LFC Requester:	Connor Jorgensen

AGENCY BILL ANALYSIS
2015 REGULAR SESSION

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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: SB 92

Sponsor: Sen. Sander Rue
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: SB 92 (or "the Bill") would enact a new law that the Bill calls the "Employee Preference Act." The Bill would prohibit any requirement that an individual pay union dues as a condition of hiring, promotion or continued employment (Section 4). SB 92 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. Section 7 would prohibit employers from deducting dues or fees "to be held for or paid to a labor organization" from an employee's wages "unless the employer has first received a written authorization for the deduction signed by the employee, which … may be revoked by the employee at any time …".

The Bill 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 8). In addition, SB 92 would authorize the Attorney General and District Attorneys to seek injunctive relief for any violation of the Employee Preference Act (Section 9), 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 10).

If enacted, the Bill would become law on July 1, 2015 (Section 12). The Bill would not apply to "employment contracts" in place as of that effective date, but would apply to renewals, extensions, and new contracts entered into after July 1, 2015 (Section 11).

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

SB 92 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.

Although SB 92 would exempt an "employment contract" entered into before its July 1, 2015 effective date, it is not clear whether this exemption would cover the agreements with labor organizations referenced in Section 6. 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.

SB 92 by its terms would apply to all employers other than "the state, a political subdivision of the state, a municipality that has adopted a home rule charter or a state educational institution" (Section 3(B)(3)). Despite this broad definition, 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.

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: HB 75, "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 SB 92, if enacted, under the Contracts Clause of Art. II, § 19 of the New Mexico Constitution (see discussion above under "Significant Issues"), SB 92 might be amended by deleting Section 6. In addition, the definition of "employer" could be revised to avoid conflicting with federal law as discussed in the last paragraph of "Significant Issues."