

White Paper on Initiated Measure 23

Summary and Overview

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. This paper looks carefully at the language of the proposed law, highlights questions, explores consequences and examines the expressed goals of the organization that is sponsoring it; which can be shown to be creating a legal mandate for forced payment of fees taken from workers in South Dakota, violating long-held values of the state's citizens and a long-standing law adopted by those citizens.

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 consequences and questions that simply must be answered. 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 on the basis of being unconstitutionally vague.
- Does the person/organization being charged the fee have to agree to accept the service and agree to pay the fee?
- IM-23 does not regulate the amount of fees being charged by organizations or businesses. It clearly states "notwithstanding other laws" as it establishes a right to charge fees – fees that apparently will be unregulated.

- What organizations could be empowered to charge fees for services rendered that are not allowed to charge fees under current law?
- For example, could the South Dakota Municipal League simply bill non-member cities for dues because they lobby the legislature on behalf of all municipal governments?
- More specifically, there is an association that represents employees of the state. It is not a union and does not negotiate contracts. The staff of this association does lobby the legislature advocating for increased pay and money for benefits on behalf of state employees. Does IM-23 empower this association to bill all state employees for services that those employees did not agree to pay to receive?

Since the language of IM-23 does not indicate the purpose of the law, a full understanding of IM-23 begins with an overview of how it was placed on the ballot, what proponents have said about their effort and a review of its legal impact and similar laws in surrounding states.

Background of Initiated Measure 23

In mid-July 2015, work began with the Legislative Research Council to shape the language that would become IM-23. The paperwork was signed by Scott Niles and Will Thomsen. Scott Niles lives in Sioux Falls and has been identified as a member of the Union of Equipment Operators Local #49 based in Minneapolis.

On September 4th, 2015, Attorney General Marty Jackley fulfilled the requirement of SDCL 12-13-25 by sending an official explanation for a proposed ballot measure that would give organizations the right to charge fees for services. Scott Niles was listed as the sponsor.

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 by filing papers with the Secretary of State. Scott Niles was listed as Chairman and Will Thomsen was listed as Treasurer.

November 9, 2015 the Ballot Committee promoting this initiative submitted 30,810 signatures to the Secretary of State who later declared that there were 14,861 qualified signatures. This was a qualification rate of 48.23%, meaning more than half of the signatures were invalid. 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. The year-end financial report filed with the Secretary of State showed all of these funds were spent on a “consultant”. Year-end financial reports show another donation to the committee of \$100 and a year-end balance of \$100. It can be safely assumed that the money was used to gather signatures with the unspent balance ready for use during the campaign. It is also generally known that the IM-23 media consultant and management team is Media One out of Sioux Falls.

Jason George, Special Projects Director for Local 49, gave an interview regarding IM-23 to South Dakota political blogger Cory Heidelberger of 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. According to George, the measure is “about what’s right and wrong.” George cited Minnesota and Illinois as examples of states which allow unions to charge fair share dues. George said that he is unaware of similar ballot measures in any other state.

On Local 49’s website, an official release regarding the certification of IM-23 as a ballot measure states that the “initiative was brought forward by Local 49 members and is supported by Local 49.” Further, the release says: “This isn’t a union or non-union issue; it is a simple matter of fairness.” Local 49’s main web page also has a statement about the ballot initiative. It states: “The ballot initiative in South Dakota that would guarantee the rights of all organizations to collect fees for the services that they provide cleared a major milestone” when it was certified by the South Dakota Secretary of State.

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. 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.

In 2010, another amendment was added to the state’s bill of rights when Amendment K which guarantees an election using a secret ballot before workers decide to be part of a union, was approved by 79% of the voters. 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.

Passage of IM-23 could result in forced payment of mandatory fees to labor organizations that will not result in organizational membership for the person forced to pay that fee. The net result will be the creation of de facto closed shops.

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 which obviously increases the incentive for unions to attempt to organize as many workplaces as possible.

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.

Legal Analysis

South Dakota is a "Right to Work" state with two specific laws that prohibit union membership or even paying fees to labor organizations as a condition of having a job. First is the Right to Work provision in the South Dakota Constitution's Bill of Rights, which states:

*§ 2. Due process--Right to work. No person shall be deprived of life, liberty or property without due process of law. **The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization** (bold added).*

The Right to Work Amendment was added to the Constitution when it was placed on the 1946 general election ballot by an act of the legislature during the 1945 session. The vote in that general election of 1946 was YES - 93,035 (70%) to NO - 39,257 (30%).

There is also another law protecting workers against being assessed fees that are made to unions in lieu of membership in statute 60-9A-14 and it says:

60-9A-14. Closed shop and agency shop contracts not authorized. Nothing in this chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization or requiring the payment of fees or contributions of any kind whatsoever in lieu of membership to a labor organization as a condition of employment. This law was passed during the 1974 legislative session.

The foregoing statute is the type of law the National Labor Relations Act specifically contemplates that states may choose to adopt to prohibit any collective bargaining agreements from requiring any kind of payments to unions from non-members

IM-23 is problematic in that it contains the phrase "Notwithstanding any other provision of law." As a result, it seems that the essential issue is whether passing IM-23 would effectively overrule South Dakota law prohibiting non-union employees from being required to pay union fees—SDCL § 60-9A-14.

Other Issues

The vagueness of the language written as IM-23 leaves many questions about how far reaching the ability to charge fees might extend. The language says nothing about unions; even though it is brought by a union that says the goal is specifically creating the ability to charge non-union employees a fair share fee.

Here is a list of questions about issues that may be created should the language of IM-23 become law:

- Is the language of IM-23 sufficient to allow a labor union to directly charge a fee to workers of a business who have not joined the union, but work under a contract that the union has negotiated, a fee for those negotiations without that fee being agreed to by the business? As noted in the other states, these fees are not prohibited but must be agreed to as part of the contract.
- Would collection of that fee be enforceable by the courts as a legal obligation?
- Does the language in IM-23 mean a union could charge a fee and not extend membership as a quid-pro-quo for charging the fee? Can the state mandate membership for those paying the union to negotiate the contract? It should be noted here that federal law requires unions to give members the political portion of their dues if they object to the union's donations. Therefore, a fair share that excludes the political activity isn't really any different than membership rights.
- If IM-23 empowers unions to collect fair share fees, could the legislature determine how those fees would be calculated? The amount set in Minnesota for fair share is full cost for negotiations, less the benefits not granted to non-members and cannot be more than 85% of the dues. Can the legislature require an accounting for the cost of negotiating the contracts?
- Are there other organizations that might be empowered to collect fees for services rendered or is this strictly a union issue being hidden among smoke and mirrors?

Note – none of these questions will need to be answered if IM-23 is defeated in November.

Other States

Justin Smith, an Attorney with Woods, Fuller, Schultz and Smith, PC Law Firm and Lobbyist for the Sioux Falls Chamber researched the status of fair share laws in other states. He reports:

Minnesota law currently does not prohibit private sector unions from charging fees or requiring membership in a union as a condition of employment. With regard to public sector unions, Minnesota law explicitly allows unions to charge non-members a "fair share" fee. See Minn. Stat. § 179A.06(3). That statute provides that the fair share fee "must be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative."

The term “exclusive representative” is essentially the public sector equivalent to a private sector union. See Minn. Stat. § 179A.03(8). Further, Minnesota law limits the allowable fair share fee to a maximum of 85% of the regular membership dues. See Minn. Stat. § 179A.06(3). These laws do not exist with regard to private sector unions, although collective bargaining agreements can still require fair share fees as Minnesota has no law prohibiting the practice.

In Illinois, the only law dealing with fair share dues is again the law governing public employees. That law provides that “[e]mployees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).” 5 ILCS § 315(6)(a).

The reason that many states do not have laws dealing with fair share dues for private unions is because, absent state Right to Work laws, private unions can already enter into agreements with employers requiring compulsory union membership. As such, there is no need for a fair share law.

No state that is a Right to Work state allows agency fees or fair share payments. And no state in the union has made any kind of these forced fees a part of their laws.

IM-23 is aimed at circumventing South Dakota’s Right to Work laws. The only reason the law is necessary is because South Dakota has clear law stating that workers cannot be forced to pay union dues. See SDCL § 60-9A-14.

South Dakota is not alone in having a Right to Work provision in law. Of the surrounding states, only Minnesota and Montana are not Right to Work states. Iowa, Nebraska, Wyoming and North Dakota are all Right to Work states.

Looking nationwide, there are 25 states which have passed Right to Work laws. They are:

Alabama	Louisiana	South Dakota
Arizona	Michigan	Tennessee
Arkansas	Mississippi	Texas
Florida	Nebraska	Utah
Georgia	Nevada	Virginia
Idaho	North Carolina	Wisconsin
Indiana	North Dakota	Wyoming
Iowa	Oklahoma	
Kansas	South Carolina	

Conversely, the following states allow union membership as a condition of employment in some fashion or another:

Alaska	Connecticut	Illinois
California	Delaware	Kentucky
Colorado	Hawaii	Maine

Maryland
Massachusetts
Minnesota
Missouri
Montana
New Hampshire

New Jersey
New Mexico
New York
Ohio
Oregon
Pennsylvania

Rhode Island
Vermont
Washington
West Virginia

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. There is more to this claim than is generally understood, consider this analysis:

James Sherk, the Bradley Fellow in Labor Policy at The Heritage Foundation, wrote in National Review magazine blog dated January 10, 2012 and discussed this claim.

*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. This is legally uncontroversial** (see note below). In 1938, the Supreme Court expressly upheld union’s ability to negotiate only on behalf of members.*

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.

Imagine a seniority system that only covered union members. The most productive workers would negotiate separately for performance pay and promotions. That would mean more money for them — and less money and fewer positions available for those on the seniority scale. Unions want their contracts to apply to all workers, especially those they hold back. 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.

** The assertion that “union only” contracts are uncontroversial is not universally embraced. Several national Human Resource issue experts have reported the courts have not settled this issue recently.

- 2) Non-member use of pension services. One would think that non-members were taking money from the retirement of members when reading this claim. 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. In fact, the organization that administers the pension for the Union of Equipment Operators nationwide specifically says on their website FAQs – “no dues are used to fund pensions in any way”.
- 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.

How many people work under union contracts in South Dakota?

This chart is from the Bureau of Labor Statistics.

Union Membership Historical Table for South Dakota

Union affiliation of employed wage and salary workers, South Dakota, annual averages, 1989–2015 (numbers in thousands)					
Year	Total employed	Members of unions (1)		Represented by unions (2)	
		Total	Percent of employed	Total	Percent of employed
1989	269	22	8.1	34	12.6
1990	257	21	8.4	29	11.3
1991	264	23	8.8	31	11.7
1992	277	25	8.9	31	11.3
1993	283	22	7.9	30	10.7
1994	—	—	—	—	—
1995	291	22	7.7	27	9.4
1996	312	23	7.4	29	9.2
1997	306	21	6.9	26	8.6
1998	324	21	6.4	26	8.0
1999	332	20	6.0	26	7.8
2000	333	19	5.6	23	6.9

**Union affiliation of employed wage and salary workers,
South Dakota, annual averages, 1989–2015 (numbers in
thousands)**

Year	Total employed	Members of unions (1)		Represented by unions (2)	
		Total	Percent of employed	Total	Percent of employed
2001	341	20	5.9	25	7.4
2002	349	19	5.6	24	6.9
2003	353	19	5.4	23	6.4
2004	347	21	6.0	27	7.7
2005	350	21	5.9	29	8.2
2006	351	21	5.9	25	7.2
2007	354	23	6.5	27	7.7
2008	369	18	5.0	24	6.4
2009	357	20	5.5	24	6.6
2010	357	20	5.6	24	6.6
2011	359	18	5.1	23	6.5
2012	351	20	5.6	24	6.7
2013	362	17	4.8	21	5.8
2014	363	18	4.9	22	6.0
2015	382	22	5.9	26	6.9

Footnotes:

(1) Data refer to members of a labor union or an employee association similar to a union.

(2) Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

Note: Data refer to the sole or principal job of full- and part-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

Dashes indicate data not available.

Source: [Current Population Survey](#)

The current population survey is a monthly survey of

**Union affiliation of employed wage and salary workers,
South Dakota, annual averages, 1989–2015 (numbers in
thousands)**

Year	Total employed	Members of unions (1)		Represented by unions (2)	
		Total	Percent of employed	Total	Percent of employed
households conducted by the Bureau of the Census for the Bureau of Labor Statistics.					

AFL-CIO Unions in South Dakota

South Dakota Affiliated Unions

Aberdeen Central Labor Union

APWU Local 7141

AFGE Local 901 – American Federation of
Government Employees

BAC Local 1 – Bricklayers and Allied
Craftworkers

AFGE Local 1509

BAC Local 2

AFGE Local 1539

BAC Local 3

AFGE Local 2228

BAC Local 4

AFGE Local 2342

BAC Local 5

AFGE Local 3035

AFGE Local 3365

BMW Local 908, IBT – Brotherhood of
Maintenance of Way Employees (build/
maintain tracks & buildings for railroads)

AFGE Local 3807

AFGE Local 4040

AFSCME Council 59 – American Federation
of State, County & Municipal Employees

CWA Local 7500 – Communication Workers
of America

AFSCME Local 169

CWA Local 7505

AFSCME Local 519

Eastern SD Building & Trades

AFSCME Local 1025

AFSCME Local 1031

IAFF Local 814 – International Association of
Fire Fighters

AFSCME Local 1052

AFSCME Local 1743

IAFF Local S-17

AFSCME Local 2488

AFSCME Local 2561

IAM & AW District Lodge # 5 – International
Association of Machinists & Aerospace
Workers

AFSCME Local 3140

APWU Local 718 – American Postal Workers
Union

IAM & AW Local 862

APWU Local 760

IAM & AW Local 2357

APWU Local 2787

IATSE Local 220 – The International Alliance
of Theatrical Stage Employees
IATSE Local M-731

IBB Local 647 – International Brotherhood of
Boilermakers

IBEW Council of SD – International
Brotherhood of Electrical Workers
IBEW Systems Council U-26
IBEW Local 160
IBEW Local 231
IBEW Local 423
IBEW Local 426
IBEW Local 499
IBEW Local 690
IBEW Local 706
IBEW Local 754
IBEW Local 766
IBEW Local 949
IBEW Local 1250
IBEW Local 1616
IBEW Local 1688
IBEW Local 1959

ICWU Local 353C - International Chemical
Workers Union Council

Joint Dakota States Council

LIUNA Local 620 – Laborers’ International
Union of North America

NALC Local 491 – National Association of
Letter Carriers
SD NALC
NATCA FSD – National Air Traffic
Controllers Association

OPEIU Local 109 – Office and Professional
Employees International Union (pilots)

OPEIU Local 277 – (Ft Worth, TX)

OE Local 49 – Operating Engineers

PASS Local MK 3 – Professional Aviation
Safety Specialists

Plumbers & Steamfitters Local 33

Professional Fire Fighters of SD

Rapid City Central Labor Union

Rd Sprinkler Fitters Local 669

SMWIA Local 10 – Sheet Metal Workers’
International Association

Sioux Falls Trades & Labor Assembly

Sioux Falls Union Labor Council

UA Local 300 – United Association of
Journeyman Pipefitting and Sprinkler Fitting

UFCW Local 304A – United Food and
Commercial Workers
UFCW Local 394
UFCW Region 6

USW Local 738 – United Steel Workers
USW Local 11-1457
USWA Local 1060 – United Steel Workers of
America
USWA Local 8188

UTU Local 64 – United Transportation Union
UTU Local 233
UTU Local 375
West River Building Trade

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 while trying to establish a legal right for some businesses and organizations to charge fees. The measure is so poorly written, it would seem that those fees may be unregulated.

IM-23 is a so poorly written it cannot be enforced, it is bad law brought by an out-of-state organization seeking to enrich themselves by forcing workers to pay money to have their jobs.

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 is sponsored by International Union of Operating Engineers Local #49 out of Minneapolis and is part of their efforts to curtail Right to Works laws. The union makes it clear that IM-23's purpose is to create a legal requirement to force workers to pay fees to unions, even when those workers don't want to belong to the union.

IM-23 should be defeated.