

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 75

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

AN ACT

RELATING TO LABOR; ENACTING THE EMPLOYEE PREFERENCE ACT;
PROVIDING FOR ENFORCEMENT OF AND PENALTIES FOR VIOLATION OF THE
EMPLOYEE PREFERENCE ACT; AMENDING SECTIONS OF THE PUBLIC
EMPLOYEE BARGAINING ACT; PROHIBITING MANDATORY LABOR
ORGANIZATION MEMBERSHIP OR PAYMENT TO A LABOR ORGANIZATION AS A
CONDITION OF PUBLIC EMPLOYMENT; PROVIDING FOR SEVERABILITY;
RAISING THE MINIMUM WAGE RATE; PROVIDING AN EXCEPTION TO THE
MINIMUM WAGE RATE FOR TRAINEES; PROVIDING A CONTINGENT REPEAL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1
through 12 of this act may be cited as the "Employee Preference
Act".

SECTION 2. [NEW MATERIAL] PUBLIC POLICY.--It is the
public policy of New Mexico that all persons shall have, and

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underscored material = new
[bracketed material] = delete

1 shall be protected in the exercise of, the right to form, join
2 or assist labor organizations or to refrain from those
3 activities, freely and without fear of penalty or reprisal.

4 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
5 Employee Preference Act:

6 A. "employer" means a person or the state; a
7 political subdivision of the state that includes, among other
8 subdivisions, a municipality that has adopted a home rule
9 charter; school districts; and post-secondary public
10 educational institutions that include, among other
11 institutions, state educational institutions pursuant to
12 Article 12, Section 11 of the constitution of New Mexico; and

13 B. "labor organization" means a union,
14 organization, agency or employee representation committee that
15 exists for the purpose, in whole or in part, of dealing with
16 employers concerning wages, rates of pay, hours of work or
17 other conditions of employment.

18 SECTION 4. [NEW MATERIAL] MANDATORY MEMBERSHIP AND FEES
19 PROHIBITED.--A person shall not be required, as a condition of
20 hiring, promotion or continued employment, to:

21 A. become or remain a member of a labor
22 organization; or

23 B. pay dues, fees, assessments or other charges to
24 a labor organization or to a charity or other third party, in
25 lieu of payment to a labor organization.

1 **SECTION 5.** [NEW MATERIAL] ORGANIZATION APPROVAL

2 PROHIBITED.--An employer shall not require a person to be
3 recommended or approved by or to be cleared through a labor
4 organization as a condition of hiring, promotion or continued
5 employment.

6 **SECTION 6.** [NEW MATERIAL] CERTAIN AGREEMENTS ILLEGAL.--An

7 agreement, understanding or practice, written or oral, implied
8 or expressed, between an employer and a labor organization that
9 is in violation of the Employee Preference Act is unlawful.

10 **SECTION 7.** [NEW MATERIAL] INVESTIGATION.--The attorney

11 general and district attorneys shall investigate complaints of
12 violations of the Employee Preference Act and shall prosecute a
13 person suspected of violating that act.

14 **SECTION 8.** [NEW MATERIAL] ENFORCEMENT.--If, as a result

15 of investigation, the attorney general or a district attorney
16 has good cause to believe that a person is violating or will
17 violate a provision of the Employee Preference Act, the
18 attorney general or district attorney may bring an action for
19 injunctive or other appropriate relief in the district court
20 for the county in which the violation is occurring or will
21 occur or in the district court for Santa Fe county.

22 **SECTION 9.** [NEW MATERIAL] PENALTY.--A person who violates

23 a provision of the Employee Preference Act is guilty of a
24 misdemeanor and upon conviction shall be punished by a fine of
25 not more than one thousand dollars (\$1,000) or by imprisonment

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1 for a definite term not to exceed ninety days or both.

2 **SECTION 10. [NEW MATERIAL] REMEDIES.--**

3 A. A person injured or threatened with injury as a
4 result of a violation or threatened violation of the provisions
5 of the Employee Preference Act shall be entitled to injunctive
6 relief against any and all violators or persons threatening the
7 violation.

8 B. A person injured as a result of a violation or
9 threatened violation of the provisions of the Employee
10 Preference Act may recover any and all damages, including costs
11 and reasonable attorney fees, of any character resulting from
12 the violation or threatened violation.

13 C. Remedies pursuant to this section shall be
14 independent of and in addition to any other penalty or remedy
15 prescribed in the Employee Preference Act.

16 **SECTION 11. [NEW MATERIAL] EXCEPTIONS.--**The provisions of
17 the Employee Preference Act shall not apply to employers and
18 employees covered by the federal Railway Labor Act; federal
19 employers and employees; employers and employees on exclusive
20 federal enclaves; or where they would otherwise conflict with,
21 or be preempted by, federal law.

22 **SECTION 12. [NEW MATERIAL] SEVERABILITY.--**If any part or
23 application of the Employee Preference Act is held invalid, the
24 remainder or its application to other situations and persons
25 shall not be affected.

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1 **SECTION 13.** Section 10-7E-4 NMSA 1978 (being Laws 2003,
2 Chapter 4, Section 4 and Laws 2003, Chapter 5, Section 4) is
3 amended to read:

4 "10-7E-4. DEFINITIONS.--As used in the Public Employee
5 Bargaining Act:

6 A. "appropriate bargaining unit" means a group of
7 public employees designated by the board or local board for the
8 purpose of collective bargaining;

9 B. "appropriate governing body" means the
10 policymaking body or individual representing a public employer
11 as designated in Section ~~[7 of the Public Employee Bargaining~~
12 ~~Act]~~ 10-7E-7 NMSA 1978;

13 C. "authorization card" means a signed affirmation
14 by a member of an appropriate bargaining unit designating a
15 particular organization as exclusive representative;

16 D. "board" means the public employee labor
17 relations board;

18 E. "certification" means the designation by the
19 board or local board of a labor organization as the exclusive
20 representative for all public employees in an appropriate
21 bargaining unit;

22 F. "collective bargaining" means the act of
23 negotiating between a public employer and an exclusive
24 representative for the purpose of entering into a written
25 agreement regarding wages, hours and other terms and conditions

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of employment;

G. "confidential employee" means a person who devotes a majority of ~~[his]~~ the person's time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies;

H. "emergency" means a one-time crisis that was unforeseen and unavoidable;

I. "exclusive representative" means a labor organization that, as a result of certification, has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining;

~~[J. "fair share" means the payment to a labor organization, which is the exclusive representative for an appropriate bargaining unit, by an employee of that bargaining unit who is not a member of that labor organization equal to a certain percentage of membership dues. Such figure is to be calculated based on United States and New Mexico statutes and case law identifying those expenditures by a labor organization which are permissibly chargeable to all employees in the appropriate bargaining unit under United States and New Mexico statutes and case law, including but not limited to all expenditures incurred by the labor organization in negotiating the contract applicable to all employees in the appropriate bargaining unit, servicing such contract and representing all such employees in grievances and disciplinary actions;~~

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~~K.]~~ J. "impasse" means failure of a public employer and an exclusive representative, after good-faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement;

~~L.]~~ K. "labor organization" means an employee organization, one of whose purposes is the representation of public employees in collective bargaining and in otherwise meeting, consulting and conferring with employers on matters pertaining to employment relations;

~~M.]~~ L. "local board" means a local labor relations board established by a public employer, other than the state, through ordinance, resolution or charter amendment;

~~N.]~~ M. "lockout" means an act by a public employer to prevent its employees from going to work for the purpose of resisting the demands of the employees' exclusive representative or for the purpose of gaining a concession from the exclusive representative;

~~O.]~~ N. "management employee" means an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis;

~~P.]~~ O. "mediation" means assistance by an

1 impartial third party to resolve an impasse between a public
2 employer and an exclusive representative regarding employment
3 relations through interpretation, suggestion and advice;

4 [Q.] P. "professional employee" means an employee
5 whose work is predominantly intellectual and varied in
6 character and whose work involves the consistent exercise of
7 discretion and judgment in its performance and requires
8 knowledge of an advanced nature in a field of learning
9 customarily requiring specialized study at an institution of
10 higher education or its equivalent. The work of a professional
11 employee is of such character that the output or result
12 accomplished cannot be standardized in relation to a given
13 period of time;

14 [R.] Q. "public employee" means a regular
15 nonprobationary employee of a public employer; provided that,
16 in the public schools, "public employee" shall also include a
17 regular probationary employee;

18 [S.] R. "public employer" means the state or a
19 political subdivision thereof, including a municipality that
20 has adopted a home rule charter, and does not include a
21 government of an Indian nation, tribe or pueblo, provided that
22 state educational institutions as provided in Article 12,
23 Section 11 of the constitution of New Mexico shall be
24 considered public employers other than state for collective
25 bargaining purposes only;

1 ~~[F.]~~ S. "strike" means a public employee's refusal,
 2 in concerted action with other public employees, to report for
 3 duty or ~~[his]~~ the willful absence in whole or in part from the
 4 full, faithful and proper performance of the duties of
 5 employment for the purpose of inducing, influencing or coercing
 6 a change in the conditions, compensation, rights, privileges or
 7 obligations of public employment; and

8 ~~[U.]~~ T. "supervisor" means an employee who devotes
 9 a majority of work time to supervisory duties, who customarily
 10 and regularly directs the work of two or more other employees
 11 and who has the authority in the interest of the employer to
 12 hire, promote or discipline other employees or to recommend
 13 such actions effectively, but "supervisor" does not include an
 14 individual who performs merely routine, incidental or clerical
 15 duties or who occasionally assumes a supervisory or directory
 16 role or whose duties are substantially similar to those of
 17 ~~[his]~~ the individual's subordinates and does not include a lead
 18 employee or an employee who participates in peer review or
 19 occasional employee evaluation programs."

20 **SECTION 14.** Section 10-7E-5 NMSA 1978 (being Laws 2003,
 21 Chapter 4, Section 5 and Laws 2003, Chapter 5, Section 5) is
 22 amended to read:

23 "10-7E-5. RIGHTS OF PUBLIC EMPLOYEES.--

24 A. Public employees, other than management
 25 employees and confidential employees, may form, join or assist

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1 a labor organization for the purpose of collective bargaining
 2 through representatives chosen by public employees without
 3 interference, restraint or coercion and shall have the right to
 4 refuse any such activities.

5 B. A public employer shall not require a public
 6 employee, as a condition of hiring, promotion or continued
 7 employment, to become or remain a member of a labor
 8 organization or to pay dues, fees, assessments or other charges
 9 to a labor organization or to a charity or other third party,
 10 in lieu of payment to a labor organization."

11 **SECTION 15.** Section 10-7E-9 NMSA 1978 (being Laws 2003,
 12 Chapter 4, Section 9 and Laws 2003, Chapter 5, Section 9) is
 13 amended to read:

14 "10-7E-9. BOARD--POWERS AND DUTIES.--

15 A. The board shall promulgate rules necessary to
 16 accomplish and perform its functions and duties as established
 17 in the Public Employee Bargaining Act, including the
 18 establishment of procedures for:

19 (1) the designation of appropriate bargaining
 20 units;

21 (2) the selection, certification and
 22 decertification of exclusive representatives; and

23 (3) the filing of, hearing on and
 24 determination of complaints of prohibited practices.

25 B. The board shall:

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1 (1) hold hearings and make inquiries necessary
2 to carry out its functions and duties;

3 (2) conduct studies on problems pertaining to
4 employee-employer relations; and

5 (3) request from public employers and labor
6 organizations the information and data necessary to carry out
7 the board's functions and responsibilities.

8 C. The board may issue subpoenas requiring, upon
9 reasonable notice, the attendance and testimony of witnesses
10 and the production of evidence, including books, records,
11 correspondence or documents relating to the matter in question.
12 The board may prescribe the form of subpoena, but it shall
13 adhere insofar as practicable to the form used in civil actions
14 in the district court. The board may administer oaths and
15 affirmations, examine witnesses and receive evidence.

16 D. The board shall decide issues by majority vote
17 and shall issue its decisions in the form of written orders and
18 opinions.

19 E. The board may hire personnel or contract with
20 third parties as it deems necessary to assist it in carrying
21 out its functions.

22 F. The board has the power to enforce provisions of
23 the Public Employee Bargaining Act through the imposition of
24 appropriate administrative remedies.

25 G. A rule promulgated by the board or a local board

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1 shall not require, directly or indirectly, as a condition of
 2 continuous employment, a public employee covered by the Public
 3 Employee Bargaining Act to pay money to a labor organization
 4 that is certified as an exclusive representative. ~~[The issue~~
 5 ~~of fair share shall be left a permissive subject of bargaining~~
 6 ~~by the public employer and the exclusive representative of each~~
 7 ~~bargaining unit.]"~~

8 SECTION 16. Section 10-7E-19 NMSA 1978 (being Laws 2003,
 9 Chapter 4, Section 19 and Laws 2003, Chapter 5, Section 19) is
 10 amended to read:

11 "10-7E-19. PUBLIC EMPLOYERS--PROHIBITED PRACTICES.--A
 12 public employer or ~~his~~ the public employer's representative
 13 shall not:

14 A. discriminate against a public employee with
 15 regard to terms and conditions of employment because of the
 16 employee's membership or nonmembership in a labor organization;

17 B. interfere with, restrain or coerce a public
 18 employee in the exercise of a right guaranteed pursuant to the
 19 Public Employee Bargaining Act;

20 C. dominate or interfere in the formation,
 21 existence or administration of a labor organization;

22 D. discriminate in regard to hiring, tenure or a
 23 term or condition of employment in order to encourage or
 24 discourage membership in a labor organization;

25 E. discharge or otherwise discriminate against a

1 public employee because ~~[he]~~ the employee has signed or filed
 2 an affidavit, petition, grievance or complaint or given
 3 information or testimony pursuant to the provisions of the
 4 Public Employee Bargaining Act or because a public employee is
 5 forming, joining or choosing to be represented by a labor
 6 organization;

7 F. refuse to bargain collectively in good faith
 8 with the exclusive representative;

9 G. refuse or fail to comply with a provision of the
 10 Public Employee Bargaining Act or board rule; or

11 H. refuse or fail to comply with a collective
 12 bargaining agreement."

13 **SECTION 17.** Section 10-7E-26 NMSA 1978 (being Laws 2003,
 14 Chapter 4, Section 26 and Laws 2003, Chapter 5, Section 26) is
 15 amended to read:

16 "10-7E-26. EXISTING ORDINANCES PROVIDING FOR PUBLIC
 17 EMPLOYEE BARGAINING.--

18 A. A public employer other than the state that
 19 prior to October 1, 1991 adopted by ordinance, resolution or
 20 charter amendment a system of provisions and procedures
 21 permitting employees to form, join or assist a labor
 22 organization for the purpose of bargaining collectively through
 23 exclusive representatives may continue to operate under those
 24 provisions and procedures; provided that the employer shall
 25 comply with the provisions of Section 10-7E-5 NMSA 1978 in

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1 effect on and after the effective date of this 2015 act. Any
 2 substantial change after January 1, 2003 to any ordinance,
 3 resolution or charter amendment shall subject the public
 4 employer to full compliance with the provisions of Subsection B
 5 of this section [~~26 of the Public Employee Bargaining Act~~].

6 B. A public employer other than the state that
 7 subsequent to October 1, 1991 adopts by ordinance, resolution
 8 or charter amendment a system of provisions and procedures
 9 permitting employees to form, join or assist a labor
 10 organization for the purpose of bargaining collectively through
 11 exclusive representatives freely chosen by its employees may
 12 operate under those provisions and procedures rather than those
 13 set forth in the Public Employee Bargaining Act; provided that
 14 the employer shall comply with the provisions of Sections [8
 15 ~~through 12 and Subsection D of Section 17 of that act~~] 10-7E-5,
 16 10-7E-8 through 10-7E-12 NMSA 1978 and Subsection D of Section
 17 10-7E-17 NMSA 1978 and provided further that the following
 18 provisions and procedures are included in each ordinance,
 19 resolution or charter amendment:

20 (1) the right of public employees to form,
 21 join or assist employee organizations for the purpose of
 22 achieving collective bargaining and the right to refuse those
 23 activities, including among other things, payment of dues,
 24 fees, assessments or other charges to a labor organization or
 25 to a charity or other third party in lieu of payment to a labor

organization;

(2) procedures for the identification of appropriate bargaining units, certification elections and decertification elections equivalent to those set forth in the Public Employee Bargaining Act;

(3) the right of a labor organization to be certified as an exclusive representative;

(4) the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment for public employees in the appropriate bargaining unit;

(5) the obligation to incorporate agreements reached by the public employer and the exclusive representative into a collective bargaining agreement;

(6) a requirement that grievance procedures culminating with binding arbitration be negotiated;

(7) a requirement that payroll deductions for the exclusive representative's membership dues be negotiated if requested by the exclusive representative;

(8) impasse resolution procedures equivalent to those set forth in Section ~~[18 of the Public Employee Bargaining Act]~~ 10-7E-18 NMSA 1978; and

(9) prohibited practices for the public employer, public employees and labor organizations that promote the principles established in Sections ~~[19 through 21 of the~~

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1 ~~Public Employee Bargaining Act~~ 10-7E-19 through 10-7E-21 NMSA
2 1978."

3 SECTION 18. A new section of the Public Employee
4 Bargaining Act is enacted to read:

5 "[NEW MATERIAL] SEVERABILITY.--If any part or application
6 of the Public Employee Bargaining Act is held invalid, the
7 remainder or its application to other situations and persons
8 shall not be affected."

9 SECTION 19. Section 50-4-22 NMSA 1978 (being Laws 1955,
10 Chapter 200, Section 3, as amended) is amended to read:

11 "50-4-22. MINIMUM WAGES.--

12 A. An employer shall pay an employee the minimum
13 wage rate of ~~[six dollars fifty cents (\$6.50)]~~ eight dollars
14 (\$8.00) an hour ~~[As of January 1, 2009, an employer shall pay~~
15 ~~the minimum wage rate of seven dollars fifty cents (\$7.50) an~~
16 ~~hour]~~, except that an employer employing a trainee employee
17 shall pay the trainee employee a minimum wage rate of no less
18 than seven dollars fifty cents (\$7.50) an hour during the
19 training period but for no longer than six months from the date
20 of hire.

21 B. Nothing in Subsection A of this section shall be
22 construed to authorize or require an employer to lower the
23 hourly wage of an employee.

24 ~~[B.]~~ C. An employer furnishing food, utilities,
25 supplies or housing to an employee who is engaged in

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1 agriculture may deduct the reasonable value of such furnished
2 items from any wages due to the employee.

3 ~~[C.]~~ D. An employee who customarily and regularly
4 receives more than thirty dollars (\$30.00) a month in tips
5 shall be paid a minimum hourly wage of two dollars thirteen
6 cents (\$2.13). The employer may consider tips as part of
7 wages, but the tips combined with the employer's cash wage
8 shall not equal less than the minimum wage rate as provided in
9 Subsection A of this section. All tips received by such
10 employees shall be retained by the employee, except that
11 nothing in this section shall prohibit the pooling of tips
12 among employees.

13 ~~[D.]~~ E. An employee shall not be required to work
14 more than forty hours in any week of seven days, unless the
15 employee is paid one and one-half times the employee's regular
16 hourly rate of pay for all hours worked in excess of forty
17 hours. For an employee who is paid a fixed salary for
18 fluctuating hours and who is employed by an employer a majority
19 of whose business in New Mexico consists of providing
20 investigative services to the federal government, the hourly
21 rate may be calculated in accordance with the provisions of the
22 federal Fair Labor Standards Act of 1938 and the regulations
23 pursuant to that act; provided that in no case shall the hourly
24 rate be less than the federal minimum wage."

25 **SECTION 20.** CONTINGENT REPEAL.--If any provision of Section 4

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1 of this act or the deletion of Subsection J of Section 10-7E-4
2 NMSA 1978, defining "fair share" in Section 13 of this act or the
3 amendment to Subsection G of Section 10-7E-9 NMSA 1978 in Section 15
4 of this act is held by a court of competent jurisdiction to be
5 unconstitutional or otherwise invalid, then Section 19 of this act
6 shall be repealed and the version of Section 50-4-22 NMSA 1978 in
7 effect immediately prior to the effective date of this act shall be
8 restored as if no amendment had been made.

9 **SECTION 21. EFFECTIVE DATE.**--The effective date of the provisions of
10 of Section 19 of this act is July 1, 2015