmental entity (Bill applies), or a federal or tribal governmental entity (Bill by its terms does not apply, *see* Section 11).

HB 72 does not include a provision limiting application of the Bill to contracts/agreements enacted after the effective date of the Bill. *Cf*. SB 92, Section 11 (stating that "the provisions of [that bill] shall not apply to any contract or agreement between an employer and a labor organization in force on July 1, 2015," the effective date of that bill if enacted). "New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary." *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500. The general rule is that a statute "is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions." *Gadsden Fed'n of Teachers v. Bd. of Educ*., 1996-NMCA-069, ¶ 14, 122 N.M. 98. Under this precedent, an attempted application of the Bill to contracts in existence prior to the Bill's effective date might very well be invalidated.

Finally, in contrast to several of the other "right to work" bills that have been introduced this session, HB 72 not only creates new criminal liability but also creates a civil private right of action. The effects of that provision on the volume of cases filed in state court should be considered.

PERFORMANCE IMPLICATIONS
There are no performance implications for this office.

ADMINISTRATIVE IMPLICATIONS
There are no administrative implications for this office.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP
Related to: SB 92, "Employee Preference Act;" SB 103, "Employee Preference Act;" and SB 183, "Employee Preference Act."

TECHNICAL ISSUES
N/A.

OTHER SUBSTANTIVE ISSUES
See "Significant Issues" above.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL
Status quo.

AMENDMENTS
To avoid potential court challenges to HB 75, if enacted, under the Contracts Clause of Art. II, § 19 of the New Mexico Constitution (see discussion above under "Significant Issues"), HB 75 might be amended by deleting Section 6. In addition, the definition of "employer" could be revised to make explicit whether it applies to corporations.