

## MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 8:30 a.m. on March 10, 2011, in Room 548-S of the Capitol.

All members were present.

Senator Emler – excused  
Senator Holland - excused

Committee staff present:

Ms. Margaret Cianciarulo, Committee Assistant  
Mr. Ken Wilke, Office of the Revisor of Statutes  
Mr. Reed Holwegner, Kansas Legislative Research Department  
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:

Mr. Karl Hansen, Chief Counsel, Department of Labor  
Mr. Eric Stafford, Senior Director of Government Affairs, Association of General Contractors  
Mr. Luke Bell, Vice President of Government Affairs, Kansas Association of Realtors

Others attending:

See attached list.

### **Handout of Approval of Committee Minutes**

Upon calling the meeting to order, the Minutes of January 13, 19, 27 and February 8 and 9, 2011 were distributed to the Committee. Chairperson Wagle asked that they call her Committee Assistant with their comments and if none are received on or before March 15, the above Minutes would stand approved. She stated going forward, the remaining Minutes would be emailed to each of the members where they can request changes through her assistant.

### **Hearing on Substitute for HB2135 – an act concerning certain employees; relating to misclassification of employees to avoid tax withholding contributions and reporting requirements.**

The Chair said the next order of business was a hearing on Substitute for HB2135 and called on Mr. Ken Wilke, Office of the Revisor of Statutes, to explain the bill which included:

In 2006, the legislature made misclassification of employees a crime and the original version of this bill basically undid what the legislature did in 2006. The problem is, if you have someone who has an employee but labeled as an independent contractor, that change of label can lead to tax fraud since you would not end up paying UI tax and others. At the current time, the issue of determining whether an employee is classified or not, could occur by either the Secretary of Labor (SOL) or the Secretary of Revenue (SOR) depending on which tax area you are looking at. In HB2135, the House changed the procedure so that the SOL has the sole responsibility of whether the employee is truly an employee or an independent contract.

New Sec. 1 provides that the SOL is the only one that makes determinations of whether a worker is classified or misclassified. This section sets forth a process whereby, if the SOR comes up with this question, he or she refers the issue to SOL for investigation and determination. The determination has to be accepted by the SOR.

New Sec. 2 imposes on the SOL the test for making this determination, by looking at the totality of circumstances, and how much control do you assert over this employee. For instance, do you provide the equipment, determine when they work, and several other factors that can be taken into consideration. Subsection (a) tells how the SOL determines if the business has classified their workers and has a reasonable basis for how they have done, based on a judicial decision, a review or ruling from IRS, or the DOL validating the classification. In the absence of this, you have a situation in the Subsection (b), beginning on page 3, line 9, setting forth eight factors that have to be considered by the secretary in making the determination.

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Page 8, lines 25 and 26, is a cross reference to the section of the unemployment compensation act where this is going to be done with reference to K.S.A. 33-703(i)(3)(D) which starts at the bottom of page 9. The stricken language, which is the key to the bill, starts at the bottom of page 9, line 43 and lines 1-6 on page 10, and comprises the old test as in current law. This stricken language is being replaced by the material we discussed in New Sec. 1 and New Section 2. The new language after this test helps codify this result.

On page 24, Section 4, lines 30-43 and at the top of page 25, lines 1-8, the old reference for the penalty pursuant to tax statutes has been taken out and inserting a new set of penalties based on the tax penalty that would be determined under K.S.A. 79-3228. The first violation is a civil penalty. On the second violation, the person would be subject to a civil penalty and if convicted, that person would be guilty of a Class C nonperson misdemeanor. If there is a third or subsequent violation, the individual would again have a civil penalty against them with a tax due and on conviction, that person would be guilty of a security level 10 nonperson felony.

Subsection (c) allows violations to be prosecuted by the Attorney General or County or District Attorney in the county where this occurred. Civil penalties go to the State Treasury and those are in addition to any other penalties prescribed by law.

The last set of amendments that you need to be aware of he said, are on page 27 and 28. In lines 24 through 33, this is the existing piece that is in the law and taken out and replaced with what you see on lines 34 through 43, and lines 1 through 14 at the top pf page. Basically this amends the DOR statute to allow for transfer of information without violating any revenue law statutes to the SOL or the Secretary's designee for the purpose of making these determinations. On page 28, lines 8-12, impose confidentiality requirements on the SOL and the Secretary's designee, and on lines 13-15 it allows both the SOL and the SOR to adopt rules and regulations necessary to affect the provisions of this particular paragraph.

The Chair recognized Senator Longbine who asked Mr. Wilke regarding page 10, regarding real estate agents and insurance agents, if the broker or manager requires the independent contractors go through continuing education, sales training, prospecting activities, or whatever the broker deemed necessary to help that individual be successful, does this language make them an employee? (Whether an employee is an independent contractor or a true employee hinges on how much control the supervisor exercises over that person. Not sure it would make them an employee, regarding continuing education.) On page 10, for real estate agents, if the broker requires a contractor to go into continuing education, does this make the person an employee? (Determined by how much supervisor control has over employee, but do not think so.)

The Chair then recognized the first of three proponents Mr. Karl Hansen, Chief Counsel, Department of Labor, who stated the bill:

- 1.) Primarily brings greater uniformity for the examination of work classification between federal and state standards.
- 2.) Streamlines the process and eliminates layers of bureaucracy with which employers may have to deal with by creating a "one touch" examination process by which only one state agency shall seek to investigate the employer for the same matter, yet provide for the proper assessment and collection of all taxes, interest and penalties due any affected state agency. If Revenue should be the first agency with whom the employer has contact in this regard, Revenue shall be the point of contact throughout and disseminate information to KDOL accordingly, and visa versa. This way, the employer has one point of contact and has only to produce the same information one time, rather than dealing with multiple agencies over the same issue.
- 3.) Previously, had no escalation of penalties for repeat offenders, however, this bill enhances the penalty scheme for these offenders.
- 4.) Brings forth principles more effective of the modern workplace as the decade old landscape when the current laws were conceived.

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Finally, Mr. Hansen said that for federal UI conformity reasons, a clarifying amendment is required prior to passage of this bill and they have submitted the appropriate language to the Revisor for the Committee's consideration. A copy of his testimony is ([Attachment 1](#)) attached and incorporated into the Minutes as referenced.

The next proponent to come before the Committee was Mr. Eric Stafford, Senior Director of Government Affairs, The Kansas Chamber of Commerce, who stated the bill amends the statutory provision of the division under the Department of Labor specifically tasked with investigating alleged claims of misclassification of employees. As introduced, the bill simply eliminates the enforcement provisions included in K.S.A. 79-3234 and is significantly different from the original version. He went on to say The Kansas Chamber opposes the new division as they did when it was created in 2006 as numerous laws are in place for companies who intentionally fail to withhold or pay taxes for employees which he has listed on page 2 of his testimony.

He stated they questioned the perceived nature of the problem versus reality, but during testimony we heard the impact of how many millions of dollars the state is missing out on because of misclassification of employees. He mentioned a report submitted from UMKC back in 2006 that said that Kansas was missing out on \$40M a year in unpaid taxes. The reality is, since this division was created in 2006, between 2006-2008 the department collected \$548K in unpaid taxes, not quite the \$40M. Also, this \$548K does not break out those who intentionally misclassify or unintentionally misclassify.

The final change made by the House they would like to address provides the state the ability to go after businesses who knowingly violate laws by misclassifying employees and close their doors only to reopen under a new business in an effort to avoid penalties of misclassifying employees. A copy of his testimony is ([Attachment 2](#)) attached and incorporated into the Minutes as referenced.

The Chair recognized the final proponent, Mr. Luke Bell, Vice President of Government Affairs, Kansas Association of Realtors who stated **HB2135** would impose new protections on the exchange of confidential taxpayer information between the Kansas Department of Labor and the Kansas Department of Revenue and would provide greater protections for the ability of individuals to act as independent contractors. They believe the state should protect the confidentiality of taxpayer information and should not attempt to discourage individuals from acting as independent contractors in the marketplace. A copy of his testimony is ([Attachment 3](#)) attached and incorporated into the Minutes as referenced.

Written opponent testimonies have been offered from Mr. Bruce Tunnell, Executive Vice President, AFL-CIO and Mr. Joe Hudson, Business Agent/Organizer Carpenters' District Council of St. Louis and Vicinity and also representing members in Kansas and Missouri. Copies of their testimonies are ([Attachment 4](#)) attached and incorporated into the Minutes as referenced.

The Chair recognized Mr. Andy Sanchez, Executive Secretary Treasurer, Kansas AFL-CIO and asked if he would like to comment to the Committee on behalf of Mr. Tunnell's written testimony? He said, the AFL-CIO opposes the bill and as the Committee listens to the testimony you hear "make it less strict," he feels it weakens the law so they are going backwards here and as far as trying to get in line with the Federal government, he would like for us to be out in front to find these people that are actually skirting the law. Lastly, he does stand by Mr. Tunnell's written testimony.

The Chair thanked the conferees and asked Mr. Hansen, how many states take care of this in the DOL instead of their DOR? (Does not know for sure, but imagines it is a bifurcated situation like what Kansas had previously, where each was going their own way. When we drafted this particular language, Revenue actually requested the DOL release the finding and renders that to the DOR.) Do you know if DOL was doing it before 2007, or was it totally DOR? (He does not know.) The Chair said we need to answer that question.

The Chair believes The Kansas Chamber testified they actually saved \$540K last year, however, in Mr. Sanchez's testimony he stated DOL discovered more than \$10.8M in previously unreported wages and could be as much as \$40M, so she said we need to figure out exactly what is going on. Mr. Hansen stated, at the end of November, 2010, according to their statistics, there were 293 employers affecting 1,826 workers the DOL discovered during their investigation, which resulted in \$195K in UI tax. The Chair

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asked, does Revenue work on the income tax side? (On the Revenue side, including the 293 and their 226, they have a total of 566 employers they found evaded withholding tax and \$10M of the wages they turned up, was subject to employee tax.) If you are talking about a "one-stop-shop" with this new bill, why wouldn't this be in Revenue? (DOR requested bill and part of it was for consistency sake.) The Chair stated she understood but the 1099's, the W2's and corporate taxes are all going to Revenue and the only thing going to the DOL is unemployment. (The DOL is doing some leg work for the DOR but at the same time, there should only be one answer and feels this best placed in the DOL because they have dealt with so many variances of employment issues and more familiar with ins and outs of the work place.) The Chair said, the DOL does not have the federal records, however, her big question is, did this bill first pass in 2006, is when the DOL was put in charge?

The Chair asked for questions or comments from the Committee which came from:

- 1.) Senator Olsen asked Mr. Hansen if he or Research could provide the other 12 of the 20 federal steps since he had already given the Committee 8 and also provide the old rules as well? (Yes.)
- 2.) In the beginning of Mr. Hansen's testimony he said the intent of the bill was, be on the same page as the federal government level requirement, but her understanding, the current law is working well. Could he comment on this?
- 3.) To Mr. Bell and Mr. Stafford, Senator Longbine said he was still not comfortable regarding the scenario he had asked Mr. Wilke, whether this bill could be interpreted to make realtors and insurance agents employees, as they are traditionally contracted employees? (Referring to Subsection (i)(4)(Q) which pertains to qualified real estate agents.)

Chairperson Wagle asked Mr. Reed Holwegner, Office of the Revisor of Statutes, if he could provide the answer by email to all Committee members on when did we start putting this mechanism into the DOL? She asked, last year did the DOL recoup \$195K in unemployment taxes because they had the bill? (Yes.) Senator Lynn asked if this bill passed, they would no longer need FTE's to perform the functions? (No.)

### **Adjournment**

As there were no further questions or discussions, the meeting was adjourned. The time was 9:30 a.m.

The next meeting is scheduled for March 15, 2011.