LFC Requester:	Connor Jorgensen

AGENCY BILL ANALYSIS
2015 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{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 22, 2015
Bill No: SB 103-305

Sponsor: Sen. William Sharer
Short Title: Employee Preference

Agency Code: Attorney General's Office
Person Writing Jennifer Salazar, AAG
Phone: 827-6990 **Email** jsalazar@nmag.gov

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: Related to HB 75, "Employee Preference Act," SB 92 "Employee Preference Act," and SB 183 "Employee Preference Act"

Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

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 103 seeks to enact the Employee Preference Act ("Act"). The Act would prohibit any requirement that an individual pay union dues as a condition of hiring, promotion or continued employment (Section 4). In addition, it 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 would render unlawful an agreement between an employer and a labor organization which is in violation of the Act.

Section 7 of the Act would task the Attorney General and District Attorneys with the duty to investigate complaints alleging violations of the Act as well as prosecute suspected violations of the Act. Section 8 would authorize the Attorney General and District Attorneys to seek injunctive relief in the county where the violation of the Act is occurring or will occur. Section 9 would make it a misdemeanor violation for anyone to violate the Act.

Section 10 exempts the following from the Act's requirements: (1) employers and employees covered by the Federal Railway Labor Act; (2) federal employers and employees; (3) employers and employees of exclusive federal enclaves; (4) provisions of the Act that conflict with federal law; and (5) employment contracts entered into prior to the Act.

The Act does not apply to "employment contracts" in place as of the Act's effective date, but does apply to renewals, extensions, and new agreements entered into after its effective date (See Section 10(B)).

SB 103 would also 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 11 and 13 would eliminate the topic 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 also make it a prohibited practice for a public employer to discriminate against a public employee because of an employee's non-membership in a labor organization.

FISCAL IMPLICATIONS

The requirement 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

This Bill 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 or lose their jobs. The Bill would also prohibit "agency shops," or a 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 the proposed language would exempt an "employment contract" entered into before the effective date of the Act, it is not clear whether this exemption would cover the agreements with labor organizations referenced in Section 6. For this reason, the Act may raise an issue under 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 has not been addressed under New Mexico's Contract 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 federal 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 to this concern, as currently proposed, the language of Section 6 may be too broad and over-reaching since it would appear to render the *entire agreement* between an employer and union, as opposed to a particular provision, unlawful in the event of any conflict with the Act.

Another issue 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 a union. This is the duty of fair representation and the duty exists with respect to all union activity, including grievance and arbitration. Sweeney v. Pence, 767 F.3d 654, 672 (7th Cir. 2014) (dissent) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)). Under this Bill, unions will still have the duty to fairly represent all members of a bargaining unit, even those who choose not to pay union dues.

Over the years, there have been several challenges to state legislation enacting right-to-work laws. The most common arguments are that these laws are preempted by federal labor law and that the laws violate several constitutional provisions, including the Fifth Amendment's Taking Clause, the Equal Protection Clause of the Fourteenth Amendment, the Contracts Clause, and the

First Amendment. Most courts have found that the 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.

In the most recent federal challenge to right-to-work legislation, the Seventh Circuit Court of Appeals upheld Indiana's 2012 right-to-work legislation. The Seventh Circuit struck down the union's claim that the state legislation was preempted by federal labor law and also held that the law did not violate any constitutional rights. Sweeney v. Pence, 767 F.3d 654, 657 (7th Cir. 2014). Specifically, the Seventh Circuit held that the law did not constitute an unconstitutional taking in violation of the Takings Clause of the Fifth/Fourteenth Amendment, nor did it violate the Equal Protection Clause or the First Amendment right to free speech. Id. at 665-66.

PERFORMANCE IMPLICATIONS
N/A

ADMINISTRATIVE IMPLICATIONS
N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP
Related to HB 75, "Employee Preference Act," SB 92 "Employee Preference Act," and SB 183 "Employee Preference Act"

TECHNICAL ISSUES
N/A

OTHER SUBSTANTIVE ISSUES
N/A

ALTERNATIVES
N/A

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

AMENDMENTS
To avoid potential court challenges to HB 103, if enacted, under the Contracts Clause of Art. II, § 19 of the New Mexico Constitution (see discussion above under "Significant Issues") HB 103 might be amended by including collective bargaining agreements entered into prior to the law's enactment in the list of exceptions listed in Section 10(B) and deleting Section 6.