

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

INDUSTRY, BUSINESS, AND LABOR COMMITTEE

Tuesday, August 29, 2006
Brynhild Haugland Room, State Capitol
Bismarck, North Dakota

Senator Karen K. Krebsbach, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Karen K. Krebsbach, Duaine C. Espgaard, Duane Mutch, Dave Nething; Representatives Bill Amerman, Donald L. Clark, Donald D. Dietrich, Mark A. Dosch, Glen Froseth, Pat Galvin, Jim Kasper, George J. Keiser, Dan J. Ruby, Don Vigesaa

Members absent: Senators Tony Grindberg, Joel C. Heitkamp; Representatives Tracy Boe, Nancy Johnson, Scot Kelsh

Others present: See attached [appendix](#)

It was moved by Senator Espgaard, seconded by Representative Keiser, and carried on a voice vote that the minutes of the January 5, 2006, and July 18, 2006, meetings be approved as distributed.

UNEMPLOYMENT TAX RATE AND REEMPLOYMENT PROCESSES STUDY

At the request of Chairman Krebsbach, committee counsel reviewed a bill draft [\[70163.0100\]](#) relating to modifying the unemployment insurance tax rate structure and a bill draft [\[70164.0100\]](#) relating to establishing a return-to-employer fee.

Chairman Krebsbach called on Mr. Larry D. Anderson, Job Service North Dakota, for comments regarding the bill drafts. Mr. Anderson submitted [written testimony](#), a copy of which is on file in the Legislative Council office.

Representative Keiser said the imposition of the \$100 fee for job-attached employees results in the double taxation for positive balance employers.

In response to a question from Representative Keiser, Mr. Anderson said the fee would be deposited into the federal advance interest repayment fund and would not have any impact on an employer's experience rating. He said the fee would be treated as a cost of utilizing the privilege of designating an employee as job-attached.

In response to a question from Representative Dosch, Mr. Anderson said participation in the return-to-employer fee program would be voluntary. He said an employer can choose not to have an employee designated as job-attached and the employee would be more available for other employment.

Ms. Maren Daley, Job Service North Dakota, said the committee may consider revising the bill draft to have the fee apply to only negative balance

employers. She said a negative balance employer could avoid the fee by buying its way to a positive balance status.

In response to a question from Representative Ruby, Mr. Anderson said the imposition of the return-to-employer fee is not an attempt to address the solvency of the unemployment insurance trust fund. He said the proposal addresses the issue relating to job-attached status. He said it is an attempt to influence employee availability needs in the state and the belief that there are too many job-attached employees.

Representative Ruby said it would appear that a negative balance employer would want the fee to be counted toward the employer's benefit for its experience rating.

Mr. Anderson said the fee would prompt a negative balance employer to think seriously about whether an employee should be designated as job-attached.

Representative Keiser said the issue is the use of the job-attached status as a business model by negative balance employers. He said he supports Ms. Daley's proposal of addressing only negative balance employers.

In response to a question from Senator Krebsbach, Mr. Anderson said the job-attached status designation has been recognized since at least 1975.

Mr. Russ Hanson, Associated General Contractors of North Dakota, Bismarck, said members of the construction industry are concerned with the idea of establishing a finite number of employees that may be designated as job-attached. He also expressed concern with the fee being used to fund the administration of Job Service North Dakota. In addition, he said, he is also concerned with fairness and the impact of the fee on business. He said the Unemployment Insurance Advisory Council has taken positive steps to address concerns relating to the job-attached status, such as changing the form that employers are sent when an employee claims to be job-attached.

In response to a question from Representative Kasper, Mr. Hanson said if an employee claims job-attached status, the employer can contest the claim and the employer ultimately decides whether an employee is designated as job-attached.

Mr. Anderson said the employer has the absolute final decision but employers do not always exercise their right to make that decision. He said the purpose of changing the form sent to employers is to convey

the seriousness of exercising that right. He said the new form makes it clear that by not responding, an employer's experience rating may be adversely affected.

Representative Kasper said Job Service should require verification from the employer before benefits are paid to an employee claiming job-attached status.

Mr. Anderson said arbitrarily denying benefits raises problems with federal laws. Under federal law, he said, Job Service has a limited amount of time to ascertain the facts surrounding a claim.

In response to a question from Senator Nething, Mr. Hanson said his organization is unlikely to support Ms. Daley's proposal to limit the application of the fee to negative balance employers.

Representative Keiser said Job Service should examine methods through which job attachment is assigned to design a process under which the employer initiates the designation but unemployment benefits are not arbitrarily withheld.

Mr. Anderson said a change such as that could likely be done through policy and practice at the agency. He said Job Service attempts to make the program operate in a manner that is not administratively burdensome to employers and employees.

In response to a question from Representative Amerman, Mr. Anderson said the purpose of the job-attached designation is to avoid a revolving door process where an employee is required to apply for jobs when the individual is not really seeking a job. He said Job Service does not require subminimum employment initially but may require an employee to realign salary and employment conditions as benefits are paid so that the employee can find suitable employment.

In response to a question from Representative Keiser, Mr. Anderson said negative balance employers come from all industries. He said about 36 percent of the negative balance employers are construction-related businesses.

Mr. David Straley, Greater North Dakota Chamber of Commerce, Bismarck, said the Unemployment Insurance Advisory Council has put a significant amount of effort into its study of reemployment processes. He has some concerns with the return-to-employer fee bill draft; however, he said, he supports the bill draft relating to the modified tax rate.

Mr. Anderson said when the unemployment insurance trust fund reaches solvency, the modified rate provided for in the bill draft would provide more of a rate break to positive balance employers.

In response to a question from Senator Krebsbach, Mr. Anderson said in proceeding with its study of the tax rate, Job Service has sought input from a variety of sources, including groups representing positive balance and negative balance employers. He said a survey of employers suggests openness to having negative balance employers bear more of the burden toward achieving solvency.

Mr. Anderson said Job Service will include in its general appropriation bill a request for funding for enhanced reemployment services under the Work First Project. He said he is not sure of the amount of funding that will be requested.

PHARMACY BENEFITS MANAGEMENT STUDY

Chairman Krebsbach called on Mr. Charles E. Johnson, Insurance Department, for comments regarding disclosure of the benefits received by a pharmacy benefits manager. Mr. Johnson submitted [written testimony](#), a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nething, Mr. Johnson said 43 insurers that write policies in North Dakota responded to the reporting requirement. He said Blue Cross Blue Shield of North Dakota indicated that a policy has been implemented to return rebates to policyholders. He said it appears that all companies responding to reporting requirements are complying with North Dakota law.

In response to a question from Representative Kasper, Mr. Johnson said although the Insurance Department has specific information regarding the dollar amounts of payments received by pharmacy benefits managers, that information was declared to be a trade secret by the 2005 Legislative Assembly.

In response to a question from Representative Keiser, Mr. Johnson said the reporting requirement imposed by the 2005 Legislative Assembly is relatively new and only one reporting period has occurred. He said it appeared the intent of the legislation was to provide some transparency and it appears that that has occurred. He said the law is making employers and insurers aware of rebates. Because the use of the rebates tend to reduce overall expenses of the insurers, he said, premiums should be affected in the long term.

In response to a question from Representative Vigesaa, Mr. Johnson said because of the confidentiality provisions in the law, he is reluctant to say exactly how much money has been saved through rebates. However, he said, it is a significant amount and it should be beneficial to ratepayers.

Representative Vigesaa said he would like the Insurance Department to consult with the Attorney General to determine whether aggregate information can be released, such as the total amount of rebates reported by all insurers.

In response to a question from Representative Froseth, Mr. Johnson said although the law has made the information reported to the Insurance Department a trade secret, an insurer, such as a mutual company, may make certain disclosures to its members if the bylaws of the company provide for disclosure.

Senator Nething said the purpose of this study was to monitor the impact of 2005 House Bill No. 1332. Because no information has been presented to the committee to suggest that any further legislation is

necessary, there does not appear to be any need for further committee action.

Chairman Krebsbach called on Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, Fargo, for comments regarding the study of the pharmacy benefits management industry. Mr. St. Aubyn submitted [written comments](#), a copy of which is on file in the Legislative Council office.

In response to a question from Representative Kasper, Mr. St. Aubyn said rebates are only a minor component of the pharmacy benefits management industry. He said the primary functions of a pharmacy benefits manager are to establish a pharmacy network and process claims. He said the revenue sources of a pharmacy benefits manager generally depend on the contractual relationship with the client. He said Public Employees Retirement System members will receive individual rebate accounts.

In response to a question from Representative Keiser, Mr. St. Aubyn said the Insurance Department will analyze whether all funds received from rebates will be used to provide for a reduction in premiums by Blue Cross Blue Shield of North Dakota.

In response to a question from Representative Keiser, Mr. Johnson said the Insurance Department's audit of Blue Cross Blue Shield will reveal information from the audit of the pharmacy benefits manager which was conducted by the insurer.

INSURANCE DEPARTMENT LIABILITY INSURANCE MARKETPLACE STUDY

Chairman Krebsbach called on Mr. Larry Maslowski, Insurance Department, who said the tourism industry liability insurance marketplace report presented at the last meeting of this committee contained a review of other states' laws and provided alternatives that the Legislative Assembly may consider which may have some impact on the liability insurance marketplace in this state.

Mr. Tracy Potter, Fort Abraham Lincoln Foundation, Mandan, said of the \$27,000 annual insurance premium for Fort Lincoln, approximately \$14,000 is for liability insurance. He said the cost of insurance is simply a cost of doing business and the foundation has no problem subsidizing the cost in its effort to enhance tourism. However, he said, some private tourism-related businesses, such as trail rides, are unable to absorb the cost of insurance. He said the cost of liability insurance prevents some small businesses from being started, particularly in rural areas. Although efforts have been made to limit liability in certain tourism industries, he said, those efforts have generally been ineffective at lowering premiums because premiums are usually rated on a national basis and not based on state law. Although he has no suggestion for a solution to the problem, he said, allowing tourism-related businesses to access coverage through the North Dakota Insurance Reserve Fund may provide another option for businesses.

In response to a question from Representative Dosch, Mr. Potter said although most trail ride businesses follow established risk management guidelines and require users to sign waivers, those efforts do not prevent the businesses from being sued.

Chairman Krebsbach called on Mr. Joe Becker, Tax Commissioner's office, for comments regarding the feasibility of providing an income tax credit for costs associated with the purchase of liability insurance for certain tourism-related businesses. Mr. Becker said the income tax credit proposal may be feasible if the targeted taxpayers are identified. He said Kansas appears to be the only state that offers such a credit. He said the Kansas credit is 20 percent of the insurance premium up to \$2,000 per year for a period of up to five years. Under the Kansas law, he said, an insurance agent must certify the policy accomplished the purpose provided for under the law.

STANDARD OF LOSS RATIO FOR ACCIDENT AND HEALTH INSURERS STUDY

Chairman Krebsbach called on Mr. Michael Fix, Insurance Department, for comments regarding the committee's study of the standard of loss ratio for accident and health insurers. Mr. Fix said the standard of loss ratio could be addressed in one of at least three ways. He said the law could be changed to lower the statutory loss ratio which would allow smaller premium plans to be more viable. A second option, he said, may be to leave the statutory loss ratios in place but add a reduction for smaller premium plans. He said the states of Iowa, Kansas, Minnesota, and South Dakota have done that. However, he said, the difficulty in doing so is defining what is a small premium plan. A third option, he said, may be to adopt the model law developed in 2000 by the National Association of Insurance Commissioners. He said the model law provides a formula that takes into account small plans. However, he said, the formula is somewhat complicated.

Mr. Fix said the Insurance Commissioner would prefer the approach of adopting the model law. He said 28 states have adopted the model law, 22 of which have done it by rule and 6 of which have done it by statute. He said doing something to adjust the loss ratio may encourage more companies to do business in the state.

In response to a question from Senator Nething, Mr. Fix said he is not sure how many states that have adopted the model law have elected insurance commissioners.

In response to a question from Representative Kasper, Mr. Fix said the argument against lowering the loss ratios is based on the fact that a lower percentage of premiums are paid in benefits. With large premium plans, he said, there may be more room for excess profits. However, he said, the Insurance Commissioner has the ability to not

approve a request for an increase in rates if a company has excess profits.

In response to a question from Representative Keiser, Mr. Fix said low-cost, minimum rate policies with mandates removed did not prove to be marketable. Thus, he said, it appeared the difference in premium may not have been as great as anticipated.

Representative Keiser said simply reducing the ratio is not likely to attract more companies to do business in the state.

Mr. Fix said it is possible that some companies that may be considering doing business here may be more likely to come to the state if the ratio were lowered. Although it may be difficult to compete with Blue Cross Blue Shield, he said, the state may be able to attract niche businesses.

In response to a question from Senator Nething, Mr. Fix said the health insurance market in this state is a static market. If a company began doing business in the state, he said, the company may need to attract consumers who are generally considered to be a healthy population. However, he said, if the insurer is a large company, it could likely spread the risk over its entire group of policyholders. He said a smaller company is not likely to be able to compete with a 90 percent loss ratio.

Representative Keiser said the larger issue is the rating system and the fact that there is no niche market available. He said the community-based rating has been a failure and the high-risk pool has gotten larger.

PROFESSIONAL EMPLOYER ORGANIZATION STUDY

At the request of Chairman Krebsbach, committee counsel reviewed a revised bill draft [\[70028.0300\]](#) relating to the licensing of professional employer organizations.

In response to a question from Representative Keiser, committee counsel said the bill draft does not contain a cross-reference to the anti-SUTA dumping law in Title 52 of the North Dakota Century Code and the liability of a staffing service under Title 65. He said a cross-reference is not necessary because there are no conflicting provisions and representatives of Job Service North Dakota and Workforce Safety and Insurance are comfortable with not including a cross-reference.

Representative Keiser said he is concerned that some of the provisions on page 7 of the bill draft could be construed to allow a professional employer organization to conduct business contrary to the statutory provisions relating to Job Service North Dakota and Workforce Safety and Insurance.

Mr. Alvin A. Jaeger, Secretary of State, submitted [written testimony](#) regarding the bill draft, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Ruby, Mr. Jaeger said his office is a recording office

and is not equipped to address the quality or the financial competency of a professional employer organization. Under the bill draft, he said, the Secretary of State would be responsible only for licensing the organizations and maintaining a record of the information submitted in the application for licensure of a professional employer organization.

Ms. Clara Jenkins, Secretary of State's office, said the audit required of a professional employer organization under the bill draft would clearly define the net worth of the organization. She said the Secretary of State's office would not be responsible for doing any further examination of the business finances of the organization.

Representative Kasper said it appears that representatives of professional employer organizations want to set some operating standards for the organizations but provide no additional protections for the public.

Mr. Jaeger said his office does not have adequate staff to review the capability of professional employer organizations and make decisions to hold out to the public that a business is legitimate.

In response to a question from Representative Amerman, Mr. Jaeger said the fees collected under the bill draft would be placed in the Secretary of State's operating fund to offset costs in administering the licensing process.

In response to a question from Senator Krebsbach, Ms. Jenkins said the bill draft contains disciplinary procedures similar to those under the law licensing contractors. She said the Secretary of State would be allowed to refer to the Attorney General complaints regarding a professional employer organization.

In response to a question from Representative Keiser, Mr. Jaeger said he would like to see all of the language relating to a coemployment relationship removed from the bill draft and only provide for the licensing of professional employer organizations.

Mr. Scott DiBiasio, National Association of Professional Employer Organizations, Alexandria, Virginia, said the bill draft addresses two main issues. First, he said the bill draft provides for licensing of professional employer organizations and for disciplinary procedures. Second, he said, the bill draft defines the client service relationship.

Mr. DiBiasio said he would like to see provisions in the bill draft relating to limited registration or reciprocity. If those provisions were in the bill draft, he said, other states could recognize professional employer organizations domiciled in this state and the Secretary of State could accept the registration or licensing status of an organization from another state without having to go through the entire licensing procedure. He said the provisions for alternative registration, which were contained in the first version of the bill draft, were an attempt to provide for the verification of financial assurance of a professional employer organization accredited by an independent body. He said the accrediting agency would have very strict requirements and the alternative

registration would make the licensing process easier for the Secretary of State.

Mr. DiBiasio said he is concerned with the requirement in the bill draft that audited financial statements not be older than six months. He said a professional employer organization license may be due for renewal more than six months after the organization's fiscal year ends, which would result in the organization needing to have another audit. He said if the audit were tied to the licensure renewal date or if the requirement were changed to 12 months, a professional employer organization would not likely need to have a second audit during a year for licensure renewal purposes.

In response to a question from Representative Kasper, Mr. DiBiasio said the provision on page 5 of the bill draft which requires an applicant for a professional employer organization license to submit evidence of business experience was designed to ensure that a person has the knowledge and ability to operate the business. However, he said, he would not object to removing that requirement from the bill draft.

In response to a question from Representative Amerman, Mr. DiBiasio said he is aware of two professional employer organizations that are members of the National Association of Professional Employer Organizations which are operating in North Dakota. In addition, he said, one organization that is domiciled in Montana has a Bismarck office.

In response to a question from Senator Nething, committee counsel said it appears that language on lines 19 and 20 of page 7 of the bill draft is repetitive and may not be necessary.

It was moved by Representative Kasper, seconded by Representative Ruby, and carried on a voice vote that the Legislative Council staff be requested to revise the bill draft to remove the provisions requiring an applicant for a professional employer organization license to submit evidence of business experience.

In response to a question from Senator Espgaard, Mr. DiBiasio said the term "working capital" is defined by generally accepted accounting standards as current assets minus current liabilities.

It was moved by Representative Kasper, seconded by Senator Nething, and carried on a voice vote that the Legislative Council staff be requested to revise the bill draft to replace the reference to "net worth" with "working capital" and to make the effective date of the bill draft October 1, 2007.

It was moved by Representative Keiser, seconded by Representative Ruby, and carried on a voice vote to request the Legislative Council staff to include in the bill draft an appropriate cross-reference to reiterate that provisions in the bill draft do not affect existing statutory provisions in Titles 52 and 65.

PUBLIC IMPROVEMENT CONTRACTS STUDY

At the request of Chairman Krebsbach, committee counsel reviewed a bill draft [\[70162.0100\]](#) relating to revisions of statutory provisions with respect to public improvement contracts.

In response to a question from Representative Kasper, committee counsel said the bill draft provides that a governing body shall award a public improvement contract to the lowest responsible bidder. He said the bill draft defines the lowest responsible bidder as the lowest best bidder for the project considering past experience, financial condition, past work with a governing body, and other pertinent attributes that may be identified in the advertisement for bids.

Mr. Jerold Backes, North Dakota American Council of Engineering Companies, Bismarck, said the joint industry committee formed to address this study has spent a significant amount of time addressing issues that have been contentious for a number of years. He said the intent of the group was to face those issues and simplify the bidding and public improvement construction law. He said the committee has come to a common understanding with respect to public improvement projects built under the traditional delivery system and has addressed issues relating to other delivery systems, such as construction management. He said the committee has come to no consensus on the design-build delivery system and he does not believe the members can overcome their differences before the next legislative session.

In response to a question from Representative Keiser, Mr. Backes said the requirement for a bid bond helps protect the governing body to ensure that the low bidder will enter a contract with the governing body. He said if there is a documented mistake in the bid, the governing body can excuse the bidder but will usually exclude that bidder from the rebidding process. He said the provision that requires a political subdivision to use an architect or engineer for procuring the plans, drawings, and specifications for a project are not changed from the current law.

Mr. Eric Johnson, Associated General Contractors of North Dakota, Fargo, said the provision relating to the acceptance of the lowest best bid may need to be changed to remove "best" from the phrase. He said the Department of Transportation and the Associated General Contractors may bring a proposal to the Legislative Assembly to allow the use of the design-build delivery method for certain highway projects.

In response to a question from Representative Kasper, Mr. Johnson said North Dakota has always been a low-bid state. He said a governing body has some flexibility to remove a bid if it can provide evidence of past problems with the bidder. However, he said, the law does not allow a low bidder to be rejected due to a personality issue with the project owner.

Representative Ruby said if a governing body did not award a contract to the lowest bidder, there should be provided a justification for the decision by the governing body.

Mr. Backes said representatives of the various industries need more time to review the bill draft and to determine if the provisions in the bill draft reflect the consensus of the joint industry committee members.

Chairman Krebsbach said the committee will consider each of the bill drafts addressed at this meeting at the September 27, 2006, meeting of the committee. There being no further business, Chairman Krebsbach adjourned the meeting at 2:30 p.m.

John Bjornson
Committee Counsel

[ATTACH:1](#)