

## White Paper on Initiated Measure 23 Executive Summary

Initiated Measure 23 (IM-23) will put one sentence into the laws of South Dakota that is indecipherable, unenforceable, overrides all other laws regarding fees, will need legislation to make it workable and is certain to end up in court.

Here is the language of IM-23 that would be added to the laws of South Dakota:

***Section 1: Notwithstanding any other provisions of law, an organization, corporate or nonprofit, has the right to charge a fee for any service provided by the organization.***

*Section 2: The effective date of this Act is July 1, 2017.*

Don't understand? Can't figure out what this means? Don't worry, the most common reaction that people express after reading this is "What the hell does that mean?" Honestly, it isn't easy to discern with a simple reading of the initiative, but it is easy to grasp when looking at the comments made by the organization that has placed it on the ballot.

Since the language of IM-23 doesn't define what the terms "organization, corporate or non-profit" mean, it creates several questions. These consequences and questions include:

- IM-23 is so poorly written it cannot be enforced without extensive additional legislation or multiple lawsuits including a likely challenge of being unconstitutionally vague.
- Does the person/organization being charged the fee have to agree to accept the service?
- It clearly states "notwithstanding other laws" as it establishes a right to charge fees – will these fees be unregulated?
- What organizations could be empowered to charge fees for services rendered that are not allowed to charge fees under current law?

### **Background of Initiated Measure 23**

On September 4<sup>th</sup>, 2015, the Attorney General forwarded the following official explanation:

INITIATED MEASURE

## ATTORNEY GENERAL'S STATEMENT

*Title: An initiated measure to give certain organizations the right to charge fees*

*Explanation: The measure gives corporate organizations and non-profit organizations the right to charge a fee for any service provided. This measure takes effect on July 1, 2017.*

On September 17, 2015, a ballot committee named “South Dakotans for Fair Compensation” was officially formed. November 9, 2015 the Ballot Committee submitted 30,810 signatures to the Secretary of State who later declared that there were 14,861 qualified signatures. The number of qualified signatures exceeded the required number of 13,871; therefore, Initiated Measure 23 (“IM-23”) was certified as a ballot measure by the South Dakota Secretary of State.

### **About the Proponents**

The International Union of Operating Engineers Local 49 based in Minneapolis claims on its website that “one of our members” is responsible for sponsoring the petition. Local 49 represents over 13,000 heavy equipment operators who drive bulldozers, backhoes, cranes, and other big machines in Minnesota, North Dakota, and South Dakota.

This union provided financial support for the “Committee for Fair Compensation” of \$158,400 in 2015. It can be safely assumed that the money was used to gather signatures with the unspent balance ready for use during the campaign.

Jason George, Special Projects Director for Local 49, gave an interview regarding IM-23 to South Dakota political blogger Cory Heidelberger of [dakotafreepress.com](http://dakotafreepress.com). George stated that the measure would allow unions to charge non-members “fair-share” dues, which is a discounted fee representing the actual expenses of contract negotiations and other services that unions perform on behalf of their constituencies, but excluding the amounts unions would spend on other initiatives, such as political activities, that non-members might object to.

### **Legal Analysis**

Having a job in South Dakota is never dependent on belonging to a labor organization or having to pay money to a union. This freedom from forced membership was placed into the State Constitution’s Bill of Rights in 1946 when 70% of the voters approved a “Right-to-Work” amendment (*Article 6; Sec 2*). It was further reinforced in 1974 when the legislature made it clear that the payment of agency fees or fair share fees in lieu of membership was just as illegal as forced membership itself (*SDCL-60-9A-14*).

In 2010, another amendment was added to the state’s bill of rights when Amendment K was approved by 79% of the voters. This amendment guarantees an election using a secret ballot before workers decide to be part of a union, (*Article 6; Sec 28*). One thing has been clear for more than 70 years; South Dakota does not accept “union shops” as a condition for having a job.

Initiated Measure 23 will change South Dakota's status as a true "Right-to-Work" state and empower other organizations to force payment for services, even if the people being billed don't want the services. While nothing in IM-23 makes it easier for a union to organize a workplace per se, if non-members can be forced to pay an "agency fee" to the union, it makes organizing more lucrative.

The impacts of IM-23 may extend well beyond mandating payments to labor unions; it may create required payments for many types of services offered by businesses or non-profit organizations.

## **Union Claims**

Reviewing the union's website one finds a list of things that unions claim to be expected to offer at no charge to any employee who works under their contract whether they belong to the union or not. This list is portrayed as a burden to the union that no other organization in the country is expected to endure. Turns out their claims aren't true. Here is a look at the three major claims:

- 1) To represent a non-member in a grievance hearing for work-related issues using the union lawyers.

Paraphrasing James Sherk, the Bradley Fellow in Labor Policy at The Heritage Foundation, who addressed this claim in a National Review magazine blog, his article relates the following information:

*Federal law does not obligate unions to represent non-members. The National Labor Relations Act allows unions to sign "members' only" contracts that apply only to dues-paying members.\*\*(see note below). As William Gould, chairman of the NLRB, under President Clinton, wrote, "The law now permits members-only bargaining for employees" - unions can exclude non-members from their contracts. They rarely do.*

*Instead, unions typically negotiate as "exclusive bargaining representatives". That lets them negotiate on behalf of all employees at a company, whether or not those workers want their representation. In that case, the law does require unions to bargain fairly. They cannot negotiate one wage for union members and the minimum wage for everyone else. Unions voluntarily represent all workers because it lets them get a better contract for their supporters.*

*That is very different from unions being required to represent everyone. It also makes the case for forcing workers to pay dues a lot weaker.*

\*\* Several national HR experts suggest this claim is not truly settled at this time

- 2) Non-member use of pension services. Non-members are indeed allowed to sign up with union retirement systems under the same rules as noted above. It costs the union nothing. The money put into the pension system is paid by the employer - not taken from union dues - and the union organization that manages the pension system gets a management fee for handling the investments for the group.

- 3) Allow non-members access to health plans. The funds for health insurance are mostly provided by the employer or a portion may be paid by the employee themselves. There are no union dues or costs to the union involved when non-union members are covered by the health plan.

## **Conclusion**

IM-23 is so poorly written it cannot be enforced without extensive additional legislation or multiple lawsuits, including a likely challenge on the basis of being unconstitutionally vague.

IM-23 does not indicate which organizations can charge fees for services.

IM-23 doesn't indicate whether or not the person/organization being charged a fee has to agree to receive the services being charged.

IM-23 does not regulate the amount of fees being charged by organizations or businesses. It clearly states "notwithstanding other laws" and is therefore overriding current law. The measure is so poorly written, it would seem that those fees may be unregulated.

IM-23 is about forcing workers in South Dakota to pay fees to labor unions and is an end-run around Right-to-Work that protects employees from being forced to join unions.

**IM-23 should be defeated.**